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ARTICLES

Jails, Sheriffs, and Carceral Policymaking

*Aaron Littman**

The machinery of mass incarceration in America is huge, intricate, and destructive. To understand it and to tame it, scholars and activists look for its levers of power—where are they, who holds them, and what motivates them? This much we know: legislators criminalize, police arrest, prosecutors charge, judges sentence, prison officials confine, and probation and parole officials manage release.

As this Article reveals, jailers, too, have their hands on the controls. The sheriffs who run jails—along with the county commissioners who fund them—have tremendous but unrecognized power over the size and shape of our

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criminal legal system, particularly in rural areas and for people accused or convicted of low-level crimes.

Because they have the authority to build jails (or not) as well as the authority to release people (or not), they exercise significant control not merely over conditions but also over both the supply of and demand for jail bedspace: how large they should be, how many people they should confine, and who those people should be. By advocating, financing, and contracting for jail bedspace, sheriffs and commissioners determine who has a say and who has a stake in carceral expansion and contraction. Through their exercise of arrest and release powers, sheriffs affect how many and which people fill their cells. Constraints they create or relieve on carceral infrastructure exert or alleviate pressure on officials at the local, state, and federal levels.

Drawing on surveys of state statutes and of municipal securities filings, data from the Bureau of Justice Statistics, case law, and media coverage, this Article tells overlooked stories—of sheriffs who send their deputies out door knocking to convince voters to support a new tax to fund a new jail, and of commissioners who raise criminal court fees and sign contracts to detain "rental inmates" to ensure that incarceration "pays for itself." It also tells of sheriffs who override the arrest decisions of city police officers, release defendants who have not made bail, and cut sentences short—and of those who would rather build more beds than push back on carceral inertia.

A spotlight on jails and the officials who run them illuminates important attributes of our carceral crisis. The power and incentives to build jail bedspace are as consequential as the power and incentives to fill it. Expanding a county's jailing capacity has profound ramifications across local, state, and federal criminal legal systems. Sheriffs have a unique combination of controls over how big and how full their jails are, but this role consolidation does not produce the restraint that some have predicted. Their disclaimers of responsibility are a smokescreen, obscuring sheriffs' bureaucratic commitment to perpetuating mass incarceration. State courts and federal agencies have increasingly recognized and regulated public profiteering through jail contracting, and advocates have begun to hold jailers accountable, challenging expansion in polling booths and budget meetings.

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INTRODUCTION

Just before Thanksgiving 2019, Lindie Keaton, a resident of Greene County, Ohio, to the east of Dayton, attended a public hearing on a proposed sales tax increase to fund a jail expansion, which she opposed.[1] Almost everyone who spoke shared her concerns: "wanting less, not more, community members jailed" and no one incarcerated due

1. Lindie Keaton, *Writer Wants Reforms, Not New Jail*, XENIA DAILY GAZETTE (Nov. 21, 2019), https://www.xeniagazette.com/opinion/letters/44707/writer-wants-reforms-not-new-jail [https://perma.cc/8KRP-855A]. Her experience was far from unique. *See, e.g.*, Pauline Black, *Insist on a Better Plan for the Jail*, ASHLAND TIDINGS (Nov. 29, 2019), https://ashlandtidings.com/opinion/guest-opinion/insist-on-a-better-plan-for-the-jail [https://perma.cc/VSA6-CWNQ] (similar demands by residents; officials "admitted that the county could have structured a tax increase for both the jail and alternative services but chose not to"); *cf.* Katie Kull, *Council Approves Municipal Inmates Housing Agreement with Jail Completion Years Away*, SPRINGFIELD NEWS-LEADER (Oct. 12, 2019), https://www.news-leader.com/story/news/local/ozarks/2019/10/13/springfield-council-approves-housing-inmates-vernon-county/3934742002 [https://perma.cc/H393-3ST2] (local resident, previously incarcerated, urged officials to "rein in officer discretion to arrest people for" misdemeanors, instead of paying surrounding counties to jail them).

to inability to pay bail.[2] The responses she heard from the commissioner and sheriff moved her to write a letter to the editor of her local newspaper. One commissioner said that "this was not the time" to talk about reforms, opining that "we need to build a new, bigger jail, and then we can talk about how to reduce[ ] the jailed population."[3] The sheriff said he would "pray that the beds wouldn't fill."[4]

Things are more complicated than these officials would have Ms. Keaton believe: building more bedspace will impede population reduction, and sheriffs need not wait for divine intercession to decarcerate. With some notable exceptions, existing scholarship suggests that criminal legal policy is made primarily at the state level in the legislature and at the county level in the courtroom or on the street.[5] But as this Article demonstrates, the sheriffs who run jails, as well as the county commissioners who fund them, have considerable control over both the supply and demand sides of jailing. Concretely, these often-neglected officials exercise power over both the number of jail beds and the number of jail detainees. It is this extraordinary confluence that gives them control over not just the conditions within our carceral system but also its size and shape.[6] A thick account of jail

2. Keaton, *supra* note 1.

3. *Id.*

4. *Id.*

5. Some prison scholars have demonstrated the ways that correctional administrators, operating in obscurity, shape the conditions in and sometimes the sizes of the facilities they run, becoming "penal policy initiators, rather than implementers." Keramet Reiter, *Reclaiming the Power to Punish: Legislating and Administering the California Supermax, 1982-1989*, 50 LAW & SOC'Y REV. 484, 501 (2016); *see also* KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 5, 87–120 (2016) (arguing that it was "administrative elites" who "invented the supermax" and revealing how in vivid detail); Keramet Reiter & Kelsie Chesnut, *Correctional Autonomy and Authority in the Rise of Mass Incarceration*, 14 ANN. REV. L. & SOC. SCI. 49 (2018) (reviewing literature on prison administrators' influence on policy).

6. Although sheriffs and commissioners are critical players in local criminal legal systems, they have been largely overlooked, and even at times misunderstood or dismissed, by legal scholars. *See, e.g.*, Marie Gottschalk, *The Past, Present, and Future of Mass Incarceration in the United States*, 10 CRIMINOLOGY & PUB. POL'Y 483, 486 (2011) (calling on scholars to "consider intently the implementation of penal policies at the local level by all the key actors in the criminal justice system—from police to prosecutors to judges to parole and probation officers," but notably omitting sheriffs and commissioners); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 547 n.88 (2020) (suggesting that sheriffs and county governments have little impact, without considering their roles as jail administrators and builders). Criminal legal system scholars often flatten the distinctiveness of sheriffs, eliding them into the "same basic process" of "urban municipal policing." David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinctive Policing Modality*, 14 AM. J. POLICE 123, 123 (1995). This is perhaps because we know relatively little about them. *See id.* at 124 ("[S]urprisingly little empirical research or published documentation exists to describe the specific form of the modern sheriff's office."); Lee P. Brown, *The Role of Sheriff*, *in* THE FUTURE OF POLICING 227, 227–28 (Alvin W. Cohn ed., 1978) (noting the "dearth of information on the role of the sheriff"). Immigration scholars, to their credit, have offered fuller accounts of the part sheriffs play in that arena. *See,*

administration and administrators—mapping both their parallels in other carceral contexts and their distinctive features—will help advocates like Ms. Keaton know what and whom to target.

On the supply side, this Article shows that sheriffs and commissioners make jail construction happen, often for reasons that have little to do with local public safety.[7] They are responsible for proposing, justifying the need for, obtaining support (whether from the electorate or other sources) to fund, and determining the size of an expansion. In doing so, they treat carceral expansion as an imperative rather than an option, ignoring the possibility that shifts in policy (including their own) could obviate the need for more bedspace. They circumvent public refusal to pay for jail building through mechanisms of municipal finance, including some that impose costs directly on criminal defendants by pledging revenues from court fines and fees to satisfy construction debt. And they participate in a bedspace market that generates revenue from jailing persons from other jurisdictions and fuels jail growth. This Article draws on a set of thousands of

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e.g., Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1377–78, 1391–92 (2019).

The very small contemporary law literature on sheriffs focuses primarily on their electoral selection and otherwise distinctive treatment under state law, and their attendant lack of accountability, but does not address in sustained fashion their role as jailer. *See* Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 44–53), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733121 [https://perma.cc/2PWD-KVEV] (engaging deeply with the local government law of sheriffs' offices and recognizing, albeit in passing, that "the funding structure of sheriffs' offices continues to be far more entrepreneurial than that of police departments," including through "the 'leasing' of excess [jail] capacity"); James Tomberlin, Note, *"Don't Elect Me": Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113 (2018) (arguing that the sheriff's "hybrid state-and-local status insulates him from regulation," and urging reform through "coalescence" of city and county policing agencies); Janet C. Hoeffel & Stephen I. Singer, *Elections, Power, and Local Control: Reining in Chief Prosecutors and Sheriffs*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 319, 323–24 (2015) (explaining that because sheriffs typically run unopposed, the electoral process offers little accountability).

Notably, the word "sheriff" appeared a single time in a recent symposium featuring over a dozen essays by leading scholars arguing for the democratization of the criminal legal system. *See* Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1532 (2017) (stating in passing that sheriffs served on a presidential task force alongside the author). Similarly, David Sklansky's important article, *Police and Democracy*, does not address them. David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005). When Bill Stuntz, the intellectual father of the democratization school, mentioned sheriffs in his opus, *The Collapse of American Criminal Justice*, it was primarily to lump "police forces or sheriff's offices" together or to describe particular historical Southern holders of the office. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 65, 91, 104–06, 109, 139, 145, 151, 189, 204, 233 (2011). *But see id.* at 68 (observing without elaboration that "[p]erhaps electing county sheriffs has something to recommend it").

7. *See infra* Part II.

municipal finance documents to demonstrate the perverse incentives for and impacts of perpetual jail expansion.[8]

On the demand side, this Article reveals that sheriffs—in their unified roles as law enforcement chiefs, jail administrators, and county politicians—have the ability and authority to reduce the number of people confined in their jails.[9] As the supervisors of patrol deputies, they can deprioritize high-volume, low-level crimes and order the use of citations in lieu of arrest in many cases. As the custodians of jails, they can exercise a panoply of powers: citing people at booking, releasing them from pretrial detention, placing them on home confinement, and shortening their sentences. As the colleagues of police chiefs, district attorneys, and judges, they can push for changes to policy and practice to reduce the number of people entering their jails and the durations of their stays. This Article provides the first comprehensive survey of the varied powers sheriffs possess under state law to control the demand for jail bedspace.

Just as the story of American criminal adjudication lacked rigorous accounts of misdemeanor justice until Alexandra Natapoff and Issa Kohler-Hausmann offered them, the story of American mass incarceration is incomplete without a deep understanding of how jails are built and run and the critical role of sheriffs in shaping their sizes and contours.[10] This Article begins to address that gap.

It highlights the often-overlooked jail and the sorely understudied sheriff as site and agent of carceral policymaking. It marshals quantitative data to show trends in county jail capacity, population levels, and contracting with other jurisdictions. In the vein of Ruth Wilson Gilmore's pathbreaking work on prison finance, it investigates the fiscal incentives that motivate jail construction and

8. Using the Municipal Securities Rulemaking Board's Electronic Municipal Market Access ("EMMA") system, which compiles official statements for municipal securities issued since 1990, the author searched for, individually downloaded, and reviewed official statements for all 1,323 issues with descriptions containing the following words or abbreviations thereof: corrections (134), detention (183), jail (356), justice (223), law enforcement (123), public safety (299), and sheriff (5). This search process was both over- and under-inclusive; some of these securities funded projects other than jail construction, and some securities used to fund jail construction are not clearly described as such. Official statements are accessible online at https://emma.msrb.org.

9. *See infra* Part III.

10. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2013) [hereinafter Natapoff, *Misdemeanors*]; Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) [hereinafter Kohler-Hausmann, *Managerial Justice*]; ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

outlines how everything from child support enforcement to deportation is facilitated by the availability of jail capacity.[11]

This Article also offers a conceptual taxonomy for cataloging the forms of sheriffs' control over supply of and demand for jail bedspace, emphasizing the interplay between them and showing that expansion saps sheriffs' authority to limit the number of people they incarcerate. It assesses sheriffs' place within two influential literatures, both concerned with the ways that institutional structure shapes public officials' behavior. Many have suggested that fragmentation of responsibility between actors in the criminal legal system distorts incentives and is partially to blame for carceral overgrowth, but in the case of sheriffs, role consolidation does not lead to restraint.[12] Instead, this Article argues, sheriffs' carceral policymaking reflects their interests as the leaders of jail bureaucracies.[13]

Finally, this Article considers how we might best advance the urgent project of curbing jail expansion. It traces a thread through a series of esoteric state court decisions and Department of Justice and Internal Revenue Service ("IRS") audits, showing that these disparate bodies have recently come to recognize and regulate the fiscal incentives that underlie the jail bedspace market.[14] And it draws insights from an emerging political science literature on sheriff elections and nascent but powerful movements to defeat them—and defund their offices, suggesting strategies for decarceral advocacy going forward.[15]

I. JAILS AND JAILERS

A. Jails by the Numbers

Jail is an unmistakable feature of the American cultural landscape. Monopoly tells its players to go "directly" to it,[16] and Elvis Presley "rock[ed]" it.[17] Yet jails are frequently and erroneously elided (even conflated) with prisons. Though jails are often neglected in the

11. *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

12. *See infra* Section IV.A.

