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COURT CULTURE AND CRIMINAL LAW REFORM

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INTRODUCTION

Movements to end mass incarceration are gaining momentum. Reform efforts seek to change the counterproductive tough-on-crime laws and policies that have been normalized over the last forty years.[1] Advocates have challenged mandatory minimums, three-strikes laws, long periods of state supervision, and other statutes and rules.[2] Alongside that momentum, it has become clear that the punishment of so many people for such a long period of time—and in so many ways—

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1. *See generally* BRENNAN CTR. FOR JUSTICE, ENDING MASS INCARCERATION: IDEAS FROM TODAY'S LEADERS (Inimai Chettiar & Priya Raghavan, eds., 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_EndingMassIncarceration_2.pdf [https://perma.cc/4F7N-9Y9X]; THE SENTENCING PROJECT, TO BUILD A BETTER CRIMINAL JUSTICE SYSTEM: 25 EXPERTS ENVISION THE NEXT 25 YEARS OF REFORM (Marc Mauer & Katie Epstein, eds., 2012), https://www.sentencingproject.org/wp-content/uploads/2016/01/To-Build-a-Better-Criminal-Justice-System.pdf [https://perma.cc/LU4P-QA9F].

2. *See, e.g.*, *Overview*, STAN. LAW SCH.: THREE STRIKES PROJECT, https://law.stanford.edu/stanford-justice-advocacy-project/#slsnav-litigation-reform-education [https://perma.cc/82GG-EXBZ] (last accessed Mar. 15, 2020) (describing litigation efforts on behalf of individuals sentenced pursuant to the three strikes law in California); James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration [https://perma.cc/4KUG-S9F3] (explaining how mandatory minimums, truth-in-sentencing, and three strikes laws have contributed to mass incarceration); Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/JRM2-VDQN] (breaking down the reasons for mass incarceration and explaining the role that excessive periods of supervision play in driving up the number of people incarcerated each year); *Excessive Punishment*, EQUAL JUST. INITIATIVE, https://eji.org/issues/excessive-punishment [https://perma.cc/9N25-8SNR] (last accessed Mar. 15, 2020) (listing EJI's work on ending excessive sentences for drug offenses, challenging three strikes laws, and combating truth-in-sentencing regime).

is driven not only by official policies but also by judicial practices that have become institutionalized over time.

Monetary sanctions and money bail are two issues that have been at the forefront of advocacy in recent years. With both systems, it is often the courts' practices—their interpretation and implementation of the law—that shape outcomes in criminal legal systems rather than the dictates of law and policy alone.

For both monetary sanctions and bail, the last few years have seen a rush of reforms.[3] These reforms have primarily focused on policy change. As recent litigation and advocacy has revealed, the use of fines as punishment for an offense and additional fees and surcharges has entrapped people in the system because of their inability to pay.[4] Even when able or required to do so, judges rarely inquire into individuals' financial circumstances when setting amounts or determining the consequences of nonpayment. And when people cannot pay, courts impose a host of punitive consequences on people, including incarceration—a punishment imposed purely because of their poverty.[5] New laws and policies require jurisdictions to consider a person's ability to pay before imposing or enforcing debts and have started to limit the consequences of nonpayment.[6]

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3. *See generally* SHARON BRETT & MITALI NAGRECHA, CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 8 (2019) (noting legislative reforms to systems of monetary sanctions enacted over the last few years in Louisiana, Texas, Mississippi, and Arizona); COLIN DOYLE, CHIRAAG BAINS & BROOK HOPKINS, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS (2019) (describing recent reform efforts and providing guidance to state and local policymakers interested in bail reform).

4. *See, e.g.*, Dade v. City of Sherwood, No. 16-cv-602, 2017 WL 2486078, at *1 (E.D. Ark. June 8, 2017); Feenstra v. Sigler, No. cv-2019-12 (Wash. Cty. Dist. Court, Okla. Mar. 21, 2019); Brown v. Lexington Cty., No. 17-cv-1426, 2018 WL 15556189, *2–5 (D.S.C. Mar. 29, 2018); BRETT & NAGRECHA, *supra* note 3, at 1–2.

5. BRETT & NAGRECHA, *supra* note 3, at 42–45 (describing punitive enforcement measures imposed on individuals who lack the ability to pay their fines and fees); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 291 (2014) (arguing that inability to pay means that punishment for even minor offenses becomes compounded and unending); CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 15 (2016) (describing how individuals who cannot afford their fines and fees face "poverty traps" in the form of additional fees or penalties).

6. *See, e.g.*, TEX. CODE CRIM. PROC. Ann. § 42.15 (West 2017); LA. CODE CRIM. PROC. ANN. § 875.1 (2018); ARIZ. SUPREME COURT, BENCH CARD FOR ABILITY TO PAY AT TIME OF SENTENCING IN CRIMINAL CASES AND CIVIL TRAFFIC CASES (2017), https://www.azcourts.gov/Portals/22/admorder/Orders17/2017-81%20FINAL.pdf [https://perma.cc/RW2P-LD23].

Bail practices are similarly problematic. The purported purpose of money bail is to incentivize a person's return to court.[7] Accordingly, when setting money bail, courts should set a bond amount that a person can either pledge or temporarily forfeit that will ensure the person's return to court. Instead, across the country, people are incarcerated before trial on unaffordable bond amounts. This happens both when courts intentionally impose unaffordable bonds and also when courts choose bail amounts without meaningfully inquiring into a person's ability to pay.[8] On any given day in the United States, nearly half a million people are in jail pretrial,[9] many of whom remain in jail only because they cannot afford very low bond amounts.[10] Consequently, recent bail reform efforts have focused on adopting actuarial risk assessments, ability-to-pay determinations, and other policies to guide judges' decision-making in setting bail.[11]

So far, the success of these policy changes has been limited. It may be that these reforms are relatively new, and implementation requires time. But it is also the case that to make these new policies effective, advocacy must be directed at ensuring robust implementation and must target not only court policies but also practice.

Addressing practice is essential because policy reforms for both bail and fines and fees systems push judges to make fact-specific determinations based on predetermined criteria. The practices of individual judges or jurisdiction-wide judicial norms drive inequities and entrench particular approaches to criminal cases. Policies vary in how open ended the inquiries are. Some new policies limit judges' decision-making authority, such as prohibiting judges from revoking

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7. *See* CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 4 (2016) [hereinafter *Bail Reform Primer*]; Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 20 (2008).

8. *See* DOYLE, BAINS & HOPKINS, *supra* note 3, at 12–13.

9. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, at 1 (2015); ROY WALMSLEY, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST 1 (3d. ed. 2016).

10. RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 29 (2015), http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf [https://perma.cc/3EMC-PA3H]; Megan Stevenson & Sandra Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE 21–23 (Erik Luna, ed., 2019), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf [https://perma.cc/Y6PV-GGHX].

11. *See* DOYLE, BAINS & HOPKINS, *supra* note 3, at 13, 72 (describing the use of actuarial risk assessment tools by counties in Wisconsin and ability-to-pay reforms in Cook County, Illinois).

driver's licenses for nonpayment of fines and fees.[12] Yet most reforms still allow judges to exercise their discretion in applying specified criteria to individual defendants. These decisions necessarily rely on the judge's individual policy interpretations and fact-finding.[13]

To change court practices, reformers must understand court culture—that is, precisely how judges make their decisions and what can be done to change judicial behavior and mindset. There is a gap in both policy change efforts and in academic discourse about understanding and influencing judicial culture directly. How a judge interprets and applies a particular policy will depend on many factors. Over the last several years, as researchers and policy advocates, we have worked with judges in several jurisdictions across the country to design and implement fines and fees and bail reforms. Some factors that have surfaced as relevant in our own work include political influences, racial bias, conflicts of interest, judicial ideology, court structure, and understanding of poverty. Very little is known about how these and other factors impact decisions, how these factors interact with each other, and how to effectively address these factors to secure lasting policy changes.

This Essay does not advocate for a particular solution to the issues posed by fines and fees and bail reform. Rather, the call to focus on changing culture serves two purposes. First, to the extent that advocates see promise in policy reforms that retain judicial discretion or are advocating within existing policy constraints that retain discretion, advocates should acknowledge the need to address court practice, too. Second, this Essay lifts up the work that advocates and communities are doing to expose the shortcomings of policy reforms in practice, rather than as they are outlined on paper.[14] A focus on

12. Andrea M. Marsh, *Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees*, *in* NAT'L CTR. FOR STATE COURTS, 2017 TRENDS IN STATE COURTS, FINES, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES 23 (2017); *see also Resources*, FREE TO DRIVE (Jan. 16, 2020, 4:33 PM), https://www.freetodrive.org/resources/#page-content [https://perma.cc/4Z9W-8L9E] (describing national campaign to end drivers' license suspensions due to outstanding court debt).

13. *See* BRETT & NAGRECHA, *supra* note 3, at 9, 13–14 (noting that most current state laws "invite bias and speculation" and rely on judges' discretion to determine ability to pay); Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 81–86 (2017) (discussing issues with applying ability-to-pay guidelines, and problems that arise when judges speculate about income).