13. *See infra* Section IV.B.

14. *See infra* Section V.A.

15. *See infra* Section V.B.

16. *See* Mary Pilon, *The Secret History of Monopoly: The Capitalist Board Game's Leftwing Origins*, GUARDIAN (Apr. 11, 2015), https://www.theguardian.com/lifeandstyle/2015/apr/11/secret-history-monopoly-capitalist-game-leftwing-origins [https://perma.cc/5QCU-7NEJ].

17. ELVIS PRESLEY, JAILHOUSE ROCK (RCA Victor 1957).

legal academy in favor of easier-to-study prison systems,[18] policy researchers and advocates across the political spectrum, from the Vera Institute of Justice[19] to the American Conservative Union Foundation, have identified jails as "the next frontier of criminal justice reform."[20] This Section analyzes data from the Bureau of Justice Statistics and the Vera Institute to describe jails in the United States and the people they incarcerate.[21]

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18. There has long been a "broad tendency" to "ignore jails." Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579 n.76 (2003). In 2014, the National Research Council published a nearly five-hundred-page volume by a committee of leading scholars of incarceration, entitled *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014). But the committee's "charge and main focus" was those sentenced to prison, to the extent that the term "incarceration" was used "to refer only to those in prison." *Id.* at 36 n.2. *But see* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965 (2012) (studying detainee culture inside a unit in the country's largest jail system). Jails have been discussed in the literature on pretrial detention as the site thereof, albeit with little focus on them as institutions or on jailers as actors. *See, e.g.*, CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUITIES IN THE CRIMINAL JUSTICE SYSTEM 132–39 (2019).

19. The Vera Institute has done superb empirical work on the expansion of jails in rural America. *See* RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [https://perma.cc/56E6-FCG3]; CHRISTIAN HENRICHSON, JOSHUA RINALDI & RUTH DELANEY, VERA INST. OF JUST., THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION (2015), https://www.vera.org/downloads/publications/price-of-jails.pdf [https://perma.cc/JB33-R9FX]; JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA (2017), https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf [https://perma.cc/E43X-5M2U]; JACOB KANG-BROWN, OLIVER HINDS, JASMINE HEISS & OLIVE LU, VERA INST. OF JUST., THE NEW DYNAMICS OF MASS INCARCERATION (2018), https://www.vera.org/downloads/publications/the-new-dynamics-of-mass-incarceration-report.pdf [https://perma.cc/RKT2-HYQB]; CHRIS MAI, MIKELINA BELAINEH, RAM SUBRAMANIAN & JACOB KANG-BROWN, VERA INST. OF JUST., BROKEN GROUND: WHY AMERICA KEEPS BUILDING MORE JAILS AND WHAT IT CAN DO INSTEAD (2019), https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf [https://perma.cc/EUL5-D42B]. Vera has also published a series of stories about the impacts of jails on communities in its *In Our Backyards* series, available at *In Our Backyards Stories*, VERA INST. OF JUST., https://www.vera.org/in-our-backyards-stories (last visited Feb. 4, 2021) [https://perma.cc/98XD-Y6X9].

20. David Guenthner & David Safavian, *The Next Frontier of Criminal Justice Reform: County Jails*, HILL (Dec. 13, 2019), https://thehill.com/opinion/criminal-justice/474213-the-next-frontier-of-criminal-justice-reform-county-jails [https://perma.cc/6UQY-U6TV].

21. Unless otherwise cited, statistics in this Section are drawn from the author's analysis of the Vera Institute's Incarceration Trends data set, which compiles and cleans all released data from the Bureau of Justice Statistics' Censuses and Surveys of Jails. This dataset is available at *Incarceration Trends Dataset*, VERA INST. OF JUST., https://github.com/vera-institute/incarceration-trends (last visited Jan. 19, 2021) [https://perma.cc/K4Z5-XMQ6]. Jails were sorted into jurisdiction types—county, city, regional, and private—using facility names where conclusive (i.e., based on the presence of the following words: county, parish, sheriff, city, metro, municipal, police, and regional) and the data set's flag for private facilities. Eighty facilities did not contain one of those words in the name or have a private flag; of those, all but twelve were manually coded

Jails are a major element of our system of mass incarceration. At any given time, jails house about 750,000 people, roughly a third of this country's 2.3 million detained people. But even this figure dramatically understates their impact. Prisons hold detainees for longer, but jails "churn" through more people: at least 5 million individuals—over 1 in 100 Americans—are jailed every year.[22] Jails are often addressed in passing, as an adjunct to prisons, but to most people who have been behind bars, jails are the site of mass incarceration; to nearly all, they are its front gate.

Jails also serve radically more diverse functions than do prisons. They are not only incarceration's front door but also its all-purpose and overflow rooms, housing detainees at many stages of different criminal and civil legal processes, on behalf of a dizzying array of law enforcement agencies. At the front end, jails hold virtually all those who have not yet been convicted. Whether arrested by the local sheriff's office, local police departments, state police, or other law enforcement agencies, pretrial detainees wind up in county jails.[23] Convicted detainees serving short misdemeanor sentences are usually held in jails rather than prisons. In some states, prisoners even serve long felony sentences in jails. They also hold people who have been accused of violating or found to have violated probation, parole, and child support obligations, as well as people who are pending possible civil commitment due to mental incapacity. Many jails also confine detainees pursuant to contracts with other counties and federal agencies, including the U.S. Marshals Service and Immigration and Customs Enforcement ("ICE").[24]

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with confidence. Only two of the remaining dozen held significant numbers of detainees in 2013: the D.C. Department of Corrections, which holds the District's pretrial population, and the Baltimore Pretrial Complex, which serves the city but is actually run by the Maryland Department of Public Safety & Correctional Services. R code is available upon request.

22. *See* Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems*, PRISON POL'Y INITIATIVE (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html [https://perma.cc/7KH4-PLTE]. Among young men of color, the rate is much higher. SUBRAMANIAN ET AL., *supra* note 19, at 11 (Black people represent 13% of the population but 36% of jail detainees). As John Pfaff argues, decarceral reformers "should [aim] to reduce the number of *prisoners*, not the *prison population*," because "many of the collateral costs of admission max out pretty quickly." JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 69 (2017). But using carceral bedspace for more, shorter stints is also likely to maximize any deterrent effects—that is, the benefits of incarceration, such as they are, also max out quickly. *See* MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 75–78 (2009).

23. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 716, 716 nn.18–19 (2017) (indicating that prior to the passage of bail reform, more than half of the misdemeanor defendants in Harris County (Houston), Texas, were incarcerated, about half were in Baltimore, and about a quarter were in New York City).

24. SUBRAMANIAN ET AL., *supra* note 19, at 7.

For example: a county jail in rural Utah might hold a person arrested by a state trooper for driving while he was intoxicated, a homeless person arrested by local police for shoplifting but unable to make bail, a person convicted of murder and transferred from a state prison hundreds of miles away, and a noncitizen who was living in Virginia until she was arrested for unlawful possession of opiates and detained during the pendency of her removal proceedings.

Jails are organized into fundamentally different and more numerous institutional arrangements than are prisons.[25] There are fifty state prison systems, plus the federal Bureau of Prisons. Each is a centrally planned and governed network. By contrast, there are around 2,750 operating jail systems, though "system" is usually a misnomer; most jurisdictions have a single facility.[26] Jails are operated by most (82%) of the 3,144 counties[27] and a small fraction (1%) of the 19,495 incorporated cities and towns in the country.[28] For a clearer sense of scale, there are about twice as many jail *systems* in the country (again, some with multiple facilities) as there are individual prison *facilities*. These jail systems vary dramatically in size. A few are enormous. The largest is Los Angeles County's. As of the end of 2019, it held over 17,000 people—more than the prison systems of over twenty states—in seven main jail facilities.[29] Another nine jurisdictions held more than

25. *Cf.* PFAFF, *supra* note 22, at 15 ("[A] national story is too blunt of an instrument to convey the complexity of the criminal justice system . . . . Ideally, we would need to tell 3,144 stories, one for each county in the United States.").

26. *See* Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, U.S. DEP'T OF JUST. 1 (June 2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf [https://perma.cc/3YCL-TUT6] (describing data from a sample of jail jurisdictions).

27. Traditional county jails do not exist in Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont, which have combined jail-prison systems. Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems*, U.S. DEP'T OF JUST. 2 (1997), https://nicic.gov/sites/default/files/014024.pdf [https://perma.cc/WZA6-7TP4]. Some states require each county to have one; some allow for regional or contractual arrangements in lieu of (rather than in addition to) local jails. *Compare* N.Y. COUNTY LAW § 217 (McKinney 2021) ("Each county shall continue to maintain a county jail as prescribed by law."), *with* NEV. REV. STAT. §§ 211.010(2), 277.080–277.180 (2021) (permitting commissioners, "with the concurrence of the sheriff," to enter into an agreement with another county or city to house detainees in lieu of providing a jail).

28. The vast majority of jail detainees—over 88%—are housed in county jails, in the custody of sheriffs. About 5% are in city jails, some of which are short-term police lockups but a few of which are large. There are also a relatively small number of regional, tribal, and private jails. Almost 90% of those held in private jail facilities are federal detainees held for ICE or the Marshals Service. Gerald G. Gaes, *Current Status of Prison Privatization Research on American Prisons and Jails*, 18 CRIMINOLOGY & PUB. POL'Y 269, 271–72 (2019).

29. L.A. CNTY. SHERIFF'S DEP'T, CUSTODY DIVISION POPULATION QUARTERLY REPORT OCTOBER - DECEMBER 2019, at 3 (2019), https://lasd.org/transparency%20data/custody%20reports/Custody%20Division%20Population%202019%20Fourth%20Quarter%20Report.pdf [https://perma.cc/2T6N-XN5F]; JACOB KANG-BROWN, CHASE MONTAGNET, EITAL SCHATTNER-ELMALEH & OLIVER HINDS, VERA INST. OF JUST., PEOPLE IN PRISON 2019, at 2 tbl.2 (2020),

5,000 people.[30] Outside of metropolitan areas, though, small systems with one or perhaps two jail facilities predominate: about 1,300 have detainee populations of between ten and ninety-nine people.[31]

The patterns and drivers of jail growth are also distinctive. As any observer of mass incarceration will be unsurprised to learn, America's jail population has more than tripled since the 1970s. But the growth has been uneven, and this unevenness is significant. City jail populations have remained low; nearly all of the growth has occurred in county jails.[32] And although the national jail population, like the total state-prison population, has leveled off from its meteoric rise in recent years, jail populations continue to grow to this day in rural areas.[33]

Data also reveal a shifting relationship between jail population levels (people) and jail capacity (beds), as illustrated by the Figure below. In the late seventies and early eighties, the national jail population grew at a faster rate than capacity, until, in 1988, national

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https://www.vera.org/downloads/publications/people-in-prison-in-2019.pdf [https://perma.cc/7FHJ-MS9L].

30. Two of these jails—in New York and Philadelphia—are city-run. The rest are operated by sheriffs in metropolitan areas: three in California (Orange, San Bernardino, and San Diego Counties), two in Texas (Harris and Dallas Counties), one in Illinois (Cook County), and one in Arizona (Maricopa County).

31. On small jails, see Rick Ruddell & G. Larry Mays, *Expand or Expire: Jails in Rural America*, 31 CORR. COMPENDIUM 1 (2006).

32. Between 1999 and 2013, county jail populations increased by about 125,000 people. During this same period, city jail populations actually shrank very slightly. Regional jails, which are generally controlled or at least utilized by multiple counties, more than doubled in size between 1999 and 2013, but still incarcerated a small fraction (less than 4%) of jail detainees. Their growth occurred primarily in a handful of states: Kentucky, Mississippi, Virginia, and West Virginia.

33. KANG-BROWN & SUBRAMANIAN, *supra* note 19, at 6; *see also* KANG-BROWN ET AL., *supra* note 19, at 14 (discussing a similar trend in prison admission rates). Rural criminal legal systems are distinctive and under-studied. Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 852 (2020) (positing that the "urban bias of academics . . . [who] tend to come from cities and suburbs" leads to minimal study of rural local governments). As discussed in Section III.A, sheriffs are responsible for a much larger portion of the policing in these communities. Rural jails are smaller, without the same economies of scale. Rural Americans have a harder time getting the mental healthcare that helps them stay out of jail and a harder time getting treatment once they have been incarcerated. C. Holly A. Andrilla, David G. Patterson, Lisa A. Garberson, Cynthia Coulthard & Eric H. Larson, *Geographic Variation in the Supply of Selected Behavioral Health Providers*, 54 AM. J. PREVENTATIVE MED. S199, S201 tbl.1 (2018) (noting one-fifth as many psychiatrists per capita in nonurban versus metropolitan counties; 80% of rural counties had zero psychiatrists). Access to counsel is also particularly meager in rural regions. *See* Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 19 (2018). Detainees with low-level charges are particularly likely to languish without adequate representation, unable to obtain release and waiting months to have their charges adjudicated. *See* Pamela Metzger, *Rural Justice Systems Low on Pretrial Resources Leave Some to Languish, Die*, USA TODAY (Dec. 13, 2019), https://www.usatoday.com/story/opinion/policing/spotlight/2019/12/13/rural-justice-systems-low-pretrial-resources-leave-some-languish/4415770002/ [https://perma.cc/LS3K-QRGF].

jail population and capacity were about equal.[34] Since then, capacity has grown at a faster rate than population.[35] This jail-building spree was particularly dramatic during the first decade and a half of the new millenium, during which time about a quarter of county jail jurisdictions significantly expanded their jail bedspace.[36]

The composition of the jail population has also changed in important ways, as likewise illustrated by the figure below. Pretrial detainees make up an increasing share of county jail populations, now around 60%. Growth in pretrial detention accounted for *all* of the growth in county jail populations between 1999 and 2013.[37] Detainees held for other jurisdictions also represented an increasing share of their incarcerated populations—20% in 2013, compared to 13% in 1978.[38] More jails have entered the bedspace market; participation increased significantly between 1978 and 2013, from about half to three-quarters of county jails.[39]

34. This was true in the aggregate; of course, some jails were overcrowded and others had empty space.

35. The Bureau of Justice Statistics conducts the nationwide Census of Jails, on which this analysis is based, only once every five to seven years, and the data from the 2013 Census are the most recent available in full. *National Jail Census Series*, NAT'L ARCHIVE OF CRIM. JUST. DATA, https://www.icpsr.umich.edu/web/NACJD/series/68 (last visited Apr. 4, 2021) [https://perma.cc/7ENN-SPJT]. Summary results from the 2019 collection were released shortly before this Article was published and reflect that this trend has continued; while the nationwide jail population remained virtually level between 2013 and 2019, jail capacity continued to expand. Zhen Zeng & Todd D. Minton, *Jail Inmates in 2019*, U.S. DEP'T OF JUST. 7 tbl.6 (Mar. 2021), https://www.bjs.gov/content/pub/pdf/ji19.pdf [https://perma.cc/SYR8-EH2V].

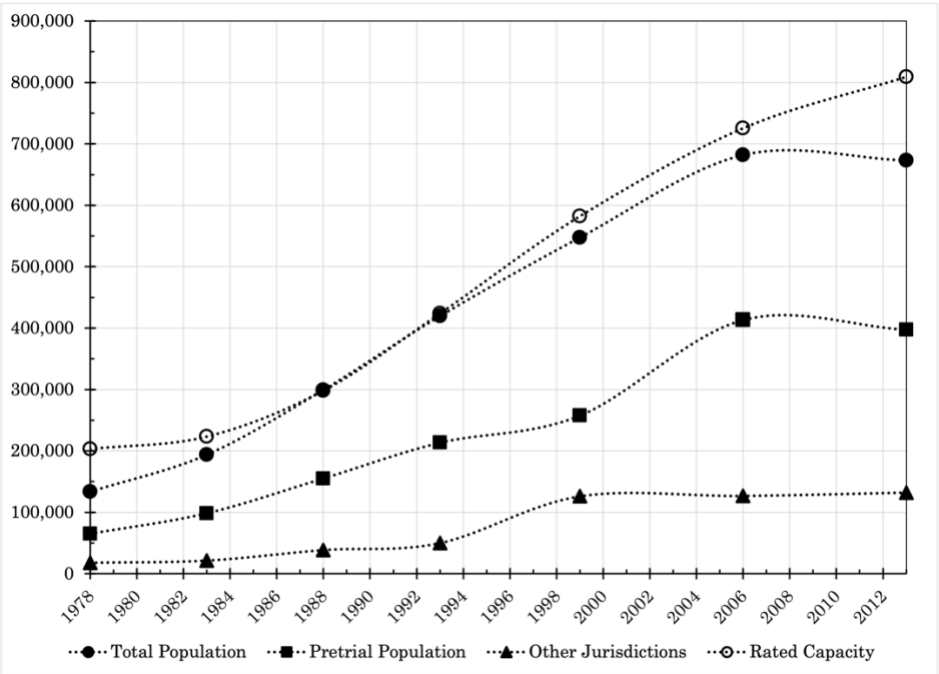
36. "Significantly" meaning by at least one hundred beds. Fewer than a dozen city jail systems expanded by at least one hundred beds during this period (from 1999 to 2013); about half of the regional jails (all of which are substantial in size) expanded by that amount.

37. Minton & Zeng, *supra* note 26, at 1–3 (similar analysis for all jails). Jail stays across all facilities also got longer. *See* SUBRAMANIAN ET AL., *supra* note 19, at 10 (average of twenty-three days in 2013, up from average of fourteen days in 1983).

38. KANG-BROWN & SUBRAMANIAN, *supra* note 19, at 14 fig.5 (similar analysis for all jails). Other jurisdictions include cities, other counties, states, and the federal government, which houses both criminal and immigration detainees in county jails. The categories of pretrial detention and detention for another jurisdiction are not mutually exclusive. *Id.*

39. *Id.* (similar analysis for all jails); *see infra* Section II.C (discussing interjurisdictional bedspace sharing). On the interplay between jail and prison populations, see KANG-BROWN ET AL., *supra* note 19, at 25–30 (discussing states where "merely shifting populations between prison and jail custody" operates as "a kind of incarceration shell game").

FIGURE 1: COUNTY JAIL POPULATION AND CAPACITY, 1978–2013



Jails also appear to be easier than prisons to empty. Although prison population levels barely budged during the first months of the COVID-19 pandemic, jail populations across the country—in big, urban facilities and small, rural ones alike—dropped dramatically, by an average of around a third and as much as two-thirds.[40] As the pandemic has worn on, however, arrest rates have rebounded, transfers from jails to prisons have slowed or stopped, and jail populations have risen.[41]

40. Emily Widra & Peter Wagner, *While Jails Drastically Cut Populations, State Prisons Have Released Almost No One*, PRISON POL'Y INITIATIVE (May 14, 2020), https://www.prisonpolicy.org/blog/2020/05/14/jails-vs-prison-update [https://perma.cc/PG25-A6QG] (noting also that some state prison population cuts are "even less significant than they initially appear" because such cuts were achieved "partially by refusing to admit people from county jails"); *see also* ACLU OF COLO., COVID-19 JAIL DEPOPULATION IN COLORADO 1–2, 12–14 (2020), https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/aclu_decarcerationreport_100720_final.pdf [https://perma.cc/KUQ8-CD64] (describing steps taken by Colorado sheriffs to reduce jail populations during the COVID-19 pandemic).

41. *See* Emily Widra, *How Much Have COVID-19 Releases Changed Prison and Jail Populations?*, PRISON POL'Y INITIATIVE (Feb. 3, 2021), https://www.prisonpolicy.org/blog/2021/02/03/january-population-update/ [https://perma.cc/Y9ZU-CZ2X].

B. The Harms of Jailing

Although jails tend to hold people for shorter stints, especially in the case of pretrial detention, harm accrues rapidly.[42] Being jailed, even for a few days, is hugely disruptive to the economic and emotional well-being of criminal defendants and their family members; they may lose employment, housing, and custody of children.[43] The best evidence available suggests that pretrial detention does not reduce future crime and may even be criminogenic.[44]

Jails pose particularly acute threats to the health and safety of detainees. Most strikingly, the risk of suicide is much higher in jail than in prison, in part because of detainees' immediate proximity to the mental health crises and trauma that both precipitated and resulted from many of their arrests.[45] Rates of serious mental illness are four to six times higher among jail detainees than the general population; while 9% of Americans have diagnosable substance use disorders, 68%

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42. *See* SCOTT-HAYWARD & FRADELLA, *supra* note 18, at 135–47 (discussing adverse effects of pretrial detention); David C. May, Brandon K. Applegate, Rick Ruddell & Peter B. Wood, *Going to Jail Sucks (and It Really Doesn't Matter Who You Ask)*, 39 AM. J. CRIM. JUST. 250, 255, 260 (2014) (explaining that "jail is viewed as significantly more punitive than prison" by the general public, judges, probation/parole officers, and incarcerated people). A new empirical study suggests that members of the public view incarceration as an "incredibly harmful experience" and that most would choose to be the victim of a crime over even a short stint in jail, with the median respondent saying that a "single day in jail is as costly as a burglary." Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* 5–6 (forthcoming 2021) (Univ. of Va. Pub. L. & Legal Theory Paper Series, No. 2021-14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787018 [https://perma.cc/B735-LS3M].

43. *See* Heaton et al., *supra* note 23, at 713, 713–14 n.4; 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, 227–30, 235–36 (2018) (estimating the impact of initial pretrial release on earnings and employment); *see also* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 4–7 (2017) (discussing the costs of pretrial detention to both detainees and society).

44. *See* Heaton et al., *supra* note 23, at 759–68 (estimating the magnitude and discussing the possible mechanisms of pretrial misdemeanor detention's effects on future crime); Dobbie et al., *supra* note 43, at 226–27, 234–35 (observing a short-run incapacitation effect but medium-run criminogenic effect of pretrial detention); *see also* CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 19–25 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/P4KX-BH2U] (finding that defendants who were detained pretrial were 1.3 times more likely to recidivate than those released at some point pretrial).

45. *See* David E. Patton & Fredrick E. Vars, *Jail Suicide by Design*, 68 UCLA L. REV. DISCOURSE 78, 82 (2020); *see also* Conrad Wilson, *Jail Suicide Epidemic Doesn't Extend to Northwest Prisons*, OR. PUB. BROAD. (Nov. 4, 2019), https://www.opb.org/news/article/suicide-jail-statistics-oregon-washington/ [https://perma.cc/KU8F-BQ8T] (discussing the discrepancy between Pacific Northwest jails, where suicides accounted for 47% of detainee deaths, and the region's prisons, where suicides represented 6% of detainee deaths); *Texas Law Fails to Slow Jail Suicides*, PROGRESSIVE FARMER (Dec. 22, 2019), https://www.dtnpf.com/agriculture/web/ag/news/world-policy/article/2019/12/22/texas-law-fails-slow-jail-suicides [https://perma.cc/LY4X-J32L].

of jail detainees do.[46] These rates are higher even than in state prison populations.[47] Mental health care, though deficient in correctional facilities of all types, is often especially bad in small jails.[48] People in jail suffer in horrifying conditions and frequently die due to abuse and neglect.[49] Although detailed and comprehensive data on jail deaths are frustratingly hard to find, a recent investigation by Reuters documented over 7,500 detainee deaths in approximately 500 large jails over the course of the past decade; the study found that the death rate had climbed 35% in this time and that at least two-thirds of those who died were detained pretrial.[50]

C. Jail Governance and Administration

The governance and administration of jails also differs profoundly from that of prisons, along a number of metrics.

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46. *See* SUBRAMANIAN ET AL., *supra* note 19, at 12.

47. *Id.*

48. *See* Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis [https://perma.cc/Y2N5-VRZY]; Max Blau, *For Sheriffs, Healthcare for Inmates Can Be a Burden. For One Doctor, It Has Been the Opportunity of a Lifetime.*, ATLANTA MAG. (Dec. 12, 2019), https://www.atlantamagazine.com/great-reads/for-sheriffs-healthcare-for-inmates-can-be-a-burden-for-one-doctor-it-has-been-the-opportunity-of-a-lifetime [https://perma.cc/QB2Y-72WR]; Max Blau, *'They Only Cut Off Half My Left Foot.' What Happens When Inmate Care Goes Wrong in Georgia?*, MACON TEL. (Dec. 16, 2019), https://www.macon.com/news/state/georgia/article238307543.html [https://perma.cc/K9DT-8V46].

49. *See, e.g.*, Maurice Chammah, *They Went to Jail. Then They Say They Were Strapped to a Chair for Days.*, MARSHALL PROJECT (Feb. 7, 2020), https://www.themarshallproject.org/2020/02/07/they-went-to-jail-then-they-say-they-were-strapped-to-a-chair-for-days [https://perma.cc/29R2-JF6A] (reporting that detainees who became agitated or attempted self-harm were placed in restraint chairs, which were associated with twenty deaths in the past six years, and that one man was addressed with the n-word, force-fed, and left to urinate and defecate on himself for five days); Elisha Fieldstadt, *Mother with Mental Health Symptoms Died in Jail from 'Torturous' Neglect, Lawsuit Claims*, NBC NEWS (Feb. 12, 2020), https://www.nbcnews.com/news/us-news/mother-mental-health-symptoms-died-jail-torturous-neglect-lawsuit-claims-n1135981 [https://perma.cc/YX2U-DUJV] (indicating that a bipolar detainee who was "observed vomiting, stumbling in circles, grabbing her genitalia, spinning in circles," and throwing food into the toilet was denied psychiatric care and meals, leading to ketoacidosis, insatiable thirst, and death).