14. *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U.L. REV. 1609, 1624 (2017) (arguing that legal scholars "have a responsibility to study and support marginalized and disenfranchised groups as they create" a new and reimagined system for public safety).

implementation may reveal deeper injustices of using criminal legal policies to address societal harms.

The Essay proceeds as follows. Part I presents a background on fines and fees and bail reform. Part II identifies court culture as a factor in the success (or failure) of reform efforts. This section starts by showing why policy changes are insufficient to shift practice in most state courts. It then identifies some factors that potentially drive court culture and summarizes existing literature on how judges make and change their decisions. Part III concludes by suggesting what this exploration of judicial culture means for reform and outlining an agenda for additional research and advocacy.

I. REFORMING FINES AND FEES AND BAIL

> [Unaffordable bail] is an example of justice denied, of a man imprisoned for no reason other than his poverty. . . . The "choice" of paying $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor, a doctrine which I trust this nation has long since outgrown.
>
> *- Justice Arthur J. Goldberg (1964)*[15]

A. Unaffordable Monetary Sanctions and Bail

The last few decades have seen a rise in both monetary sanctions[16] and money bail.[17] Today, more people than ever before are trapped in criminal legal systems, and for longer periods of time, because of their poverty.[18]

States across the country have increased the dollar amounts of fines that can be imposed as punishment and have also introduced or

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15. Arthur J. Goldberg, *Equal Justice for the Poor, Too*, N.Y. TIMES, March 15, 1964, at 24, https://timesmachine.nytimes.com/timesmachine/1964/03/15/106946833.html?pageNumber=281 [https://perma.cc/C74H-SH5K].

16. *See* Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1755 (2010) (acknowledging how criminal justice decision-makers have begun "to impose a growing number of monetary sanctions on people who are convicted—and sometimes merely accused—of crimes"); Emma Anderson, Alyson Hurt & Joseph Shapiro, *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees [https://perma.cc/K4VM-CKSZ] (showing rise in court fees charged to defendants across the country).

17. SUBRAMANIAN ET AL., *supra* note 10, at 29.

18. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/JRM2-VDQN].

increased fees, costs, and surcharges—collectively referred to in this Essay as "fees."[19] Fees are often enacted to raise revenue to fund government functions, including criminal legal systems themselves, and amount to regressive taxes. Statutes vary as to whether they require courts to tailor amounts to an individual's financial circumstances.[20] Even when judges do consider ability to pay, they have broad leeway and often fail to make the inquiry, or impose high fees and fines regardless of what a person can afford.[21]

In recent decades, states not only ballooned the amount of financial punishment imposed on people at sentencing, they also increased the consequences of nonpayment and the punitive nature of their efforts to collect outstanding sums. People saddled with court debt face prolonged entrapment in criminal legal systems, including additional fines and fees, warrants, arrest, incarceration, and driver's license revocation.[22]

With the increased reliance on fees as a revenue source, and a concurrent increase in tough-on-crime politics nationwide, courts internalized this push for revenue and decided cases accordingly.[23] For example, the circumstances in Ferguson, Missouri led the U.S. Department of Justice to investigate and issue a scathing report on the city's policing tactics aimed at increasing revenue collection via the

19. *See* Harris et al., *supra* note 16, at 1756–59, 1769 (explaining categories of monetary sanctions and how amounts have increased over time).

20. *Compare* TEX. CODE CRIM. PROC. ANN. art. 45.0491 (West 2020) (allowing for waiver of monetary sanctions if a person is indigent or cannot pay, and where payment would impose an undue hardship on the individual), *and* MO. SUP. CT. R. 37.65(c) (providing that the judge shall waive, lower, or modify "any fine, fee, or cost or the amount previously assessed and due" if the judge "finds the defendant does not have the ability to pay the amount when assessed or due and is unable to acquire the resources to pay"), *with* IOWA CODE ANN. § 910.2 (West 2013) (making fines, penalties, and some surcharges considered mandatory debts which are not waivable), *and* ARIZ. REV. STAT. ANN. §§ 13-603(C),13-804(C)–(E) (2013) (requiring that courts in criminal cases impose "the full amount of the economic loss to the victim as determined by the court and in the manner as determined by the court or the court's designee").

21. *See* BRETT & NAGRECHA, *supra* note 3, at 12–14 (describing barriers preventing judges from exercising full discretion to waive or suspend enforcement of fees).

22. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 10–11, 20–22 (2010) (describing how individuals with outstanding court debt are often subjected to harsh enforcement mechanisms including warrants, arrest, incarceration, and more).

23. Fines and fees can be assessed for municipal ordinance violations, traffic tickets, misdemeanor charges, and felony charges. The amount and type of monetary sanctions imposed will vary from state to state and offense to offense, but common examples include clerk fees, transcript or processing fees, warrant fees, and in many jurisdictions, fees associated with the provision of appointed counsel (sometimes called "indigent defense reimbursement fees") or time spent in jail awaiting adjudication (often "room and board fees").

municipal court.[24] But the fact pattern in Ferguson was hardly unique. In Arkansas, after a shortfall in revenue following the 2008 financial crisis, the state supreme court encouraged lower courts to collect more revenue through fines and fees. The head of the administrative office of the courts believed the shortfall was due to judges' willingness, "because of the economy, to allow people to work off their fees instead of having to pay."[25] After the supreme court's "encouragement," collections rebounded quickly.[26]

In recent decades, money bail practices have likewise proliferated and have been the key driver behind skyrocketing pretrial incarceration rates. On any given day, the United States now incarcerates nearly half a million people who have not been convicted of a crime.[27] This number defies both international and historical norms. With just over 4 percent of the world's population, the United States has almost 20 percent of the world's pretrial jail population.[28] In the United States today, there are more legally innocent people behind bars than there were convicted people in American jails and prisons in 1980. "Pretrial incarceration is responsible for all of the net jail growth in the past 20 years."[29]

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24. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10–12, 42 (2015) [hereinafter *DOJ Ferguson Report*], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/Q7KW-T9D3].

25. *Chief Justice Says Up To $350,000 Needed for Courts*, PINE BLUFF COM. (Jan 24, 2012, 7:52 AM), https://www.pbcommercial.com/sections/news/state/chief-justice-says-350000-needed-courts.html [https://perma.cc/F3ZR-E4X4].

26. Bill Bowden, *Unpaid Court Fees Split Carroll County Officials*, ARK. DEMOCRAT-GAZETTE (July 3, 2014), http://www.arkansasonline.com/news/2014/jul/03/unpaid-court-fees-split-carroll-county- [https://perma.cc/M3Y6-MT48]. However, the push to use courts as revenue generators/collectors is not unique to Arkansas, or to the era immediately following the 2008 financial crisis. A diverse literature in the 1990s taught courts and probation to collect more. *See, e.g.*, DALE PARENT, DEP'T OF JUSTICE, NAT'L INST. FOR JUSTICE OFFICE OF JUSTICE PROGRAMS, RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES 1 (1990) (concluding user fees were a promising and significant source of revenue and recommending better tracking systems for better collections). For many years, it has been considered normal, and indeed desirable, to encourage courts to bring in more money.

27. MINTON & ZENG, *supra* note 9, at 1; WALMSLEY, *supra* note 9, at 1.

28. WALMSLEY, *supra* note 9, at 13; Michelle Ye Hee Lee, *Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners*, WASH. POST (Apr. 30, 2015, 10:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm_term=.d10281e3c39c [https://perma.cc/4K37-LPM9].

29. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/JRM2-VDQN].

Money bail has played a central role in the rise of pretrial incarceration. From its origins in English law, bail has traditionally been a tool for releasing people pretrial while also ensuring that they return to court.[30] The logic is straightforward. If the state takes money from people for missing court dates, people will have an incentive to appear in court.

In practice today, that is often not the function of money bail. Instead of being a mechanism for pretrial release, money bail is often a mechanism for pretrial incarceration. When a judge conditions a person's release on payment of a money bond, that person remains in jail until the money is deposited with the court.[31] If a judge imposes a bond amount that a person cannot afford, the person remains in jail until their case is resolved—sometimes months or years later.[32]

Accordingly, judges can use money bail as a covert way to incarcerate people before trial. Separate from money bail, most states have procedures that allow judges to deny pretrial release for people who present a high risk of flight or dangerousness.[33] But most states only allow judges to incarcerate people facing more serious charges.[34] The procedures for incarcerating someone pretrial are rigorous and often include evidentiary hearings, appointment of counsel, cross-examination, and burdens of proof for the prosecution to meet.[35] Money bail is much simpler. Imposing unaffordable bond amounts has become an easy way for judges to incarcerate people and evade these due process requirements.