50. Peter Eisler, Linda So, Jason Szep, Grant Smith & Ned Parker, *Dying Inside: The Hidden Crisis in America's Jails*, REUTERS (Oct. 16, 2020), https://www.reuters.com/investigates/special-report/usa-jails-deaths/ [https://perma.cc/9KZB-Z3YN] (first in a series of stories with linked data set); *see also* Katie Rose Quandt, *America's Rural-Jail-Death Problem*, ATLANTIC (Mar. 29, 2021), https://www.theatlantic.com/politics/archive/2021/03/americas-rural-jail-death-problem/618292/ [https://perma.cc/ZD5A-38AN] ("A disproportionate number of [jail] deaths happen in America's smallest jails."); Matt Sledge, *Louisiana Doesn't Count People Who Die Behind Bars, So Loyola Law School Will Fill the Void*, NOLA.COM (Mar. 28, 2021), https://www.nola.com/news/courts/article_ae4490d4-8e4a-11eb-8968-e762f7d9234f.html [https://perma.cc/V5ZE-3R4P] (describing data-gathering project).

Dispersion. As previously discussed, a few dozen state and federal prison systems have centralized administrations.[51] Thousands of jail systems, by contrast, are little fiefdoms, run separately and independently.

Leadership. Prison administrations are headed by commissioners of corrections appointed by governors, while jails are run by elected sheriffs.[52] Commissioners of corrections have a singular ambit: corrections. Sheriffs, though, are also generally their counties' chief law enforcement officers, responsible for policing as well as jails.[53] Officials who run prisons and jails thus differ along two important axes: to whom they are accountable, and the scopes of their responsibility and authority.

Funding. Prison officials seek appropriations from state legislatures and their executive-branch superiors, who have total control over correctional budgets. But the relationship between sheriffs who operate jails and the county commissioners[54] who fund them is instead one of (messy) power sharing between coequal elected officials.[55]

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51. *See supra* notes 25–31 and accompanying text.

52. On the state of political science research on sheriffs, see generally Mirya R. Holman & Emily Farris, *Sheriffs in the United States: Authority and Autonomy in Local Criminal Justice*, 28 COMPAR. POL. NEWSL. 38 (2018). In our federal system, there is significant variation between jurisdictions; when speaking generally about the modal sheriff and jail, this Article ignores these differences, but they are worth noting. Sheriffs do not exist in Alaska (no county governments), Connecticut (replaced by marshal system), or Hawaii (deputy sheriffs serve in state Department of Public Safety). Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T OF JUST. 18 app. at tbl.9 (July 2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf [https://perma.cc/25X2-BP6L]. Sheriffs in Rhode Island and a few counties in other states are appointed rather than elected. *State-by-State Election Information*, NAT'L SHERIFFS' ASS'N (2015), https://www.sheriffs.org/sites/default/files/uploads/documents/GovAffairs/State-by-State%20Election%20Chart%20updated%2008.13.15.pdf [https://perma.cc/E5U7-NGA3].

53. Falcone & Wells, *supra* note 6, at 143.

54. The county governments with which sheriffs partner vary significantly in name and form between and within states; for convenience, their officials are referred to here as "commissioners," the most frequent denomination. *See* NAT'L ASS'N OF CNTYS., COUNTY GOVERNMENT STRUCTURE: A STATE BY STATE REPORT 7 (2009), https://www.pfw.edu/dotAsset/98216b7d-e66c-4da6-a78b-1871b6c1f439.pdf [https://perma.cc/CK2U-9V29]. Common to nearly all is fiscal control over the local criminal legal system. *See The American County Platform and Resolutions 2019-2020*, NAT'L ASS'N OF CNTYS. 132 (2019), https://www.naco.org/sites/default/files/documents/2019-2020%20American%20County%20Platform%20FINAL.pdf [https://perma.cc/ZUS6-J8P5].

55. Nearly all county jails are run by sheriffs, though there are a handful of exceptions in metropolitan areas, such as the jails in Miami-Dade County, Florida, and King County, Washington. In certain counties, commissions can take over jail management without the agreement of the sheriff. *See, e.g.*, Kristen M. Kraemer, *Update: Benton Co. Republicans Want Jail Returned to Sheriff. 2 Commissioners Say No*, TRI-CITY HERALD (Dec. 12, 2019), https://www.tri-cityherald.com/news/local/article238231399.html [https://perma.cc/Q2FZ-PEES]. In others, a sheriff can force a commission to take control of the jail system. Aaron Brilbeck, *Oklahoma County Sheriff Extends Jail Transfer Deadline with Conditions*, NEWS 9 (Dec. 10, 2019), https://www.news9.com/story/41434614/oklahoma-county-sheriff-extends-jail-transfer-deadline-with-conditions [https://perma.cc/8GYL-LJQD]. In most jurisdictions, this cannot occur. *See, e.g.*, State *ex rel.* Hayes v. Cummins, 42 S.W. 880, 881–82 (Tenn. 1897) (holding that the sheriff may

As the Eleventh Circuit once put it, "counties and their sheriffs maintain their county jails in partnership"; the sheriff "manages the institution," while the county "provides the facility and the money for upkeep."[56] This partnership can be highly collaborative or full of tumult; sheriffs and county commissioners not infrequently come into conflict regarding budgeting decisions, contracting authority, and the use of jail facilities.[57] Counties in many jurisdictions are precluded by state constitutional law from dictating how sheriffs spend their budgets, but do with some exceptions control the overall purse strings.[58] This is especially relevant when it comes to jail construction or renovation, which involves expenditure well beyond a sheriff's annual budget and generally necessitates incurring debt.[59]

As the remainder of this Article will demonstrate, these features of jail governance and administration shape the extent to which and on whose initiative jails are expanded; the mechanisms by which they are paid for; how many and which people fill them, and who has the ability

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not be deprived of exclusive supervision of county jails). City and regional jails are generally run by appointed officials. *See, e.g.*, NEV. REV. STAT. § 211.115 (2021) (city jail administrators); VA. CODE ANN. § 53.1-106 (2021) (regional jail superintendents).

56. Parker v. Williams, 862 F.2d 1471, 1478–79 (11th Cir. 1989). Historically, the distinction between jail management (the sheriff's purview) and jail building and repair (the county's purview) arose in the context of liability for escape. *See, e.g.*, Stiles v. Dearborn, 6 N.H. 145, 145–46 (1833). In many states, a sheriff was liable for escapes that occurred through "his negligence," whereas the county was responsible for escapes that occurred due to "the insufficiency of the gaol." *Id.*

57. *See, e.g.*, *Nash County Cuts Off Funds to Sheriff's Office amid Jail Spat*, WRAL.COM (Dec. 24, 2019), https://www.wral.com/nash-county-cuts-off-funds-to-sheriff-s-office-amid-jail-spat/18852179 [https://perma.cc/WPX3-QP7H]; Steve Vockrodt, *Judge Says Clay County 'Intentionally Manipulated' Sheriff Budget, Orders $1M Payment*, KAN. CITY STAR (Aug. 29, 2019), https://www.kansascity.com/news/politics-government/article234519322.html [https://perma.cc/YD76-DR9X]; Quinton Chandler, *Sheriff Revolt over County Jail Conditions Shines Spotlight on Low Funding*, STATEIMPACT OKLA. (Apr. 11, 2019), https://stateimpact.npr.org/oklahoma/2019/04/11/sheriff-revolt-over-county-jail-conditions-shines-spotlight-on-low-funding [https://perma.cc/YKL8-YPWY]. Recently, disagreements have arisen between sheriffs and county officials over whether to house immigration detainees for ICE and who has the power to decide. *See* Gloria DeLeon, *Commissioner, Sheriff Disagree on Federal Contract to House Immigrants at County Jail*, KFOX14 (June 28, 2018), https://kfoxtv.com/news/local/commissioner-sheriff-disagree-on-federal-contract-to-house-immigrants-at-county-jail [https://perma.cc/RXK3-3Y8H]; *see also* Steve Bohnel, *Opinion: County Executive Has No Legal Authority to Sign Sheriff's 287(g) Agreement*, FREDERICK NEWS-POST (Oct. 18, 2019), https://www.fredericknewspost.com/news/politics_and_government/levels_of_government/county/sheriff/opinion-county-executive-has-no-legal-authority-to-sign-sheriff/article_bb853871-23b8-5a4a-b6b5-04c271540bae.html [https://perma.cc/X6YT-2WXZ].

58. *See, e.g.*, Tomberlin, *supra* note 6, at 134–35, 134 n.132 (indicating that Florida sheriffs have the right to appeal county budget limits to the governor under FLA. STAT. § 30.49(4)–(5) (2021)).

59. *See, e.g.*, N.Y. State Comm'n of Corr. v. Ruffo, 530 N.Y.S.2d 469, 472 (Sup. Ct. 1988) (concluding that because the sheriff "is not authorized by law to build a new jail, or to raise taxes to fund a major renovation, he cannot be ordered to do that which is not within his power"), *aff'd in relevant part as modified*, 550 N.Y.S.2d 746 (App. Div. 1990). Relatedly, state legislatures have much control not only over carceral funding but also over fundraising; they are able to raise taxes and incur debt for prison building more readily than county commissions can for jail building.

to increase or decrease their population levels; and the avenues by which their use can be challenged.

II. JAIL BEDSPACE: THE SUPPLY SIDE

Mass incarceration requires a massive apparatus.[60] Although jail cells can be filled beyond capacity, with detainees forced to sleep on the floor or in shifts, space is a limiting factor. As Ruth Wilson Gilmore argues, carceral infrastructure is half of the story: "[W]e must [not only] understand[ ] how prisoners became so massively available as carceral objects, [but also] figure out how the ground the [jails] stand on becomes available for such a purpose."[61]

This Part excavates the role that sheriffs and county commissioners play together in proposing, arguing and securing support for, and deciding on the scope of jail construction.[62] It shows them circumventing popular opposition through creative use of municipal securities, imposing the fiscal burden of carceral growth on the incarcerated, and aggressively seeking intergovernmental funding sources. And it shows them facilitating a perpetual cycle of expansion, untethered to local public safety needs, through participation in the bedspace contracting market. It demonstrates these officials' power over the supply of jail bedspace and illuminates their incentives as jail administrators and criminal legal policymakers.

A. Promoting and Planning

Sheriffs and county commissioners, the officials who bear daily responsibility for managing jail populations and pay for jail operations, play a primary role in advocating for additional jail bedspace. Often, a sheriff brings a building proposal to the county commission, which works out whether and how to finance it.[63] Even when a jail-planning

60. This is true across the system of criminal adjudication and punishment. *Cf.* PFAFF, *supra* note 22, at 129–30 (suggesting one "important explanation for why felony filings rose as crime rates fell: there were simply more prosecutors").

61. GILMORE, *supra* note 11, at 130; *see also* HEATHER SCHOENFELD, BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION 4 (2018) ("[R]efram[ing] the story of mass incarceration as a story of the dramatic increase in the state capacity to punish"—that is, "carceral capacity"—"points to the importance of physical space.").

62. This role is especially important because, as James Jacobs wrote of prisons, filling jails "requires a vast number of small decisions" by numerous officials, while building them "requires a small number of large decisions" by a few key actors. James B. Jacobs, *The Politics of Prison Expansion*, 12 N.Y.U. REV. L. & SOC. CHANGE 209, 209 (1983).

63. *See, e.g.*, Goldie Rapp, *New Jail, Law Enforcement Center Officially Underway*, NEWSTRIBUNE (Nov. 13, 2019), https://www.newstrib.com/2019/11/13/new-jail-law-enforcement-center-officially-underway/ahcylm7 [https://perma.cc/959X-GA8J] (noting that at the

process appears to be more deliberative, sheriffs and commissioners are typically the prime movers.[64] Other local criminal legal system actors who "use" the jail—judges, prosecutors, and police chiefs—may voice support for an expansion, but they rarely, if ever, lead advocacy efforts; they are certainly not empowered to sign a construction contract or raise revenue to cover it.

If a funding plan requires voters' approval, sheriffs and commissioners generally play the lead role in the public messaging required to encourage voters to accept a tax increase, despite the possibility that such activities run afoul of prohibitions on the use of public money to advocate for ballot measures.[65] In advance of a 2017 election in Pueblo County, Colorado, for example, sheriffs' deputies went out to canvass, going door-to-door to ask residents to vote in favor of a new facility.[66] Despite their efforts, the measure failed.[67] In Sanpete County, Utah, commissioners held an open house at the existing jail facility to show residents why a $12 million, 128-bed facility was needed to replace the old 44-bed building.[68] In Guthrie County, Iowa, a sheriff's deputy recently went live on Facebook to urge voters to support a jail addition tripling its bedspace, at a cost to taxpayers of $8 million.[69] The Canyon County, Idaho, sheriff created a Jail Education website, complete with an election countdown clock.[70] A National Institute of

groundbreaking for a new jail, the sheriff said, "My hat goes off to the county board . . . . We brought this idea to them, they are the ones who oversaw it, looked at our plan and brought it together").

64. *See, e.g.*, Sarah Volpenhein, *Marion Judge Pushes for Jail Expansion, Signals Withdrawal of Overcrowding Release Order*, MARION STAR (Nov. 13, 2019), https://www.marionstar.com/story/news/local/2019/11/13/marion-judge-pushes-jail-expansion-withdraw-release-order/4177750002 [https://perma.cc/5VBP-DATA] (detailing the decision to draw up plans for a new jail made by a "jail commission," comprised of sheriffs and commissioners).

65. *See, e.g.*, IDAHO CODE § 74-604 (2020); IOWA CODE § 68A.505 (2021).

66. Elise Schmelzer, *Despite Fewer Arrests, Arapahoe County Jail Remains Overcrowded. The Sheriff Has a $462M Solution That Could Mean a Tax Hike.*, DENVER POST, https://www.denverpost.com/2019/06/26/arapahoe-county-jail-crowding-tyler-brown (last updated June 26, 2019) [https://perma.cc/D2RE-TE2E].

67. *Id.*

68. Ben Winslow, *Sanpete Says New Jail Needed Badly*, DESERET NEWS (Apr. 24, 2006), https://www.deseret.com/2006/4/24/19949948/sanpete-says-new-jail-needed-badly [https://perma.cc/B6A9-UDWC]. In Houghton County, Michigan, the board planned an " 'effective and comprehensive' public outreach" campaign in order to "have it marketed properly," out of concern that voters did not "believe[ ] the people directly involved with the jail." Garrett Neese, *Houghton County Continues Jail Talks*, DAILY MINING GAZETTE (Oct. 26, 2019), https://www.mininggazette.com/news/2019/10/houghton-county-continues-jail-talks [https://perma.cc/4L9U-4Y3A].

69. Laura Bacon, *New Jail Needed for Guthrie County Sheriff's Office*, ATL. NEWS TEL. (Dec. 24, 2019), https://www.swiowanewssource.com/atlantic/news/article_1557c404-828d-5e91-a0b0-12c2d358233f.html [https://perma.cc/B44R-5WAG].

70. *Jail Education*, CANYON CNTY., IDAHO, https://www.canyonco.org/elected-officials/sheriff/jaileducation (last visited Feb. 1, 2021) [https://perma.cc/UL99-4RK5].

Corrections Bulletin goes so far as to recommend that sheriffs "[u]se the personal touch," urging them to "[p]lan campaign events as you would plan a party."[71]

When the project will rely on an outside source of funding, sheriffs and county commissioners may band together to ask for it.[72] In 2006, the County Commissioners Association of Ohio and Buckeye State Sheriffs Association jointly advanced a proposal for state funding for jail construction. In it, they explained that there is currently " 'no room in the inn' for individuals who ought to be incarcerated" and that people convicted of misdemeanors are "waiting to serve their sentences but can't."[73]

Some of these officials are unabashed boosters of incarceration, while others are more circumspect. One sheriff in Vanderburgh County, Indiana, recently explained that he is "tired of people telling me we are over-incarcerated" and "want[s] to make sure we don't under-build."[74] A few, though, argue that uncontrolled jail growth is undesirable or ineffectual; some are even "trying to shrink" their carceral systems.[75]

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71. Gail Elias, *Building Community Support for New Jail Construction*, U.S. DEP'T OF JUST. 8 (May 2006), https://info.nicic.gov/nicrp/system/files/021328.pdf [https://perma.cc/YK8Z-LBSF].

72. *See, e.g.*, Chris Daley, *Sheriff Tracks Jail Expansion Funds*, MOUNTAIN DEMOCRAT (Feb. 20, 2017), https://www.mtdemocrat.com/news/sheriff-tracks-jail-expansion-funds [https://perma.cc/6BHG-TCF3]; Taylor Deville, *Sheriff Gets OK to Chase Grant for Jail*, ENTERPRISE (June 21, 2019), https://www.pressreader.com/usa/the-enterprise/20190621/281492162843989 [https://perma.cc/2V27-QD95].

73. *County Legislative Information Program: State Capital Funds Sought for County Jail Construction*, CNTY. COMM'RS ASS'N OF OHIO 1–2 (2006) (emphasis omitted), https://www.ccao.org/wp-content/uploads/5-4-06%20NA%20Jail%20Funding.pdf [https://perma.cc/FH6N-TWSQ]. In 2018, though, the County Commissioners Association of Ohio opposed a ballot measure that would have addressed overcrowding by prohibiting jail sentences for drug possession, claiming that it would lead to an unfunded mandate for treatment services. *CCAO Opposes Issue 1*, CNTY. COMM'RS ASS'N OF OHIO (Sept. 25, 2018), https://ccao.org/ccao-opposes-issue-1 [https://perma.cc/8AS9-2YNT]. Ohio's sheriffs continue to advocate for more state funding for jail construction, modeling their proposal on the state's school construction funding formula. *See Sheriff Everhart Attends Press Conference to Support Legislation Establishing a County Jail Construction Funding Formula*, WKTN (Feb. 19, 2021), https://wktn.com/sheriff-everhart-attends-press-conference-to-support-legislation-establishing-a-county-jail-construction-funding-formula [https://perma.cc/U9CZ-R6Q8].

74. John T. Martin, *Vanderburgh County Jail Expansion Talk to Resume; Many Tough Questions Remain*, COURIER & PRESS (Dec. 1, 2019), https://www.courierpress.com/story/news/2019/12/01/tough-questions-surround-possible-expansion-vanderburgh-co-jail/4307228002 [https://perma.cc/VX4G-F7ER]; *see also* Amelia Harper, *Conditions at Nash Jail Under Study*, ROCKY MOUNT TELEGRAM (Nov. 4, 2019), https://www.rockymounttelegram.com/news/local/conditions-at-nash-jail-under-study/article_79945825-e99d-54b7-acc6-2b99d83d5f80.html [https://perma.cc/X4YN-M6GX] (reporting that the sheriff would double jail capacity "if money was no object").

75. *See, e.g.*, Diana Anghel, *Champaign County Jail Inmates Endure Detrimental Conditions*, DAILY ILLINI (Dec. 2, 2019), https://dailyillini.com/news/2019/12/02/champaign-county-jail-inmates-endure-detrimental-conditions [https://perma.cc/EM5X-CKSF]; *see also* Kristina Gaffny, *Leaders Advocate for Funds to Support Jail-Diversion Programs*, YOURARLINGTON.COM (Nov. 3, 2019), https://www.yourarlington.com/search/news-archive/359-pol-serve/16304-diversion-

Increasingly, in response to activism, jailers acknowledge the demand for responses to crime that sound in rehabilitation rather than incapacitation or deterrence, but they often claim that jail is the best place to provide such services.[76] In Jackson County, Oregon, for example, the sheriff maintains a website to "educate citizens," making the case for a new jail.[77] A professionally produced video segment asserts that "often," the parents of a detainee "will basically beg us to please keep their son or daughter in jail" to receive drug treatment, a sentiment echoed by treatment providers who argue that their services will be delivered more effectively if their patients are held captive.[78] The video even offers one local police chief's view that legal representation is improved by incarceration: "[O]ne of the biggest issues that criminal defense attorneys have is that they can't engage with their clients in a meaningful way if the client's not kept in jail, because a lot of the clients are transient."[79]

Poor conditions are also sometimes cited as justification for expansion. Sheriffs and commissioners may worry about the prospect

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110319.html [https://perma.cc/C9J5-R6TB] (sheriff advocated for state-funded diversion programs because "we cannot arrest and incarcerate our way out of the behavioral health challenges we face"); Scott Liles, *Judge: Low Construction Costs Give Jail Extra Space for Expansion*, BAXTER BULL. (Nov. 17, 2017), https://www.baxterbulletin.com/story/news/local/2017/11/18/judge-low-construction-costs-jail-expansion-beds/867674001 [https://perma.cc/23N8-UW2J] (sheriff opposed to building extra bedspace that voters rejected and said he would not use it to house detainees).

76. *See* MAI ET AL., *supra* note 19, at 16 ("Whether it is a new wing or a new facility to accommodate and enhance service provision, these efforts are often accompanied by an increase in the number of jail beds."). Some sheriffs have even attempted to use their partially empty jail facilities to house people who are homeless or have substance-use disorders but have not been charged with any crime. *See* Jessica Pishko, *The Repurposing of the American Jail*, ATLANTIC (Nov. 19, 2019), https://www.theatlantic.com/politics/archive/2019/11/going-jail-substance-abuse-treatment/602206 [https://perma.cc/8A7H-RKC5]. This is a new iteration of a longstanding dynamic. *See* Melanie D. Newport, Jail America: The Reformist Origins of the Carceral State (July 2016) (Ph.D. dissertation, Temple University) (ProQuest) (arguing, with a focus on Cook County Jail, that policymakers rationalized the growth of large urban jails from the 1950s to 1990s by branding them as providers of social services and rehabilitation); *cf.* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 12–13 (2017) (describing Black advocacy for "an all-of-the-above strategy" to crime-fighting that paired policing and incarceration with jobs, schools, and housing, but explaining that "African Americans never got the [all-of-the-above strategy]—just the tough-on-crime laws"). It parallels the "mission creep" in policing. *See* Tracey L. Meares, *The Path Forward: Improving the Dynamics of Community-Police Relationships to Achieve Effective Law Enforcement Policies*, 117 COLUM. L. REV. 1355, 1365 (2017).

77. *New Jail Project*, JACKSON CNTY. SHERIFF OR., https://jacksoncountyor.org/sheriff/Jail/New-Jail-Project (last visited Mar. 12, 2021) [https://perma.cc/G6BJ-WSAL].

78. Jackson County Sheriff, *Jackson County Jail—Capacity Crisis*, YOUTUBE (Dec. 5, 2018), https://www.youtube.com/watch?v=WY0a_MNOGOQ (video at 3:20–3:40).

79. *Id.* (video at 5:35–5:50). The sheriff's office commissioned a survey of county residents to gauge their support for a $100 million jail-construction bond; although voters disfavored it, "the dream of a new jail remains." Jamie Parfitt, *Sheriff: Fewer Inmates Being Released from Jail Due to Overcrowding*, KDRV.COM (June 26, 2018), https://www.kdrv.com/content/news/Sheriff-Fewer-Inmates-Being-Released-from-Jail-Due-to-Overcrowding-486598051.html [https://perma.cc/VG4X-3USX].

of litigation or the risk of having the jail closed down by oversight officials,[80] many of whom feel that their role pertains only to the quality of the carceral enterprise and requires agnosticism as to its size.[81] They may also be motivated by the threat overcrowded conditions pose to the safety of their staff and to the well-being of detainees. There is, though, an intersection between the quality and quantity of jail bedspace, and an attendant risk that efforts to address substandard conditions of confinement—which could also be remedied if the same physical plant and staff were used to house and attend to fewer people—provide humanitarian cover for county officials' latent carceral expansionism.

Whether or not overcrowding is cited as the impetus for expansion, sheriffs and county commissioners proposing a jail construction project often rely on a population projection—that is to say, they attempt to predict how many people they will incarcerate in ten or twenty years.[82] In Vanderburgh County, Indiana, for example, which had 512 beds, a consultant to jail planners concluded that adding 750 would "meet projected incarceration needs 20 years into the future . . . while a 500-bed addition could be full on its opening day."[83]

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80. *See* MAI ET AL., *supra* note 19, at 18–19. For recent examples of the role played by state-level jail monitors in spurring carceral growth, see Dennis Ting, *Jefferson County, Indiana, Residents See Income Tax Hike for New Jail*, WHAS11 (Jan. 2, 2020), https://www.whas11.com/article/news/local/jefferson-county-indiana-residents-see-income-tax-hike-for-new-jail/417-47a78bee-296a-41f8-8887-905e04af4b48 [https://perma.cc/66VY-NLS4]; Dan Browning, *Three Minnesota Counties Must Rebuild Old Jails, with More to Follow*, STARTRIB. (Dec. 7, 2019), https://www.startribune.com/three-minnesota-counties-must-rebuild-old-jails-with-more-to-follow/565933602 [https://perma.cc/5TGF-Z2P5]; DANA KAPLAN, CTR. FOR CONST. RTS., IMPACTS OF JAIL EXPANSION IN NEW YORK STATE: A HIDDEN BURDEN 1 (2007). For a rare example of an oversight body criticizing jail profiteering, see Charlie Deitch, *Allegheny County Will Make $4.3 Million Profit in New Contract to Provide Phone Calls for County Jail Inmates*, PITTSBURGH CURRENT (July 2, 2020), https://www.pittsburghcurrent.com/acj-phone-profits [https://perma.cc/B5A5-G3AD]. For a survey and assessment of jail oversight mechanisms, see generally Michele Deitch, *But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States*, 47 AM. J. CRIM. L. 207 (2020). For critiques of their role in prison expansion, see GILMORE, *supra* note 11, at 89–92, 242; and BRETT STORY, PRISON LAND 96–97, 175 (2019).