Judges can also impose money bail without knowing that the accused person will be incarcerated for being unable to afford the bond amount. In many places, it is uncommon for judges to make ability-to-pay inquiries or determinations before setting bail.[36] A bond amount that a judge considers reasonable may be unaffordable to the defendant. Another common practice is for judges to set bail according

30. *See Bail Reform Primer*, *supra* note 7, at 4–8.

31. *Id.* at 5–6.

32. *Id.*

33. *See, e.g.*, KY R. CRIM. P. 4.06; D.C. CODE ANN. § 23-1322 (West 2001); N.M. CONST. art. II, § 13.

34. *See, e.g.*, KY R. CRIM. P. 4.06; N.M. CONST. art. II, § 13. *But see* N.J. STAT. ANN. § 2A:162-18 (West 2017) (allowing courts to detain people "charged with any crime").

35. *See, e.g.*, N.J. Ct. R. 3:4-2 (c)(1)(B), (c)(2); N.J. STAT. ANN. § 2A:162-16, -18 (West 2017); *see also* ALEXANDER SHALOM, COLVETTE TVEDT, JOSEPH E. KRAKORA & DIANE D. PRICE, AM. CIVIL LIBERTIES UNION OF N.J., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 26 (2016).

36. *See, e.g.*, SHERIFF'S JUSTICE INST., COOK CTY., CENTRAL BOND COURT REPORT 1–2 (2016), https://www.chicagoreader.com/pdf/20161026/Sheriff_s-Justice-Institute-Central-Bond-Court-Study-070616.pdf [https://perma.cc/H4XS-CQ6T].

to bail schedules.[37] Bail schedules list predetermined money bail amounts based on the charge a defendant faces: the more serious the charge, the higher the bail amount.[38] People who can pay go free, and people who can't afford the scheduled amount stay in jail until their cases are over.

Unlike the rise of monetary sanctions, the rise of money bail and pretrial incarceration is not linked to changes in formal policies, court rules, or statutes. Judges have been able to impose money bail since the colonial era.[39] Yet it is only in recent decades that judges have more frequently imposed money bail and more frequently imposed unaffordable bond amounts that result in pretrial incarceration.[40] The causes for this particular shift in judicial behavior are understudied. The most straightforward explanation may be that the increase in money bail and pretrial detention is largely a function of the broader cultural and legal shift toward punitiveness. Money bail has always been an available mechanism for covert pretrial incarceration. Judges just happened to develop a stronger appetite for it in the political moment of tough-on-crime policies elsewhere in the law. The rise in pretrial incarceration is not so much the result of changes in positive law or policy as it is the result of changing judicial practices and attitudes.

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37. *Bail Reform Primer*, *supra* note 7, at 11–12.

38. *See id.* at 11 ("[B]y setting out a simple matrix of offenses and corresponding dollar amounts, bail schedules do not allow for meaningful individualized considerations of a defendant's circumstances.").

39. *See generally* Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4 (2018) (using the history of bail to address American pretrial justice concerns). Commercial bail bond companies—businesses that extract a fee from defendants in exchange for posting a full bond amount—are a relatively recent phenomenon of the last century. *Id.* at 7. The presence of commercial sureties undoubtedly influences how bail is imposed and the financial impact of bail on poor communities. There is no doubt that the bail bond industry is a powerful lobbying presence in many states and strongly opposes the elimination of money bail. *See, e.g.*, Michael Dresser, *After Revelations in Oaks Case, Advocates Urge Lawmakers to Avoid Bail-Bond Industry Lobbyists*, BALT. SUN (Jan. 10, 2018, 2:20 PM), http://www.baltimoresun.com/news/maryland/politics/bs-md-bail-bond-avoid-20180110-story.html [https://perma.cc/Z9XZ-EPZR] (reporting alleged bribe from bail-bond industry representative to Senator Nathaniel Oaks). But the presence of commercial sureties does little to explain why judges have increasingly turned to money bail as a means of preventive detention. Bail bond companies make no money from people who remain in jail—their profits are tied to the people who are able to afford to pay a fee and bond out.

40. DOYLE, BAINS & HOPKINS, *supra* note 3, at 7.

B. Recent Reforms

Recent reforms to bail and fines and fees have included clearer or stricter guidelines for judicial decision-making. For fines and fees, reforms have often meant adopting policies that ask judges to conduct ability-to-pay determinations and tailor financial sanctions accordingly. For example, a number of states now require courts to consider a defendant's ability to pay before imposing monetary sanctions.[41] Statutes introduce open-ended standards that say the fines and fees should not, for example, cause the person a "substantial hardship," and note factors—such as the person's income, assets, and expenses—that judges should consider when assessing ability to pay.[42] Reforms have also targeted the spiral of consequences attendant to nonpayment,[43] for example, by requiring judges to request court appearances through orders to show cause rather than arrest warrants.[44] Although some states have ended bad practices such as revoking driver's licenses for nonpayment outright, most others have required courts to inquire into an individual's ability to pay before revoking driver's licenses, incarcerating, or imposing other consequences for nonpayment.[45] Some states have seen progress in repealing fees,[46] and others are targeting the conflicts of interest

41. *See Bail Reform Primer*, *supra* note 7, at 7 (citing state efforts to encourage risk assessment tools and to "end[] the use of secured money bail in certain situations for arrestees who are unable to pay").

42. *See, e.g.*, LA. CODE. CRIM. PROC. ANN. § 875.1(C)–(D) (2019) (requiring that, "prior to ordering the imposition or the enforcement of [financial sanctions] . . . the court shall determine whether payment in full . . . would cause substantial financial hardship to the defendant or his dependents"); Supplement to the Settlement Agreement at 21, Kennedy v. Biloxi, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. 27, 2016), https://www.aclu.org/supplement-kennedy-v-biloxi-settlement-agreement [https://perma.cc/77NP-L3VL] (outlining factors for judges to consider in determining ability to pay); MECKLENBURG CTY. DIST. COURT, BENCH CARD: IMPOSITION OF FINES, COSTS, FEES, AND RESTITUTION (2018), https://finesandfeesjusticecenter.org/content/uploads/2018/11/Mecklenburg-Final-Imposition-Bench-Card-10.16.17.pdf [https://perma.cc/8FML-9HCJ].

43. Nonpayment can lead to warrants, arrest, periods of incarceration, loss of driving privileges, and more. *See* Brett & Nagrecha, *supra* note 3, at 30–31.

44. *See, e.g.*, H.R. 16-1311, 69th Gen. Assembly, Reg. Sess. (Colo. 2016) (eliminating use of warrants to respond to nonpayment); MO. SUP. CT. R. 37.65 (requiring that the court use show cause orders rather than arrest warrants to secure appearance upon nonpayment).

45. *See, e.g.*, ARIZ. SUPREME COURT, BENCH CARD FOR ARS § 13-810 ORDER TO SHOW CAUSE HEARINGS (OSC), LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS 3 (2017), https://www.azcourts.gov/Portals/22/admorder/Orders17/2017-81%20FINAL.pdf [https://perma.cc/RW2P-LD23] (allowing the court to arrest and incarcerate for nonpayment if the court first holds a hearing and finds nonpayment was willful or due to "an intentional failure to make bona fide efforts to pay").

46. *See, e.g.*, S. 144, 2019 Leg., Reg. Sess. (Cal. 2019).

attendant to these revenue-raising mechanisms.[47] But most early efforts have hinged on the defendant's ability to pay.[48]

Bail reform efforts have by and large attempted to change judicial decision-making by introducing additional processes that provide judges with more information, more time to make decisions, and more guidance on what decisions to make.[49] Two mechanisms for reform predominate: actuarial risk assessment instruments and procedural protections for preventive detention. Risk assessments have been promoted as a way to help judges better predict a defendant's likelihood of missing court dates or committing crime[50]—particularly violent crime[51]—while awaiting trial. These tools are often accompanied by a "decision-making matrix," which functions much like a sentencing grid, offering recommendations for conditions of release or detention based on the algorithm's assessment of a person's relative risk level.[52] Procedural protections seek to ensure that judges make pretrial detention decisions only after making sufficient inquiries at adequate hearings. To order detention, the prosecution must prove by clear and convincing evidence that the accused person is a danger to public safety, and defense counsel must have the opportunity to

47. *See, e.g.*, *Orleans Parish, LA: Bail*, CIVIL RIGHTS CORPS (2019), https://www.civilrightscorps.org/work/case/orleans-parish-la-bail [https://perma.cc/2KTD-2VZ5].

48. *See, e.g.*, S. 572, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (precluding individuals from being jailed for failure to pay a fine unless nonpayment violated the terms of their probation); HALEY HOLIK & MARC LEVIN, TEX. PUB. POLICY FOUND., CONFRONTING THE BURDEN OF FINES AND FEES ON FINE-ONLY OFFENSES IN TEXAS: RECENT REFORMS AND NEXT STEPS 1–5 (2019) (describing recent legislative reforms in Texas that require courts to consider whether nonpayment was willful); *see also* CRIMINAL JUSTICE POLICY PROGRAM, SURVEY TO FEES AND FINES ADVOCACY COMMUNITY (2019) (on file with authors) (finding that the vast majority of respondents were targeting ability to pay reforms).

49. *See generally* DOYLE, BAINS & HOPKINS, *supra* note 3, at 10–26. Despite the rallying cry to end money bail, all fifty states still permit money bail. California may be poised to be the first state to officially eliminate money bail. *See* S. 10, 2017–18 Leg., Reg. Sess. (Cal. 2018) (authorizing California's transition from a money-based release system to a risk-based release and detention system). Recent reforms in New Jersey have caused money bail to be strongly disfavored and have eliminated money bail as a means of pretrial detention. *See* N.J. STAT. ANN. § 2A:162-15 (West 2017) ("Monetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required.").

50. LAURA & JOHN ARNOLD FOUND., RESEARCH SUMMARY: DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 2 (2013).

51. Chelsea Barabas, Karthik Dinakar & Colin Doyle, *The Problems with Risk Assessment Tools*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html [https://perma.cc/AL6M-QDVG].

52. *See, e.g.*, LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: DECISION MAKING FRAMEWORK – COOK COUNTY, IL 1–2 (2016) (on file with authors).

cross examine witnesses and present its own evidence.[53] In model policies and in some jurisdictions, judges are only permitted to order pretrial detention directly—not surreptitiously through setting impossible conditions of release such as unaffordable money bond amounts.[54]

C. Policy Reforms Have Produced Mixed Results

Despite the strides made in creating new bail procedures and right-sizing monetary sanctions in several jurisdictions, the broader impact of these reforms shows that statutes, court rules, and official policies are important, but not a panacea. For many jurisdictions that have adopted formal reforms, the results thus far have been underwhelming.

Jurisdictions have had mixed results with bail reform. Kentucky's adoption of a risk assessment algorithm neither lowered pretrial jail populations nor ameliorated racial disparities in pretrial detention.[55] A Massachusetts Supreme Judicial Court decision requiring judges to make ability-to-pay inquiries at bail settings has not lowered the number of people who are detained pretrial.[56] In Cook County, which includes Chicago, judges continue to detain people on unaffordable bond amounts despite administrative order forbidding them from doing so.[57] Other jurisdictions, like Mecklenburg County, North Carolina, have experienced positive outcomes after implementing reforms. But it is often unclear whether these outcomes are the result

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53. *See, e.g.*, N.J. STAT. ANN. §§ 2A:162-16, -18 (West 2017).

54. *See, e.g.*, CIRCUIT COURT OF COOK COUNTY, GENERAL ORDER NO. 18.8A (2017), http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release.aspx [https://perma.cc/F238-NKGP]; DOYLE, BAINS & HOPKINS, *supra* note 3, at 10–13.

55. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 308–09 (2018). Algorithmic risk assessments may not be helping bail reform take root. Pretrial risk assessments may not actually reduce pretrial incarceration and are likely to perpetuate biases in the criminal history data used to train these tools. A deeper discussion of risk assessments is beyond the scope of this Essay, but the tools have also faced sustained criticism concerning their design, accuracy, implementation, transparency, and equity along race, class, and gender lines. *See* Chelsea Barabas, Karthik Dinakar & Colin Doyle, *Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns*, MIT MEDIA LAB (July 17, 2019), https://www.media.mit.edu/posts/algorithmic-risk-assessment [https://perma.cc/NG24-S229].

56. SPECIAL COMM'N ON BAIL REFORM, FINAL REPORT OF THE SPECIAL COMMISSION TO EVALUATE POLICIES AND PROCEDURES RELATED TO THE CURRENT BAIL SYSTEM, Exhibit C at 2 (2020), https://d279m997dpfwgl.cloudfront.net/wp/2020/01/0102_bail-reform-report.pdf [https://perma.cc/Z2DN-GHK9].

57. THE COALITION TO END MONEY BAIL, SHIFTING SANDS: AN INVESTIGATION INTO THE FIRST YEAR OF BOND REFORM IN COOK COUNTY 8, 15 (2018), https://chicagobond.org/wp-content/uploads/2018/10/shiftingsands.pdf [https://perma.cc/ELY4-JSG7].

of bail reform, other changes that occurred at the same time, or broader trends that preceded and instigated official policy changes.[58] The standard bearer for bail reform appears to be New Jersey, which has eliminated money bail and dramatically lowered its pretrial incarceration rate. New Jersey's achievements are likely due in part to changes in court culture, which will be explored in the next section of this Essay.

Similarly, policies mandating up front ability-to-pay assessments do not end the practice of imposing unaffordable monetary sanctions. Many states have had such laws for some time or have adopted laws recently, without significant changes to how monetary sanctions are imposed or enforced. Individual cases indicate judges' reluctance to fully embrace the law's letter and spirit, resulting in the continuation of unattainable financial sanctions or disproportionately punitive responses to nonpayment. In Arkansas, for example, a person can be incarcerated for nonpayment of court debt only if the court finds that the nonpayment was willful.[59] State law has, for decades, required judges to consider the person's financial resources, employment status, earning ability, and "any other special circumstances" that might affect a defendant's ability to pay before determining whether nonpayment was willful.[60]

But despite these enumerated factors, case law suggests there is still significant room for judges to make these decisions arbitrarily. For example, the Arkansas Supreme Court affirmed a lower court's holding that applying to a few jobs in one's hometown, without success, did not show sufficient "bona fide efforts" to gain employment and to be able to pay off court debt.[61] In that case, the court revoked the person's probation—despite the ability-to-pay policy—because the court felt that the person simply should have tried harder. Even after significant judicial attention to the issue of unreasonable monetary

58. *See generally* CINDY REDCROSS & BRIT HENDERSON, MDRC CTR. FOR CRIMINAL JUSTICE RESEARCH, EVALUATION OF PRETRIAL JUSTICE SYSTEM REFORMS THAT USE THE PUBLIC SAFETY ASSESSMENT (2019).

59. Jordan v. State, 939 S.W.2d 255, 257 (Ark. 1997); *see also* Bearden v. Georgia, 461 U.S. 660, 672 (1983) (requiring states to consider alternative measures of punishment other than imprisonment when a defendant's failure to pay is not willful).

60. ARK. CODE ANN. § 5-4-205(f)(3) (2013); *Jordan*, 939 S.W.2d at 257 ("Considerations such as those enumerated in Ark. Code Ann. [§ 5-4-205(f)(3)] . . . are required before probation is revoked."); LeFlore v. State, No. CACR 11-685, 2012 WL 1869565, at *3 (Ark. Ct. App. May 23, 2012) ("In determining whether to revoke probation for nonpayment, the court is required to consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.").

61. Hoffman v. State, 711 S.W.2d 151, 154 (Ark. 1986) (quotation omitted).

sanctions in the state—brought on by litigation and investigative advocacy by the Lawyers' Committee for Civil Rights, the American Civil Liberties Union, and others[62]—state judges continue to use their discretion to determine "bona fide efforts" based on subjective determinations of whether a person "should" have been able to find work.[63] Reforms that hinge on ability to pay are therefore limited, as judges retain broad latitude to interpret ability to pay as they see fit, or sidestep such requirements altogether.[64]

II. COURT CULTURE AS A TARGET OF REFORM

A. The Power of Court Culture

The success of reforms implemented for both fines and fees and bail hinges on how judges apply the law and policies. As discussed, ability-to-pay assessments often leave it up to the court to decide whether a particular financial sanction would impose an "undue hardship"—even if there are statutory or rule-based factors the court must consider in making that assessment. And, in most states, when deciding whether to release a person pretrial, the court follows a multifactor test and makes a decision based on those factors.[65] Across jurisdictions, some of the differences in the success of recent reforms are surely due to formal policy differences. But success is also dependent on judges applying standards in a manner consistent not

62. *See, e.g.*, Dade v. City of Sherwood, No. 16-cv-602, 2017 WL 2486078 (E.D. Ark. June 8, 2017). In 2016, in response to a lawsuit against the City of Sherwood, Arkansas, for allegedly running an unconstitutional debtor's prison, the state created a statewide committee of district and circuit court judges to propose policy changes to the bench. *See* U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 51–52 (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [https://perma.cc/G8RE-Y8EB]. This committee sent a signal to judges across the state that judicial leadership was responding to the federal law suit proactively. *See id.* Yet, it remains unclear whether or how the statewide committee will change state policy on the issue, and whether judges will willingly apply any new policies that are promulgated.

63. *See* Joseph v. State, 577 S.W. 3d 55, 59 (Ark. Ct. App. 2019) (affirming the trial court's conclusion that the defendant did not make sufficient bona fide efforts to pay off court debt because he "clearly had the ability to work" as he was employed before he was incarcerated, earned his GED while incarcerated, and was able to pay for a cell phone and cable television).