81. *See, e.g.*, Tom Sissom, *State Reports Show Many Jails Overcrowded*, ARK. DEMOCRAT-GAZETTE (Oct. 28, 2019), https://www.arkansasonline.com/news/2019/oct/28/state-reports-show-many-jails-overcrowd [https://perma.cc/6XH3-73YP] (reporting that coordinator of oversight body said inspection reports "don't make policy recommendations," and "don't tell [a county] . . . that they need to build a new jail," as "[t]here are lots of ways to manage population and construction is only one of them").

82. On analogous problems with prison population projections during California's prison-building boom, see Franklin E. Zimring & Gordon Hawkins, *The Growth of Imprisonment in California*, 34 BRIT. J. CRIMINOLOGY 83, 90–94 (1994). Those making prison population projections, however, have much less direct control over prison population levels than do sheriffs over jail population levels.

83. John T. Martin, *Meeting Vanderburgh Jail Long-Term Needs Will Take 750 Beds, Consultant Says*, COURIER & PRESS (May 14, 2019), https://www.courierpress.com/story/news/2019/05/14/consultant-vanderburgh-jails-long-term-need-750-more-beds/3671518002 [https://perma.cc/A4ZT-PSFD].

Because jails are long-term investments, such an endeavor is in some sense unavoidable, but close attention to the process of population projection is revealing. Sheriffs and county commissioners generally take these predictions of future incarceration as gospel. A study of the jail-bond issuance process in seven municipalities found, however, that the architecture firms, construction companies, and underwriters with financial stakes in potential projects "commission feasibility studies that demonstrate the benefits of the jail bonds to underpin their pitches."[84] In some cases, they fabricate or inflate the fiscal benefits and underestimate the costs of the proposed facility.[85] Another review of population projections by Vera Institute researchers found the projections lacked a "standardized, accepted methodology"; some assumed continued straight-line growth at recent, exceptionally rapid rates.[86] Others reject as "unrealistic" models that predict declines in jail population based on recent policy shifts, such as the increased use of cite and release by local law enforcement.[87] This refusal to engage critically with the range of available law enforcement policy choices is especially remarkable given that the same sheriffs urging jail construction are *themselves* empowered, as discussed in Part III, to reduce jail populations in a number of ways.

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84. ACTION CENTER ON RACE & THE ECONOMY, ACTIVEST AND IN THE PUBLIC INTEREST, JAIL BONDS REPORT 2 (October 2017) (on file with author); *see also* GILMORE, *supra* note 11, at 96 (describing the advocacy function of population projections by the California Department of Corrections, which "combined technical number-crunching skills with a flair for emphasizing the drama inherent in the 'crisis' "). On the risks of relying on consultants to manage jails, see Ian MacDougall, *New York City Paid McKinsey Millions to Stem Jail Violence. Instead, Violence Soared.*, PROPUBLICA (Dec. 10, 2019), https://www.propublica.org/article/new-york-city-paid-mckinsey-millions-to-stem-jail-violence-instead-violence-soared [https://perma.cc/Y5DG-YDZ2].

85. JAIL BONDS REPORT, *supra* note 84, at 2 (observing that these feasibility studies "find[ ] a need in the region for [contract] beds, overestimating the daily fees [they would generate], and underestimating the number of staff needed at the facility").

86. MAI ET AL., *supra* note 19 at 22; *cf.* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 163–68 (2016) (discussing Nixon's Long-Range Master Plan for expansion of the federal prison system, "based not on the reality of crime but on population growth projections" and since-disproven assumptions about the demographics of crime).

87. MAI ET AL., *supra* note 19, at 23. Unexpected decarceral policy shifts may render such projections inaccurate and the resulting expansions unnecessary. *See, e.g.*, Sara Gentzler, *Thurston County Commissioners OK Estimated $19 Million Plan to Expand County Jail*, DAILY CHRON. (Nov. 16, 2019), https://www.chronline.com/crime/thurston-commissioners-ok-estimated-million-plan-to-expand-county-jail/article_d12e599e-08aa-11ea-9f30-5f0bcc563c76.html [https://perma.cc/TDC6-B6QG]. County officials could use thoughtful and nuanced analyses to help them evaluate decarceral approaches and the attendant cost savings. *Cf.* Carri Graham, *Harrison County Jail Has More Inmates Than It Can House*, HERALD-STAR (Jan. 2, 2020), https://www.heraldstaronline.com/news/local-news/2020/01/harrison-county-jail-has-more-inmates-than-it-can-house [https://perma.cc/NY8M-5NKH] (county hired an engineering firm to resolve dispute between sheriff and commission regarding extent of an expansion).

B. Financing

Jails are major investments, expensive and long-lasting.[88] As a matter of both financing and logistics, they are difficult to expand gradually. In rural counties, jail expansions are often "the most expensive forms of capital expense a county can incur."[89] The capital cost of building normally exceeds the amount available to a county without either incurring debt or obtaining external assistance.[90] And the bills do not stop once construction is complete. As Michelle Anderson has shown, jails' annual operating budgets, which increase when facilities expand, make up a significant portion of routine local government spending.[91] A recent study of county jail budgets in Kentucky and Tennessee found that jail spending comprised an average of 15% of total county budgets in both states, and varied quite widely; over a third of Kentucky counties spent at least a quarter of their annual budgets on jails.[92] In Penobscot County, Maine—a fairly extreme case—funding to run the jail made up *half* of the county's entire budget for 2020.[93]

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88. Chris Rogers, *Jail Construction Could Cost County $22M*, WINONA POST (Jan. 2, 2019), https://www.winonapost.com/Article/ArticleID/62306/Jail-construction-could-cost-county-$22M [https://perma.cc/QCL4-B9AR] ("Whatever Winona County builds, it will be stuck with for a long time, staffing costs included.").

89. Rebecca Sitzes, *Jail Expansion Planned in Shelby*, GASTON GAZETTE (Jan. 4, 2020), https://www.gastongazette.com/news/20200104/jail-expansion-planned-in-shelby [https://perma.cc/472H-QWPR]; *see also* Giana Magnoli, *County Supervisors Extend Contract, Costs, Completion Date for Oft-delayed Northern Branch Jail*, NOOZHAWK (June 9, 2019), https://www.noozhawk.com/noozhawk/print/supervisors_antenna_system_northern_branch_jail_santa_maria_20190609 [https://perma.cc/T26Z-MKRX] (Santa Barbara County, California's jail was the "largest capital improvement project in county history"); Juliette Daniels, Opinion, *No on Jail*, CASCADIA WKLY. (Oct. 18, 2017), https://www.cascadiaweekly.com/cw/currents/32849 [https://perma.cc/C7SK-MQJA] (same in Whatcom County, Washington); *Chairman Liakakis Signs Jail Expansion Construction Contract*, SAVANNAH HERALD (Mar. 2, 2011), https://savannahherald.net/chairman-liakakis-signs-jail-expansion-construction-contract-p1373-1.htm [https://perma.cc/QZ6W-UTKL] (same in Chatham County, Georgia).

90. It is rarely possible for counties to build major jail expansions using cash reserves. *See* Andrew Hartsig, *Investing in America's Infrastructure: County Funding for Capital Facilities*, NAT'L ASS'N OF CNTYS. (Mar. 1, 2018), https://www.naco.org/featured-resources/investing-america%E2%80%99s-infrastructure-county-funding-capital-facilities [https://perma.cc/8PRP-ZJJ2].

91. Michelle W. Anderson, *The Western, Rural Rustbelt: Learning from Local Fiscal Crisis in Oregon*, 50 WILLAMETTE L. REV. 465, 478 (2014); *see also Local Spending on Jails Tops $25 Billion in Latest Nationwide Data*, PEW CHARITABLE TRS. (Jan. 29, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data [https://perma.cc/B5WG-QXDQ] (reviewing national data on state and local jail expenditures).

92. *What Jails Cost Statewide*, VERA INST. OF JUST., https://www.vera.org/publications/what-jails-cost-statewide (last visited Apr. 4, 2021) [https://perma.cc/K4Z5-XMQ6] (click on each state to access data about its counties' jail spending and revenue).

93. Judy Harrison, *Penobscot County Is Still Trying to Nail Down a 'Reasonable' Cost for a New Jail*, BANGOR DAILY NEWS (Nov. 14, 2019), https://bangordailynews.com/2019/11/14/

Indeed, because it is much harder for counties to raise revenues than it is for states to do so,[94] fiscal incentives may be even more relevant to jail policy than they are to prison policy.[95] This is especially true in poor, rural counties, which, as Lisa Pruitt and Beth Colgan have shown, struggle mightily to raise revenue and provide basic services given their limited tax bases.[96] In recent years, scholarly attention has increasingly shifted towards the local budgetary processes that shape the functioning of the criminal legal system. This work has identified and challenged the generation of municipal revenue through court fines and fees and policing, raising concerns about resource extraction from the poor and about the pro-carceral incentives this creates.[97] Fiscal motives for bedspace expansion are no less important or troubling.

Together, sheriffs and county commissioners pursue several sources of funding for jail expansion, each of which shapes their carceral policymaking incentives in important ways.[98] They can put their plans to build the capacity to incarcerate more people to a vote, seeking

news/bangor/penobscot-county-is-still-trying-to-nail-down-a-reasonable-cost-for-a-new-jail [https://perma.cc/AB4B-REAP].

94. *See* JOSHUA MCLAURIN, NAT'L ASS'N OF CNTYS., A LOOK AT COUNTY REVENUE AUTHORITY: A STATE BY STATE REPORT 1–3 (2008), https://www.naco.org/sites/default/files/documents/County%20Revenue%20Authority.updated.pdf [https://perma.cc/26EK-UJ63] (explaining constraints on counties' ability to generate revenue).

95. Ruth Gilmore's work identifies other aspects of the political economy of incarceration with which this Article does not attempt to grapple but which are doubtless important chapters of the story of jail expansion. *See* GILMORE, *supra* note 11, at 58–84 (analyzing the roles of surplus finance capital, surplus land, surplus population, and surplus state capacity in California's prison-building boom).

96. Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 227–29 (2010). *See generally* KATHERINE S. NEWMAN & ROURKE L. O'BRIEN, TAXING THE POOR: DOING DAMAGE TO THE TRULY DISADVANTAGED 87–93 (2011). Of course, county-level public finance is very much relevant to understanding where prisons a state has decided to build are sited.

97. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 6–8 (2018) (discussing the exploding use and effects of economic sanctions on individuals in the criminal process); Beth A. Colgan, *Fines, Fees, and Forfeitures*, *in* 4 REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 205, 209–12 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_4.pdf [https://perma.cc/6TYS-53EZ] (examining the distortions of criminal justice incentives that result from the use of economic sanctions); Robert A. McBride, *Policing for Profit: How Urban Municipalities' Focus on Revenue Has Undermined Law Enforcement Legitimacy*, 9 FAULKNER L. REV. 329, 331–32 (2018) (discussing law enforcement agencies' perverse economic incentive to issue more citations in order to boost their budgets).

98. Though there is an extensive literature on private prisons, the financial incentives public officials face are no less powerful. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 523–41, 544 (2005) (just as private prison companies and officer unions have financial interests in incarceration, officials "view[ ] incarceration in economic terms and regarding prison inmates as the economic units of a financial plan"). John Pfaff has similarly urged a renewed focus on the fiscal incentives of public officials as the "engines behind prison growth." PFAFF, *supra* note 22, at 7; *see also id.* at 80–82, 93, 225 ("[P]rivate pathologies ('Keep the prison filled!') are just as apparent in the public sector as in the private sector.").

funding through voter-approved general obligation bonds. In these cases, they may be forced by organized taxpayers to justify the necessity of expansion and to consider alternatives. Or they can circumvent the electorate through more complex municipal financing techniques, focusing more on reassuring investors that incarceration will continue to produce revenue than on convincing residents that it is good policy. They can saddle the very people they are confining—defendants—with the financial burden of building bedspace, pledging court fines and fees to cover the cost of the jail. And they avoid traditional municipal debt by looking to state and federal grants and loans, prospecting in the interjurisdictional incarceration market.

General Obligation Bonds. The lion's share of jail building is financed by issuance of municipal securities through which the county takes on debt, to be repaid over a span of many years. In the baseline case, general obligation bonds are used; the county promises to use its power to tax (specifically, to tax local property owners) to satisfy its debt.[99] Ordinarily, voters have the opportunity to approve the issuance of general obligation bonds for jail construction.[100] Often, they reject them—sometimes, like in Canyon County, Idaho, repeatedly.[101] Public opposition is undoubtedly founded in part on resistance to higher taxes, although votes against bond issues inherently reflect some amount of cost-benefit analysis by voters; there is evidence from public opinion surveys that even tough-on-crime voters who want more funding for policing do not support additional spending on incarceration.[102] In some

99. *See, e.g.*, *General Obligation Jail Bonds, Series 2017A*, BECKER CNTY., MINN. 2 (2017), https://emma.msrb.org/ER1061438-ER831417-ER1232355.pdf [https://perma.cc/8HPH-WDV7].

100. *See* Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 196 & n.23 (2001).