64. State law in California, for example, requires ability-to-pay determinations prior to imposing fees, yet one study of practices in Alameda County found that such determinations rarely occurred. As a result, the average adult is charged over $6,000 in fees alone, despite the fact that many have no financial ability to pay such amounts. THERESA ZHEN & BRANDON GREENE, E. BAY CMTY. LAW CENTER., PAY OR PREY: HOW THE ALAMEDA COUNTY CRIMINAL JUSTICE SYSTEM EXTRACTS WEALTH FROM MARGINALIZED COMMUNITIES 2 (2018), https://ebclc.org/wp-content/uploads/2018/10/EBCLC_CrimeJustice_WP_Fnl.pdf [https://perma.cc/8AYA-86ZD].

65. *See, e.g.*, N.M. CT. R. 5-401(C).

only with the policy itself, but also with the principles that animated the policy reform. Much of the differences in reform outcomes might be explained by differences in culture—including how court culture has changed through the process of reform.

Consider New Jersey, the standard bearer for contemporary bail reform. In 2017, New Jersey largely abandoned the use of money bail, adopted a statewide risk assessment tool, and created robust procedural protections for pretrial detention. In three years' time, New Jersey achieved substantial results, lowering the state pretrial jail population by 35 percent.[66] Since New Jersey adopted reform, crime rates have gone down[67] and court appearance rates have remained stable.[68] Many formal policies have, on their own, contributed to the reductions in New Jersey's pretrial jail population. Unlike the previous system, judges are now only permitted to detain a small portion of the pretrial population. Judges cannot detain people who were issued citations in lieu of arrest, can only detain people upon a motion from the prosecutor, and cannot covertly order detention by imposing unaffordable bail.[69]

Nonetheless, policy alone cannot fully explain the precipitous drop in New Jersey's pretrial population. In 2017, the first year of reform, prosecutors requested pretrial detention in just over 10 percent of criminal cases.[70] New Jersey judges could have rubberstamped the prosecutors' requests for detention but instead denied more than 40 percent of those requests, releasing nearly 6,000 people pretrial.[71] New Jersey judges' exercise of discretion was responsible for this difference as each of the 6,000 people was legally eligible for detention.[72] Not only that, but these same judges had been detaining thousands more people before reforms were adopted. Amidst the official statutory reforms, a court culture change has also happened. In a very short span of time,

66. GLENN A. GRANT, CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE FOR CALENDAR YEAR 2017, at 4 (2017), https://www.njcourts.gov/courts/assets/criminal/2017cjrannual.pdf [https://perma.cc/2FDN-YPK6].

67. *Has Bail Reform Been a Success? Check the Crime Numbers, Then Decide*, NJ.COM (Dec. 05, 2018), https://www.nj.com/opinion/2018/12/has_bail_reform_been_a_success_check_the_crime_num.html [https://perma.cc/8AQ3-AV2W].

68. DOYLE, BAINS & HOPKINS, *supra* note 3, at 45–49.

69. *Id.*

70. *See* GRANT, *supra* note 66, at 4, 14 (noting that "[p]rosecutors filed 19,366 motions for pretrial detention" while "142,663 defendants issued a complaint-warrant or a complaint-summons").

71. *See id.* (explaining that judges detained only 8,043 defendants of the 19,366 defendants that prosecutors sought to detain).

72. These 6,000 cases do not include prosecutors' requests for detention that prosecutors later withdrew or that judges dismissed outright. *Id.* at 14.

judges across the state became strikingly less punitive with pretrial decision-making.[73] And it has made the difference in thousands of cases.[74]

A key to successfully implementing reforms, therefore, is to target the space between policy reforms and the resulting judicial decisions. What makes judges exercise their discretion to decide these cases differently? What types of structural, ideological, and cultural factors influence judicial decision-making, and how can future policy reform efforts on bail and fines and fees more directly target those influences and ensure any such reforms are impactful?

B. Targeting the Space Between: Components of Court Culture That Can Impede the Traction of Policy Reforms

The myriad influences on court culture and their individual significance are unknown. However, our experience working with state and local jurisdictions to develop and implement policy reforms to bail and fines and fees systems highlighted several potential factors that likely impact court culture, even where objectively "good" policies exist.

We group these factors into two buckets: institutional and sociocultural factors. By institutional factors, we mean aspects of court structure and operations that can impact judicial decision-making. This includes conflicts of interest and revenue generation (i.e., how courts and court actors are funded); political and public pressures on decision makers; structural issues, including busy dockets and the lack of unified court systems in many jurisdictions; and limited rights of appeal or judicial oversight.

Sociocultural factors, on the other hand, are less about how the court system is set up and more about patterns of thought judges may engage in based on their own personal experiences, attributes, or societal norms. These thought processes may occur explicitly or implicitly. The structural and socioeconomic barriers we identify include racial bias, court ideology, and general misconceptions of poverty among judicial decision-makers. These barriers undoubtedly influence judicial decision-making in contexts other than fines and fees

73. *Judiciary Releases Annual Criminal Justice Reform Report*, N.J. COURTS (Apr. 2, 2019), https://www.njcourts.gov/pressrel/2019/pr040219a.pdf [https://perma.cc/TC5C-KTZ6].

74. The reasons for the cultural change are not self-evident and merit further study. One possible reason is judicial education. Unlike other states, New Jersey's reforms were accompanied by a vast education program that reached nearly every public servant involved in the bail process, including judges. Much of the reduction in the pretrial jail population occurred after educational programs had happened but before statutory reforms became law.

or bail, but we highlight them here because of their particular importance in influencing the reach of policy reforms in these parts of the criminal legal system. Moreover, the factors we identify are not exhaustive—there are undoubtedly many more factors that influence judicial decision-making. However, the factors discussed below serve as a first attempt to raise areas of inquiry and future study.

i. Institutional factors

The institutional factors we identify—conflicts of interest and revenue generation, political and public pressure, structural issues, and limited rights of appeal—are all aspects of a court's internal structure or operations that impact the overall culture of the bench. Each of these factors are addressed below.

1. Conflicts of interest and revenue generation

Whether and how courts are expected to generate revenue to fund government functions, including their own courts, impacts judges' decisions about when to impose financial sanctions on individual defendants, the amount to impose, and how to enforce outstanding fines and fees. These conflicts of interest have received national attention, both through the Ferguson investigation[75] as well as more recent litigation.[76] Equally important are the more indirect ways judges experience institutional pressures from court administrators or from other recipients of fines and fees, and how these pressures impact judges' decisions in individual cases.

The Ferguson investigation exposed how the municipal court funded itself on the backs of the city's poorest, predominately minority residents.[77] The pressure to raise revenue influenced both policing strategies and the imposition and enforcement of monetary sanctions by the city's municipal court judge.

Last year, a federal appeals court invalidated the New Orleans court system's practice of imposing monetary sanctions, citing

75. *DOJ Ferguson Report*, *supra* note 24, at 3–4.

76. Nick Sibilla, *Federal Court Declares New Orleans Debtor's Prison Unconstitutional*, FORBES (Aug. 30, 2019, 12:44 PM), https://www.forbes.com/sites/nicksibilla/2019/08/30/federal-court-declares-new-orleans-debtors-prison-unconstitutional/#155eb38d221f [https://perma.cc/MP3A-EAPT].

77. *See generally DOJ Ferguson Report*, *supra* note 24, at 42 (describing how the City of Ferguson relied on revenue raised through traffic and municipal fines and fees to fund court operations).

unconstitutional conflicts of interest. The U.S. Court of Appeals for the Fifth Circuit found the practices unconstitutional because the judges in charge of making decisions in individual cases about monetary sanctions were incentivized by their responsibility for the courts' budget. The Fifth Circuit's decision noted that in periods of budgetary shortfalls, "Judges have attempted to increase their collection efforts"[78] and that "there was no evidence that the Judges had ever instituted a practice of considering a defendant's ability to pay before jailing them for failure to pay their court debts."[79]

As the example discussed earlier from Arkansas shows, even without direct control over the expenditures of fines and fees collections, judges can be influenced by institutional interests in the money. Arkansas judges operating under the same set of statutes come to very different results on the amount of monetary sanctions and enforcement based on the institutional messaging about the importance of their collections role. In that example, after a post-recession dip in collections, Arkansas refilled its coffers after central judicial authorities sent a clear message to local courts to raise more money.[80]

Judges also face financial pressures from the other institutional recipients of fees. In one state, a judge told attorneys with Harvard Law School's Criminal Justice Policy Program that he was willing to waive everything except the fees that go to clerks because he did not want to pursue reforms that would negatively impact his relationship with his clerk. In another state, judges spoke about how if they waived a certain fee, "a man with a gun would call," referring to how the sheriff, who received the money, would contact them if the revenue was reduced. Although these are anecdotal examples in need of more research, they show how individual judges may be sensitive to financial pressures, and make decisions regarding individuals' fines and fees accordingly.

2. Political and public pressures

Every day, judges make decisions that directly impact their communities, and these decisions are often reported in newspapers or are otherwise part of the public discourse. Pressures to adjudicate cases

78. Cain v. White, 937 F.3d 446, 449–50 (5th Cir. 2019).

79. *Id.* at 450.