101. *See Voters Overwhelmingly Reject $187 Million Request to Build New Canyon County Jail*, KTVB (May 22, 2019), https://www.ktvb.com/article/news/politics/elections/voters-reject-187-million-request-to-build-new-canyon-county-jail/277-5c885d9b-c1f6-4509-bfe9-468cbc2aabcf [https://perma.cc/N9R6-UXQC] (four-time rejection). Additional tax levies may also be proposed (and voters may likewise refuse) to fund the ongoing operations of a jail. *See, e.g.*, Anderson, *supra* note 91, at 481–82 (indicating that voters rejected levy despite warnings that existing revenues were insufficient to cover the cost of running the jail, even if the county eliminated every other service from the budget).

102. *See* Mark A. Cohen, Roland T. Rust & Sara Steen, *Prevention, Crime Control or Cash? Public Preferences Towards Criminal Justice Spending Priorities*, 23 JUST. Q. 317, 318–19 (2006); Marie Gottschalk, *The Carceral State and the Politics of Punishment*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 205, 232–33 (Jonathan Simon & Richard Sparks eds., 2013) (citing references); *see also* Jack Norton, *Life and Jail in Southern Colorado*, VERA INST. OF JUST. (Apr. 19, 2018), https://www.vera.org/in-our-backyards-stories/life-and-jail-in-southern-colorado [https://perma.cc/65FY-C2HH] (providing examples of the reasons voters gave for rejecting two successive ballot measures to construct a larger jail). More data and analyses are required to determine why jail construction and renovation bonds are so frequently rejected. Are voters consistently more inclined to pay for policing than they are for incarceration, or are voting patterns better explained by tax burdens than by policy preferences? Do voters prefer increasing jail

cases, opposition is explicitly framed in terms of concern about over-incarceration, especially of people of color.[103] This financing structure discloses to a community that it will be funding carceral growth, and it gives residents a say.

Revenue Debt. Because taxpayers often vote against general obligation bonds for jail building, officials committed to expansion frequently circumvent them, using a range of opaque municipal finance instruments that do not require approval by the local electorate in a referendum. One particularly common vehicle for departing from taxpayers' preferences is the lease-revenue bond. As Ruth Wilson Gilmore put it when describing the use of these bonds in the California prison-building boom, when public officials need to "raise much more money than anyone [is] brave or foolhardy enough to request from voters[,] [l]ease revenue bonds [are often] the solution."[104]

The "end run around voters" works like this: The sheriff and commissioners of the county want to build a new jail but fear (perhaps based on past experience) that voters will not agree to pay for it through increased property taxes.[105] So they arrange for the county building authority, which lacks the ability to impose taxes directly, to issue a bond. Investors who buy the bond issue are informed that the building authority will use the bond funds to build the jail, which it will lease to the county itself; the debt will be satisfied using the payments the county makes to its own building authority for use of the jail.[106] After a period of years, the county acquires the jail. Hypothetically, the county

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capacity over improving jail conditions, or vice versa? Are those jurisdictions able to finance jail construction without voter approval building jail bedspace at a faster clip?

103. *See, e.g.*, Jim Meadows, *Champaign County Board to Look at Jail Consolidation Proposal Thursday Night*, WILL (Oct. 24, 2019), https://will.illinois.edu/news/story/champaign-county-board-to-look-at-jail-consolidation-proposal-thursday-night [https://perma.cc/VV58-KXBZ].

104. GILMORE, *supra* note 11, at 99; *accord An Introduction to Municipal Lease Financing*, ASS'N FOR GOVERNMENTAL LEASING & FIN. 2 (2000), https://aglf.memberclicks.net/assets/docs/municipal_lease_financing.pdf [https://perma.cc/KAC2-Q4ES]. Early scholarship on correctional privatization recognized it as similarly "abrogat[ing] [the] power of the people" to disapprove of jail construction. Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 816–17 (1987) (noting that voters twice rejected a jail-bond issue before a private financier underwrote it).

105. *AB900 Borrows $7.5 Billion to Build New Prisons: Fact Sheet on the Use of Lease Revenue Bonds to Build Prisons*, CALIFORNIANS UNITED FOR A RESPONSIBLE BUDGET 2 (2008), https://www.curbprisonspending.org/wp-content/uploads/2010/05/Fact-Sheet-on-Lease-Revenue-Bonds-Updated-May-08.pdf [https://perma.cc/S2UZ-TFT8]. This is the diametric opposite of the participatory approach to budgeting now demanded by abolitionist movements. *See* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1634–37 (2019) (describing recent participatory budgeting campaigns).

106. *Cf.* Alex Anderson, *Hiding Out in Prison Bonds*, FORBES (Oct. 22, 2008), https://www.forbes.com/2008/10/22/prison-correctional-bonds-pf-ii-in_aa_1022fixedincome_inl.html?sh=272e23db6e33 [https://perma.cc/5EY4-36PJ] (explaining the mechanics of how municipalities use lease revenue bonds to finance prisons).

could stop using the facility in the interim, leaving investors high and dry; as a practical matter, it would have nowhere else to incarcerate its residents and has no plans to stop jailing them.[107]

This is sleight of hand: whether or not tax revenues are formally pledged, taxpayers will repay debts incurred to build jails. It requires a "political suspension of disbelief" to characterize a government agency and its public works board as "entities buying, selling, and leasing property and rights between them."[108] In certain cases, courts have recognized as much, deeming these financing strategies shams and invalidating them.[109] As these courts have appreciated, lease-revenue bonds can serve to "mislead . . . citizens as to real costs" and "enable government officials to avoid public scrutiny."[110]

Fine and Fee Revenue. In some instances, county officials resort to another tactic: shifting the burden of jail construction onto criminal defendants, including those they incarcerate. Although detainees are regularly charged for the daily cost of their room and board[111]—a very

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107. *See* Steven L. Schwarcz, *The Use and Abuse of Special-Purpose Entities in Public Finance*, 97 MINN. L. REV. 369, 381–82 (2012) (noting that the financing entity "operate[s] as an integral part of [county] government," and is therefore "too-important-to-fail").

108. GILMORE, *supra* note 11, at 100. County commissioners generally appoint or approve the members of the board of a municipal building authority.

109. Courts considering functionally identical arrangements have reached different outcomes. *Compare* Montano v. Gabaldon, 766 P.2d 1328, 1330 (N.M. 1989) (disapproving of such financing absent voter approval and finding it to create indebtedness because the county is, practically, "obligated to continue making rental payments in order to protect [its] growing equitable interest"), *with* Mun. Bldg. Auth. v. Lowder, 711 P.2d 273, 276, 279 (Utah 1985) (approving of such financing because the county is entitled to terminate its annual lease, despite recognizing that "of course, as a practical matter the county will renew the lease for the next twenty years" and then acquire the jail).

110. Schwarcz, *supra* note 107, at 376–77, 384.

111. *See* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 321–23 (2014) (detailing the history of detainee fees and pay-to-stay practices); Michael Wetzel, *Jail Fees Hurt Inmates' Loved Ones, Help County Budgets*, U.S. NEWS & WORLD REP. (Nov. 24, 2019), https://www.usnews.com/news/best-states/alabama/articles/2019-11-24/jail-fees-hurt-inmates-loved-ones-help-county-budgets [https://perma.cc/BW8F-EWFV] (recognizing that such fees are often paid out of detainee accounts into which family members deposit funds). Lately, some courts and even some sheriffs have begun to appreciate that these fees can "feed the cycle of incarceration." *E.g.*, Angie Jackson, *Washentaw County Forgives $509K in Jail Debt for More Than 31,000 People*, DETROIT FREE PRESS, https://www.freep.com/story/news/local/michigan/2021/02/04/washtenaw-county-jail-debt/4388377001 (last updated Feb. 4, 2021) [https://perma.cc/UP3T-3XTK]; *see* State v. Richey, 569 S.W.3d 420, 425 (Mo. 2019) (holding unanimously that jail board bills are not taxable as court costs and failure to pay cannot result in further incarceration). Jailing also involves other expropriative practices, like the charging of extortionate phone fees to fill public coffers with kickbacks. *See* Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3, 12–15 (2020) ("[A] nationwide survey of prison phone contracts found commission rates of up to 60%, with an average nationwide rate of 42%."); Brian Highsmith, *Commercialized (In)justice: Consumer Abuses in the Bail and Corrections Industry*, NAT'L CONSUMER L. CTR. 21–22 (2019), https://www.nclc.org/images/pdf/criminal-justice/report-commercialized-injustice.pdf [https://perma.cc/XFF5-XC8S];

rough approximation of the marginal cost of their incarceration—criminal defendants also contribute to the fixed costs of additional bedspace.[112] This takes different forms. In many counties, criminal court fines and fees go into the county general fund and are then used to pay to service jail-construction debt.[113] In others, though, the link is much clearer: criminal court fines and fees paid by criminal defendants are pledged to expanding the jails that incarcerate them.[114] In these cases, county policymakers have yoked themselves to perpetuation of a roundly criticized program of resource extraction from poor people. The link between choices officials made as jail administrators and their criminal legal policy decisions could not be more direct or explicit.

When Washington County, Arkansas, issued bonds to finance the construction of a 36-bed juvenile detention center, it elected to

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Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [https://perma.cc/M6YB-BGDU] (explaining why jail phone contracts are even more exploitative than prison counterparts).

112. On the use of commissary kickbacks to pay for the capital costs of jail expansion, see Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 641 (2015); Mark Shenefelt, *Davis County Plans to Bond for $9.8 Million Jail Medical Wing*, STANDARD-EXAM'R (Nov. 14, 2019), https://www.standard.net/news/government/davis-county-plans-to-bond-for-million-jail-medical-wing/article_0821a409-01a0-5919-9589-41d6a704d968.html [https://perma.cc/C59Q-RW7E]. Sometimes, detainees are literally put to work building new jail facilities. *See* Taylor Upchurch, *Inmates Help Build New Jail with a Fresh Start in Mind*, WYMT (Mar. 14, 2019), https://www.wymt.com/content/news/Inmates-help-build-new-jail-with-a-fresh-start-in-mind—507157201.html (labor for "cleanup, painting, and epoxy coating" will save over half a million dollars); *Jail Programs: A State and Local Partnership That Works*, UTAH DEP'T OF CORR. 3 (2017), https://corrections.utah.gov/images/pdf/2017-08-JAILBOOK2017.pdf [https://perma.cc/8QYY-CUK5]; *cf.* GILMORE, *supra* note 11, at 125 (proposal by officer union to have prisoners "do much of the building" on new facilities, "saving labor costs").

113. Revenue from court fines and fees is reported in financial disclosures accompanying bond issues. *See, e.g.*, *Certificates of Participation (City of Atlanta Public Safety Projects), Series 2018*, GA. MUN. ASS'N 23 (2018), https://emma.msrb.org/ES1106319-ES864753-ES1265869.pdf [https://perma.cc/6VV6-8VHJ] (noting a reduction in general fund revenue from fines and forfeitures due to reduced pretrial intervention revenues); *Revenue Warrants (Walker County Jail Project), Series 1996*, WALKER CNTY. PUB. BLDG. AUTH. 10 (1996), https://emma.msrb.org/MS127292-MS102600-MD198425.pdf [https://perma.cc/JJ66-RSLL] (explaining that debt obligations are expected to be paid with general fund revenue from new criminal-case and bail-processing fees). Court fines and fees may also be used by one jurisdiction to pay another to house its detainees. *See, e.g.*, Trace Christenson, *Calhoun County Sues Battle Creek over Jail Bed Payments*, BATTLE CREEK ENQUIRER (Nov. 27, 2019), https://www.battlecreekenquirer.com/story/news/2019/11/27/calhoun-county-sues-battle-creek-over-jail-bed-payments/4319015002 [https://perma.cc/PX4J-TV62] (county receives one-third of municipal court fines and costs in exchange for housing detainees).

114. Although county officials choose to impose and pledge revenues from these fines and fees, their power is not unconstrained; in certain states, counties and cities are statutorily authorized to impose additional court fines and fees only if they are spent on jail. *See, e.g.*, ARK. CODE ANN. § 16-17-129 (2021). For a compelling argument that criminal legal fines and fees do not operate like ordinary "user fees" (such as for toll bridges), see Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517 (2021).

service the bonds not with the county's general revenues, but with revenues from court fines and costs.[115] In its bond disclosure documents, the county promised not to reduce the fines and court costs imposed in criminal cases—including in juvenile court—unless mandated by state statute.[116] To reassure prospective investors that adequate funds would be available to avoid default, it reported that the criminal court fine revenue it received had steadily increased—doubled, in fact—in the preceding five years.[117]

In 2000, three rural Alabama counties—Cleburne, Conecuh, and Lawrence—built new jails and likewise promised to pay for them in large part with court fees they had recently imposed.[118] For example: the previous year, the governing body of Cleburne County had adopted an additional fee of thirty dollars in every case (civil and criminal, including traffic cases but excluding small claims) in county and municipal court, to be used to plan, build, and finance a county jail.[119] It covenanted that it would continue to "impose, assess and collect" court fees "to the maximum extent permitted by law."[120]

Similarly, in Kentucky, bonds were issued to help finance the construction of forty new county jails across the state.[121] The bonds were serviced primarily with pledged receipts from court costs. A ten-dollar fee, assessment of which was "not subject to the discretion of the court," was collected from each defendant who pleaded or was found guilty; the proceeds were used to pay the debt.[122] Since a reduction in receipts would impair the obligation of repayment, the issuing authority covenanted to oppose by "appropriate legal action" any statute or

115. *Capital Improvement Revenue Bonds (Juvenile Detention Center Project), Series 1999*, WASH. CNTY., ARK. 4, 10 (1999), https://emma.msrb.org/MS158876-MS134184-MD260341.pdf [https://perma.cc/7TFQ-GAPY]. Of the top five bases for detention at the facility in 2018, four were misdemeanors or technical violations; the other was theft by receiving. Not a single violent felony made the top-ten list. WASH. CNTY. JUV. JUST. CTR., ANNUAL REPORT (2018), https://www.co.washington.ar.us/home/showdocument?id=19515 [https://perma.cc/BY52-NA8F].