80. *Chief Justice Says Up To $350,000 Needed for Courts*, PINE BLUFF COM. (Jan. 24, 2012, 7:52 AM), https://www.pbcommercial.com/sections/news/state/chief-justice-says-350000-needed-courts.html [https://perma.cc/R6MF-WPRY].

in a way that will satisfy the public may impact individual decisions regarding bail and fines and fees.[81] Judges often state they do not want to end up in the paper because of a bad decision.[82] The very structure of pretrial incarceration encourages judges to be more punitive, independent of legislation encouraging a more lenient approach, because of the fear of releasing someone pretrial who then commits a horrible crime.[83] Because judges will be held accountable for such tragedies, they err on the side of detention to avoid any political blowback. In the alternative, when a judge incarcerates someone pretrial who would not have committed a crime on release, no one will ever know.

In many jurisdictions, judges are elected and the pressures to avoid risky decisions may be increased if they are expected to win elections. Judges may therefore be tempted to respond to public opinion in how they do their work.[84] Although the popularity of tough-on-crime policies is waning—as the recent election of reform-minded judges in Houston, Texas shows[85]—these narratives persist.

For convenience, this Essay has used the term "judges" fairly loosely to encompass a range of state employees who are responsible for adjudicating cases. In many jurisdictions, the "judges" who make bail and monetary sanction decisions are part-time quasi-judges who are appointed by local government officials and serve with little independence. The people serving in these roles typically have other employment and are often not lawyers[86]—frequently, their appointment is due to political connections.[87] For these judges, their

81. Ronald Kessler, *I Set a Defendant Free and Got Blamed When He Raped Someone*, MARSHALL PROJECT (Aug. 31, 2017, 10:00 PM), https://www.themarshallproject.org/2017/08/31/i-set-a-defendant-free-and-got-blamed-when-he-raped-someone [https://perma.cc/TJX9-XBZG].

82. *Id.*

83. *See* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 426–32 (2016) (identifying this as a principle-agent problem and exploring the issue in depth).

84. *See generally* Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. L. STUD. 169 (2009) (finding that judicial voting is correlated with the political preferences of the electorate).

85. Adeel Hassan, *17 Black Women Sweep to Judgeships in Texas County*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/us/black-female-judges-texas-election.html [https://perma.cc/X9RL-GPM5].

86. *See, e.g.*, S.C. CODE ANN. § 22-1-10(B)(1) (2019) ("No person is eligible to hold the office of magistrate who is not at the time of his appointment a citizen of the United States and of this State, and who has not been a resident of this State for at least five years, has not attained the age of twenty-one years upon his appointment, and has not received a high school diploma or its equivalent educational training as recognized by the State Department of Education.").

87. *See, e.g.,* Rick Brundrett, *Senators Continue Tradition of Keeping Magistrates on Short Leashes*, NERVE (Feb. 5, 2019), https://thenerve.org/senators-continue-tradition-of-keeping-magistrates-on-short-leashes [https://perma.cc/W9Y4-524F].

continued employment is conditioned on staying in the good graces of local elected officials who may have their own set of political priorities that the judges are then motivated to follow.

3. Court structure

The structure of court operations, including how many cases individual judges must hear each day, may also influence the effect of policy reforms. Municipal court and misdemeanor dockets are long, and hearings tend to move quickly to get through the large volume of cases. Judges are frequently influenced by a desire to decide cases quickly and efficiently,[88] which in turn may result in decisions being made without having to provide much support or insight into what was considered. Unlike in the federal system, where judges must specify their reasons for ordering pretrial detention in a written memorandum,[89] judges in state courts typically make bail and detention decisions on the fly in hearings that can be less than a minute long. The need to move through cases quickly may result in entrenched practices that are driven by efficiency rather than fairness and that fail to catch up to or meet the ideals of newly reformed policy. The lack of a record may also mean there is never an opportunity for oversight or accountability of judicial decisions to ensure judges are actually following new policies.

Other structural issues beyond case volume may impact whether policy reforms are effective. The tendency for certain courts to operate in isolation from one another—such as municipal courts—may mean those courts' practices go unnoticed or unevaluated, even if statewide or regional policy changes are approved. Or, where lower-level courts fall under the supervision of a regional court system, the head of that system may dictate priorities or practices that impact the decision-making of individual trial judges. The different ways of organizing court hierarchies, or providing oversight of lower court judges, may have some impact on whether policy reforms take root.

88. *See, e.g.*, Nancy Gertner, *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 428 (2016); *see generally* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (describing how judges need to use deliberation to check their intuition, and to do so, must be afforded more time to make decisions, write opinions more often, be trained on disciplines such as statistics, and rely on scripts, checklists, and other tools instead of their own guts and memories).

89. 18 U.S.C. § 3142 (2018).

4. No or limited right of appeal

Many judicial decisions, including decisions regarding whether or not to set bail, and at what amount, are not reviewable.[90] Therefore, one of the main checks on whether trial court judges are following the law is often unavailable in this area. And, even when there is appellate review, the standards are deferential to judges, allowing decisions to be overturned only if the trial court abused its discretion[91] or the sentencing decision was "unreasonable."[92] Often lower court decisions are not on the record, and courts are not required to make findings. Oversight and quality control of judicial decision-making on these issues, therefore, is limited at best. Some policy changes addressing issues with monetary sanctions aim to add a record or findings section to increase reviewability.

The value of an appeal or other oversight also rests on appellate courts having a different judicial culture than lower courts, rather than acting as a rubber stamp on those decisions. The appellate court in the Arkansas case above affirmed the lower court's holding that proving an inability to pay required more than showing lack of success obtaining a job in the person's home town.[93] Similarly, many states have required that certain groups of defendants be released from custody pending trial and have permitted pretrial detention only for people facing particular charges and only through a robust adversarial process. In many states, judges disregard these rules daily, imposing unaffordable bail on people the judges are not permitted to detain.[94] As with fines and fees, it is widely known that, despite positive state law prohibiting the practice, judges continue to set unaffordable bail in violation of the Constitution.[95]

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90. *See, e.g.*, Parsons v. State, 347 S.E.2d 504, 504 (S.C. 1986) (dismissing appeal from an order denying bail as "not directly appealable"). *But see* Dotson v. Clark, 900 F.2d 77, 78 (6th Cir. 1990) (holding that "habeas corpus bail decisions are appealable").

91. *See, e.g.*, State v. Steele, 61 A.3d 174, 180 (N.J. Super. Ct. App. Div. 2013) ("The setting of bail is vested in the sound discretion of the trial court, and we consequently review the trial court's decision for an abuse of discretion.").

92. *See, e.g.*, United States v. Booker, 543 U.S. 220, 264 (2005) (affirming that "[t]he courts of appeals review sentencing decisions for unreasonableness").

93. *See supra* notes 61–64 and accompanying text.

94. *See supra* Part I.A (providing examples of required procedures and excessive pretrial detention rates around the country).

95. *See, e.g.*, Tana Ganeva, *The Fight to End Cash Bail*, 2019 STAN. SOC. INNOV. REV. 18, 24 (discussing recent bail reforms in New York, which Bronx Freedom Fund Executive Director Elena Weissmann notes have been implemented at a glacial pace, in part because of the fact that court "culture eats policy," meaning it is hard to actually implement policy reforms at the ground level); N.J. Wikler, *The Economics of Divorce*, 25 JUDGE'S J. 9, 49 (1968) (discussing how, in the child support context, judicial "guidelines themselves will not make a difference without a

ii. Sociocultural factors

1. Racial bias

Racial bias, both explicit and implicit, pervades society at large and the criminal legal system in particular. A wealth of empirical research has found that, for the same conduct, Black people are treated more harshly at every stage of the criminal process than their white counterparts. Compared to similarly situated white people, Black people are more likely to be arrested, prosecuted, and convicted, and are also more likely to be sentenced to harsher punishments.[96]

Recent empirical research confirms that racial bias also influences bail decisions. A study of judges tasked with bond setting in Philadelphia found that judges overpredict the risk of Black defendants committing crimes on pretrial release and underpredict the risk of white defendants.[97] Accordingly, these judges imposed money bail more often on Black defendants than white defendants and assigned higher bail amounts to Black defendants than white defendants.[98]

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corresponding change in the way that judges see the problem. Unless judges come to realize the degree of inequality . . . the guidelines will be ignored, or used as ceilings—a practice which would be quite unjustified").

96. *See* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2018), https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf [https://perma.cc/ZA4M-EGYU] ("As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, . . . compared to one of every seventeen white boys."); LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 1 (2013), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf [https://perma.cc/7KGU-93ER] ("White drivers were both ticketed and searched at lower rates than black and Hispanic drivers."); Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 226 (2004) ("Research on labeling and stereotyping of black and Hispanic offenders reveals that court officials (and society-at-large) often view them as violent-prone, threatening, disrespectful of authority, and more criminal in their lifestyles . . . ."); JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 13 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Racial%20Disparities%20Report%20062515.pdf [https://perma.cc/2ZAK-NSWQ] ("African Americans are jailed at almost four times the rate of whites."); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320 (2014) ("Across the distribution, blacks receive sentences that are almost 10 percent longer than those of comparable whites arrested for the same crimes."); Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 HUM. RTS. 14, 14 (2010) ("[N]early 40 percent of the racial disparity in incarceration today cannot be explained by differential offending patterns.").

97. David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, 1888–90 (2018).

98. *Id.* at 1885–86.

Other research has found that Latinx and Black defendants "are more likely to be detained [pretrial] than similarly situated white defendants."[99]

For fines and fees, studies have shown that the racial makeup of a city may influence the extent to which the courts extract revenue from its residents. One study found that there is a strong correlational relationship between the amount of revenue a city brings in through fines and fees, and the portion of the city's residents that are Black.[100]

2. Ideology

Beyond explicit ideological commitment, judges may resist changes in policy because of longstanding habits on the bench. Tough on crime policies have dominated the country for decades, and judges have been at the frontline of enforcing these policies. As public sentiment changes and legislatures pursue reforms, judges are likely to lag behind. For a judge, being less punitive means reversing course on a career of judicial decision-making. Ideologically motivated or not, many judges have grown comfortable in their practices, trust the wisdom and experience they have gathered from years on the bench, and will not be eager to change how they collect fines and fees or impose bail.

3. Misconceptions of poverty

Many, if not most, judges come from a socioeconomic background that is different than the litigants that come before them in criminal court. A judge's upbringing or current socioeconomic status may limit their understanding of the reality of poverty and, therefore, their decisions regarding how to set an appropriate financial sentence for a person currently experiencing poverty. Many judges simply cannot appreciate what it means to have such limited economic means that coming up with $100 of bail money or $100 for fines and fees is impossible for a large number of defendants. As described by the former Chief Justice of the Supreme Court of Puerto Rico, "most judges are alienated from poor communities. [They] don't understand their problems, their needs, and their aspirations, because [they] don't

99. Demuth & Steffensmeier, *supra* note 96, at 222.

100. Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1092–93 (2017).

generally have a background in poverty, whether personal or professional."[101]

Research suggests that this misunderstanding of poverty and how it impacts an individual's ability to pay for basic life necessities leads to misguided judicial decision-making. Our research in Germany, which examined the country's system of imposing day fines—a form of graduated economic sanctions based on ability to pay—found that judges routinely overestimate the amount people can afford to pay.[102] Judges may believe fifty dollars a month towards fines and fees is attainable, but for many people, it is not.

A judge's own experience or knowledge of poverty may also influence decision-making regarding what constitutes affordable bail.[103] Perhaps it is an overly generous explanation for the ballooning number of individuals incarcerated pretrial, but for at least some judges, misconceptions regarding the economic resources available to individuals could impact decisions to set bail at particular amounts that end up being unattainable. The situation is not self-correcting. In most jurisdictions, judges never learn which defendants were able to secure their release on money bail and which defendants remained in jail because they were unable to post bond.

C. Court Culture is Understudied

Figuring out precisely which of the above-identified factors influences court culture, and thereby judicial decision-making—and to what extent—requires additional research. However, there is some literature available as a starting place.

Current research has focused primarily on judicial decision-making in federal appeals court, though some scholars have studied the

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101. Liana Fiol Matta, *Knowing the Communities We Serve*, 49 CT. REV. 14 (2013).

102. *See* MITALI NAGRECHA, CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., THE LIMITS OF FAIRER FINES: LESSONS FROM GERMANY (forthcoming Spring 2020).

103. Data reflects a large disconnect between the amount of money bail set for individuals nation-wide and the amount of money most criminal defendants can afford to pay. Nationwide in 2009, the median cash bail amount in felony cases was $11,700, increasing on average between 33 and 67 percent since 1992, depending on the type of crime. *See* PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 7 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf [http://perma.cc/X6X3-SR6M]. A quarter of defendants had bail set at $25,000 or more, even for property, drug, or "public order" crimes. *See id.* Yet a recent study of two major metropolitan areas found that the average person involved in the criminal-legal system earned less than $7,000 a year, and more than half of those people were unable to afford their bail even if it was set at $5,000 or less. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201–40 (2018).

decision-making of individual federal trial courts (primarily in the context of sentencing),[104] and a few scholars have also examined the decision-making of state trial and appellate courts.[105] Yet, "[s]tate courts are a fertile place for study, and little has been done to date."[106]

Current research suggests that judicial decisions can be influenced by (1) the personal attributes of individual judges; (2) the processes judges are required to follow when ruling or documenting their decisions; and (3) formal judicial training and education. We will briefly discuss each of these areas of research, concluding with notable holes in the literature that are of particular importance for reforming monetary sanctions and bail.

i. Personal attributes of individual judges

There is a relatively recent body of research that suggests that the personal attributes of judges influence their individual decisions. For example, a judge's race[107] and gender[108] may impact that judge's rulings

104. *See generally* Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 60–85 (2005) (examining racial and sex disparities in federal trial court prison sentencing cases); Max Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 734–36 (2008) (examining the decision making of Democratic- and Republican- appointed federal trial judges in federal sentencing cases); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268, 1276 (2014) (examining federal trial court discretion in sentencing cases).

105. *See, e.g.*, Shepherd, *supra* note 84, at 171 (examining the influence of political retention voting on state supreme court judges); Guthrie, Rachlinski & Wistrich, *supra* note 88, at 19 ("[W]e have conducted several studies involving hundreds of federal and state trial judges around the nation, and we have found that judges commonly encounter stimuli on the job that induce intuitive reactions, though they occasionally demonstrate an ability to override those intuitive responses.").

106. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 835 n.17 (2008).

107. *See, e.g.*, Jonathan Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179 (2013) (finding that "black judges [on federal appellate courts] are much more likely than nonblack judges to support affirmative action plans"); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 339 (2012) (finding that federal trial court judges who were members of a minority group disposed of employment civil rights cases at the summary judgment stage less often than white judges); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 29–45, 51–53 (2008) (finding a strong relationship between the race of federal trial and appellate judges and their decision making in Voting Rights Act cases); *see also* Miles & Sunstein, *supra* note 106, at 840 (observing that individual characteristics, including race and gender, impact federal appellate judges' voting patterns, but this effect is not universal across all case types).

108. *See, e.g.*, Yang, *supra* note 104, at 1277 (finding that "female judges and Democratic-appointed judges issue shorter sentences and are more likely to depart downward from the Guidelines after *Booker*, compared to their male and Republican-appointed peers"); Christina L.

in profound ways. The extent of this influence may depend on the nature of the case.[109] Other studies found that a judge's academic training or legal philosophy may impact their decisions.[110] Some studies have found that it is not just the personal attributes of an individual judge that will influence decision-making, but also the race and gender makeup of the judge's colleagues, especially in appellate cases with diverse panels.[111]

Finally, a judge's individual political views and party affiliation may impact outcomes for litigants that come before that bench.[112] One article also speculates that federal district court judges are loyal to the

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Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010) (finding that in federal appellate cases, "[o]n average, the probability of female judges voting in favor of the plaintiff in a sex discrimination case is around 0.10 higher than it is for male judges"); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (finding that a significant relationship existed between gender and individual federal appellate judges' decisions in sex discrimination and sexual harassment cases); Max Schanzenbach, *supra* note 104, at 57, 60–85 (finding that "[f]or serious offenses, increasing the proportion of female judges in a [federal] district decreases the sex disparity" in prison sentencing cases); *see also* Miles & Sunstein, *supra* note 106, at 840 (noting that in certain kinds of cases, a judge's sex affects their voting patterns).

109. *See* Miles & Sunstein, *supra* note 106 at 840 (highlighting research that "a judge's race does not exert a meaningful influence in employment discrimination cases, an area where one might predict race would be particularly salient. In contrast, race matters in voting rights cases; African American judges are more likely to vote in favor of plaintiffs, and white judges are more likely to vote in favor of plaintiffs if an African American judge is sitting on the panel").

110. *See, e.g.*, Elliot Ash, Daniel L. Chen & Suresh Naidu, Ideas Have Consequences: The Impact of Law and Economics on American Justice 34 (March 20, 2019) (unpublished manuscript), http://elliottash.com/wp-content/uploads/2019/03/ash-chen-naidu-2019-03-20.pdf [https://perma.cc/6QJ5-H2RP] (concluding that federal trial and appellate judges who have been trained in economics "render conservative vote and verdicts, are against regulation and criminal appeals, and mete harsher criminal sentences and deterrence reasoning"); Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy*, 86 TUL. L. REV. 181, 216 (2011) (positing that "individual moral intuition plays a role at least as important as rule-based legal reasoning in the decision-making process of Supreme Court Justices engaged in constitutional judicial review").

111. *See, e.g.,* Kastellec, *supra* note 107, at 179 (finding that "the random assignment of a black judge to a three-judge panel in affirmative action cases nearly ensures that the panel will issue a liberal decision"); Boyd, Epstein & Martin, *supra* note 108, at 406 (finding that in federal appeals courts, "the likelihood of a male judge ruling in favor of the plaintiff increases by 12% to 14% [in sex discrimination cases] when a female sits on the panel"); Cox & Miles, *supra* note 107, at 26 (finding that "as more Democratic appointees were added to a panel, the rate at which a judge voted to impose liability rose" in federal Voting Rights Act cases).

112. *See, e.g.*, Yang, *supra* note 104, at 1277 (finding that female judges and Democratic-appointed judges give shorter sentences and are more likely to depart downward from the guidelines after *Booker*, compared to their male and Republican-appointed peers); Shepherd, *supra* note 84, at 171 (finding that state supreme court "[j]udges facing Republican retention agents tend to vote in accord with standard Republican policy" and that "[t]he mirror image applies for judges facing retention decisions by Democrats"); Schanzenbach & Tiller, *supra* note 104, at 734–36 (finding patterns based on political appointment in sentencing determinations); Miles & Sunstein, *supra* note 106, at 838–41 (finding that in many areas of the law, party affiliation by proxy of appointing president has a measurable effect on appellate voting patterns).

political and social groups that appointed them, and that judges are sensitive to professional development expectations.[113]

ii. Procedural influences

In addition to personal attributes, judges' decision-making may also be influenced by the amount of formal process they are required to engage in when making or documenting their rulings.

Some existing research considers what policies and practices are effective in guiding judges and the role of discretion, especially coming out of the changes to the federal sentencing guidelines over the last forty years. Literature suggests that "writing opinions could induce deliberation that otherwise would not occur" and "challenge the judge to assess a decision more carefully, logically, and deductively."[114] The literature also suggests using "scripts, checklists, and multifactor tests" to decrease judges' reliance on their own experiences and memories.[115]

Procedure on the back end to audit decisions for compliance with required processes may also be beneficial. One article suggests that "judges' discretionary determinations, such as bail setting, sentencing, or child-custody allocation, could be audited periodically to determine whether they exhibit patterns indicative of implicit bias."[116] This suggestion is grounded in the observation that judges have few existing forms of systemic accountability and feedback.[117] This is an area ripe for additional study, particularly in the context of process-driven reforms to bail and fines and fees.

iii. Trainings and judicial education

Finally, another recent body of research considers providing courtwide trainings as a way to impact judicial decision-making, particularly to counteract the effects of implicit bias. In general, the

113. Mary K. Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591, 609 (2009).

114. Guthrie, Rachlinski & Wistrich, *supra* note 88, at 36–37. *But see* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1286 (2008) (describing how, "[i]n most cases the process of writing will improve the underlying decision, or at worst will have no effect on it," but "[s]ome types of decisions are susceptible to what psychologists refer to as 'verbal overshadowing,'" where being required to justify a decision may negatively impact the decision made).

115. Guthrie, Rachlinski & Wistrich, *supra* note 88, at 35.

116. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1230 (2009).

117. *Id.* at 1230–31.

literature is mixed on the value of implicit bias trainings.[118] In the context of judicial decision-making, one article rejects both formalist and realist explanations and instead "posits that judges generally make intuitive decisions but sometimes override their intuition with deliberation."[119] But another study casts doubt on judges' willingness and ability to see their own biases,[120] and therefore calls into question whether such training will be useful. Some recent work suggests the importance of empathy in decision-making as a way to counter bias, because "[j]udges who are unable to assess problems from any vantage point other than their own may not be capable of administering justice equally and impartially."[121] This need is particularly exacting in the context of understanding poverty. Future research could attempt to draw out how trainings or educational programs focused on increasing empathy and understanding poverty may impact judicial decisions.

iv. Notable gaps in current research

The above provides an overview of current literature regarding how to influence judicial discretion. In addition to the institutional and sociocultural factors we identified in this Essay, there are likely many

118. *See, e.g.*, Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1083 (2019) (acknowledging that recognizing implicit bias may help judges overcome it, while also advocating for more research into the ways that increasing diversity on the bench could decrease implicit bias); Ramirez, *supra* note 113, at 596, 641 (arguing there is an increased need for judges to be educated on biases, "particularly the influence of race, gender, class, and culture" in the wake of *Booker*, so that judges have "tools for self-examination"); John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 8 (2010) ("Training about implicit biases in general, how they most likely influence judicial decision-making and how their impact can be minimized, could become an important first aspect of the ever-growing world of judicial education."). *But see, e.g.*, Barbara Applebaum, *Remediating Campus Climate: Implicit Bias Training is Not Enough*, 38 STUD. PHIL. & EDUC. 129, 130 (2019) (cautioning against relying on implicit bias training as a panacea and arguing that implicit bias trainings may serve to protect, rather than disrupt and correct, systemic ignorance); Jonathan Kahn, *The 911 Covenant: Policing Black Bodies in White Spaces and the Limits of Implicit Bias as a Tool of Racial Justice*, 15 STAN. J. C.R. & C.L. 1, 8–9 (2019) (explaining that implicit bias frameworks, including trainings, marginalize racism); Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 303–05 (2015) (describing research showing that reduced bias following implicit bias trainings is likely to be short-lived rather than long-lasting and noting the lack of evidence showing that "reducing implicit bias . . . decrease[s] the incidents of biased behavior").

119. Guthrie, Rachlinski & Wistrich, *supra* note 88, at 3.

120. Rachlinski et al., *supra* note 116, at 1225–26 (expressing concern that "judges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes on all occasions," based on a study in which 97 percent of 36 judges surveyed believed they were in the top 50 percent of judges that avoided racial prejudice in the courtroom).

121. Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 704 (2014).

other avenues here that are ripe for closer study. As a group of prominent legal academics noted, although there have been studies of individual factors influencing culture, "much of the existing empirical work on federal district courts has failed to take account of the institutional setting in which those judges operate."[122] More research is needed to account for the varied settings in which judges make their decisions because "incentives and constraints shaping judges' decision-making will vary depending on, for example, whether they have a life appointment or are elected; whether they hear cases alone or with colleagues; and whether and under what circumstances their decisions might be altered, overturned, or undone by the actions of others."[123]

Importantly, despite the breadth of research examining how individual judges' race, gender, or political ideology may influence case outcomes, there is a notable hole in the literature surrounding how judges' socioeconomic status, currently or historically, may influence decision-making. This is of particular importance for understanding how judges may or may not understand or empathize with people experiencing poverty and how their decisions may—intentionally or inadvertently—ignore the lived reality of many litigants.

Finally, there is little written about how to shift the thinking of a whole bench (as opposed to individual judges and panels of judges) when a new law is passed or new policy introduced, and how changes in institutional composition may shape judicial behavior.[124] This line of research is vital to understanding why in many places, despite jurisdiction-wide policies, fines and fees reforms or bail reforms have not taken root and resulted in more meaningful changes—and how to ensure future policy reform efforts are more successful.

III. CONCLUSION

With these issues in mind, as lawyers, advocates, and academics, we must find ways to ensure that the implementation of reforms lives up to their ideals. As drawn out above, this means targeting not just

122. Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J. L. & POL'Y 83, 84 (2009).

123. *Id.*

124. Ramirez, *supra* note 113, at 638–39 (suggesting that "[a] key to influencing judicial involvement and enthusiasm for cultural-competency education is to ensure that those influential district court judges—that is, the connectors, mavens, and salespersons—have the opportunity to experience cognitive training so that they may be convinced of its value and recommend such training to their peers"); *see also* David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEG. STUD. 371, 371 (1999) (creating a model to measure the prestige of federal appellate judges and concluding that higher prestige can translate into an ability to influence other judges).

stronger written guidelines, but also understanding and addressing the judicial culture in which those laws and policies are enacted.

To have fairer systems of pretrial justice and monetary sanctions, courts must undergo a transformation that cannot be accomplished by policy revisions alone. Judicial education will be a component. But we also suggest that there is a need to shift the societal context in which these decisions are made. The culture of a court, or a particular judge, will amount to more than what they learn in training or how closely their decisions are evaluated.

The precise ways in which court culture can be shifted will be driven by what future research and advocacy reveals to be the effective ways of moving courts in a less punitive direction. Based on what we know, broader community organizing and engagement will be important components to changing narratives and ensuring that the spirit and intent of policy reforms is being carried out—that the policies amount to more than words on a page. For example, in the context of monetary sanctions, judges had often assumed that nonpayment was driven by a lack of will to comply. It has taken collective efforts to shift that narrative and shed light on the poverty of those who are asked to pay. The shift in context has helped change how judges interpret the law. To keep judges accountable, these changes and future changes will require community organizing and movement building.

Future study and advocacy should therefore address these questions: (1) To what extent do the barriers identified here actually influence judicial culture? (2) What other understudied or underscrutinized structural and socioeconomic barriers influence culture? (3) What are the best avenues for advocates, policy-makers, and individuals to influence judicial culture and dismantle these barriers to reform?