116. WASH. CNTY., ARK., supra note 115, at 10.

117. *Id.* at 18–19.

118. *Revenue Warrants (County Jail Project), Series 2000*, CLEBURNE CNTY. PUB. BLDG. AUTH. 8, 13, A-9 (2000), https://emma.msrb.org/MS168666-MS143974-MD279609.pdf [https://perma.cc/GC7R-4Y3F]; *Revenue Warrants (Conecuh County Jail Project), Series 2000*, CONECUH CNTY. PUB. BLDG. AUTH. 12 (2000), https://emma.msrb.org/MS168315-MS143623-MD278909.pdf [https://perma.cc/J9QR-8KJQ]; *Revenue Warrants (County Jail Project), Series 1997*, LAWRENCE CNTY. PUB. BLDG. AUTH. 7, A-8 (1997), https://emma.msrb.org/MS133511-MS108819-MD210582.pdf [https://perma.cc/8XRB-JHT5].

119. CLEBURNE CNTY. PUB. BLDG. AUTH., *supra* note 118, at 8.

120. *Id.* at A-9.

121. *Multi-County Correctional Facilities Revenue Refunding Bonds, Series 1994*, KY. LOC. CORR. FACILITIES CONSTR. AUTH. at iv, 1 (1994), https://emma.msrb.org/MS99577-MS74885-MD145089.pdf [https://perma.cc/X8BU-5UDJ].

122. *Id.* at 6–7 (noting annual revenues of about $4 million stemming from 400,000 adjudications of guilt).

regulation that would reduce the court revenues available to service the bond debt, and, if necessary, to request that the legislature increase the costs assessed.[123] Because the bond issue was not set to mature—to be paid off—for twenty years, this financing decision effectively cemented the use of economic sanctions for the foreseeable future.[124]

State and Federal Funding. Finally, sheriffs and commissioners hoping to build a jail sometimes look outside the ordinary avenue of municipal debt entirely, obtaining financing instead from the state legislature or the federal government. At a basic level, this funding weakens local political control over jail expansion decisions by offering an alternative way to fund carceral growth that the electorate disapproves of, and it undercuts budgetary arguments for reducing population rather than increasing bedspace.[125]

State funding is particularly significant in California, where billions of dollars have been made available to counties through the process of "realignment"—the transfer of prisoners to local jails to ease overcrowding in the prison system.[126] As a result, "malcontent . . . sheriffs" have traveled to the capitol to "express their frustration [to the state corrections board] at being passed over for the

123. *Id.* at 6–7, C-19.

124. *See id.* at 10.

125. *Cf.* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 940–44 (2015) (demonstrating that federal funding for police departments disrupts local accountability). Although federal grants cover under 1% of total annual criminal legal system spending by local governments, PFAFF, *supra* note 22, at 102, they are very significant for the counties that receive major infusions of funding for jail construction, unlike for a larger prison system.

126. *See* John F. Pfaff, *Why the Policy Failures of Mass Incarceration Are Really Political Failures*, 104 MINN. L. REV. 2673, 2683–84 (2020) (discussing jail-building subsidies that accompanied realignment). In advocating for shifts from prison- to jail-based incarceration, Frank Zimring has recently suggested that because some realignment funding was given unconditionally, it did not create any "incentive to the counties to expand institutional capacity or, for that matter, to expand the number of persons locked up in existing facilities." FRANKLIN E. ZIMRING, THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION 117–18 (2020). But in fact, counties across California have invested heavily in jail construction in response to and using funds provided through realignment. *See* Anat Rubin, *California's Jail-Building Boom*, MARSHALL PROJECT (July 2, 2015), https://www.themarshallproject.org/2015/07/02/california-s-jail-building-boom [https://perma.cc/79ME-NMNY] ("Twenty-eight counties are leveraging $1.7 billion in state grants to build and expand 35 jails, [which] will initially add about 12,000 jail beds in the state [and] are designed to accommodate future expansions . . . .").

[jail-building] grants and to make a final appeal."[127] State financing, however, plays a major role in other states as well.[128]

The federal government, too, has financed the construction of jails. Although such facilities often dedicate bedspace to be used for federal detainees, the funds—which can come from unexpected sources like the Department of Agriculture and federal mine lease districts—are often designed to promote local economic development.[129] One press release called the doubling of a jail's size an "investment[ ]" in the "rural way of life that stands as the backbone of our American values."[130]

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127. Rina Palta, *State Awards $500M in Jail Construction Funds: Sheriffs Want More Resources, Protesters Want Fewer Jails*, KPCC (Jan. 16, 2014), https://www.scpr.org/news/2014/01/16/41642/state-awards-500-million-in-jail-construction-fund [https://perma.cc/2LM3-9AMD] (discussing a category of realignment-era grants exclusively for jail construction). Sometimes counties "give back" jail-construction grants because the operating costs would be too high ("(It's like) you win a car, but now you can't afford the gas and insurance."), but they must be careful: "counties can get 'strikes' that will count against them for winning future jail grants." Alayna Shulman, *Shasta County $20 Million Jail Grant: Where It Went, Where It Didn't*, REC. SEARCHLIGHT, https://www.redding.com/story/news/local/2017/08/04/heres-what-happened-20-million-jail-grant-shasta-county-gave-up/538386001 (last updated Aug. 4, 2017) [https://perma.cc/F4PG-X9L8]. On the historical roots of the "long struggle[ ] over which level of government should be responsible for incarceration," see W. David Ball, *"A False Idea of Economy": Costs, Counties, and the Origins of the California Correctional System*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 28–29 (2016) (explaining that California's first penal code deemed the county jails the state prison). On the history of state funding for California's county jails, see Jacob Kang-Brown & Jack Norton, *Funding Jail Expansion in California's Central Valley*, VERA INST. OF JUST. (Oct. 8, 2020), https://www.vera.org/in-our-backyards-stories/funding-jail-expansion-in-californias-central-valley [https://perma.cc/4YHX-VAP7].

128. As of 2009, seven states provided state funding for the construction or renovation of local and regional jails, while twenty-eight provided state funding for jail operations. Dep't of Crim. Just. Servs., *Virginia's Peculiar System of Local and Regional Jails*, COMMONWEALTH OF VA. 6 (2010), https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/research/virginias-peculiar-system-local-and-regional-jails.pdf [https://perma.cc/LHQ8-KJB2]; *see also* Ben R. Williams, *Henry County Will Borrow Money to Fund Jail Construction*, MARTINSVILLE BULL. (June 28, 2018), https://www.martinsvillebulletin.com/news/henry-county-will-borrow-money-to-fund-jail-construction/article_79be5250-7a8e-11e8-b139-4ba496eab9ba.html [https://perma.cc/8ZZS-7RLW]; Larry Limpf, *County to Ask for State Help with Jail Expansion*, PRESS (Nov. 22, 2019), https://presspublications.com/content/county-ask-state-help-jail-expansion [https://perma.cc/CR7K-EPTL] (Ohio commissioners and sheriffs asked legislature for continued state-county jail-building "partnership").

129. *See* Off. of the Inspector Gen., Audit Div., *The United States Marshals Service's Cooperative Agreement Program*, U.S. DEP'T OF JUST. 1 (2005), https://oig.justice.gov/reports/USMS/a0528/final.pdf [https://perma.cc/X8QA-CA3E] (outlining use of direct capital investment in jails in exchange for guaranteed bedspace); Brian Sonenstein, *Since 1996, US Agriculture Department Gave over $277 Million to Fund Local Jail Construction*, SHADOWPROOF (June 6, 2018), https://shadowproof.com/2018/06/06/277-million-usda-jail-construction-boom [https://perma.cc/49EB-UR3L] ("USDA-backed jail projects called for building extra bedspace specifically to generate revenue."); Grace Reader, *Mesa County Awarded $1.5 Million Grant for Jail Expansion*, KJCT8 (Apr. 11, 2019), https://www.kjct8.com/content/news/Mesa-County-awarded-15-million-grant-for-jail-expansion-508471101.html [https://perma.cc/6LS4-A7Y5].

130. Press Release, Michelle Jacobs, U.S. Dep't of Agric., USDA Celebrates Completion of Putnam County Jail Expansion (Jan. 8, 2016), https://www.rd.usda.gov/newsroom/news-release/usda-celebrates-completion-putnam-county-jail-expansion [https://perma.cc/V77U-847Q].

Another federally funded jail construction project, one of the local sheriff's "top priorities," was celebrated as a "most welcome government gesture for our taxpayers."[131]

C. Contracting

Bedspace contracting—with cities, other counties, the state,[132] and the federal government—also plays an important role in decisions by sheriffs and county commissioners about how much carceral capacity to make available. As discussed above, interjurisdictional bedspace sharing has increased significantly over time.[133] Though there is also an interstate "trade" in convicted prisoners between departments of corrections, its scale pales in comparison to the jail bedspace market: while roughly one-fifth of jail detainees are held for another jurisdiction, only about one-hundredth of state prisoners are held out of state.[134] The contracts that govern jails' cooperative detention arrangements are sought, negotiated, and signed by commissioners and sheriffs.[135] These intergovernmental arrangements not only fill beds but also support and even drive jail construction.[136] Contract revenue

131. Press Release, U.S. Congressman Henry Cuellar, New Jim Hogg County Jail Receives over $5 Million in Federal Funds from the USDA (Feb. 8, 2010), https://cuellar.house.gov/news/documentsingle.aspx?DocumentID=169762 [https://perma.cc/KVN2-UYB7].

132. For a fifty-state survey of the legal and fiscal arrangements by which state prisoners are housed in county jails, see Brian Albert, *State Prisoners in County Jails*, NAT'L ASS'N OF CNTYS. 6–15 (Feb. 2010), https://www.naco.org/sites/default/files/documents/State%20Prisoners%20in%20County%20Jails%20Updated.pdf [https://perma.cc/9PK5-FZMV].

133. *See supra* notes 38–39 and accompanying text (between 1978 and 2013, the percentage of jails holding detainees for other jurisdictions almost doubled, and the percentage of jail detainees being held for other jurisdictions increased by one and a half times).

134. *See* Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1819–20, 1879–82 (2020) (explaining that the prisoner trade is primarily concentrated in a few jurisdictions). The sheer multiplicity of competitive participants in the jail bedspace market probably helps to explain its more significant growth.

135. *See, e.g.*, *Intergovernmental Agreement Between Hall County, Georgia and City of Flowery Branch Regarding Housing of City Inmates at the Hall County Jail*, ST. OF GA., CNTY. OF HALL (Mar. 28, 2019), https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/338385/Jail_Contract.pdf [https://perma.cc/CQ68-ULEF] (providing for signatures by the chairman of the board of commissioners and the sheriff, among others).

136. Jacob Kang-Brown & Jack Norton, *America's Hidden Gulag*, N.Y. REV. (Feb. 19, 2021), https://www.nybooks.com/daily/2021/02/19/americas-hidden-gulag [https://perma.cc/TG4C-M5G7] ("[The] relationship between federal agencies and county jails has encouraged jail expansion, and . . . rewarded anti-immigrant policy among sheriffs and county administrators.").

can also help to prevent jails from closing when sentencing[137] and bail[138] policy reforms have sapped local demand.[139] At the same time contracting spurs jail growth based on economic rather than public safety needs, it obscures it; because per diem checks and detainee transport vans are crossing jurisdictional lines, contracting delocalizes and therefore undermines accountability.

Counties regularly overbuild their new jails, with the expectation that the detention facilities will "pay for themselves," in whole or in part, through revenue received for holding detainees for other jurisdictions.[140] The relative scale of this growth can be enormous.[141] Asotin County, Washington, has a jail built to house sixteen people; it currently houses three times that many. Based in part on the promise of rent from neighboring counties, the county plans to

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137. *See* Bryn Stole, *In North Louisiana, Sheriff and Private Prison Operator Trade Prisoners for ICE Detainees*, TIMES-PICAYUNE (Oct. 21, 2019), https://www.nola.com/news/article_9927b374-f388-11e9-8eca-43ec3c782d9f.htm [https://perma.cc/SFQ2-RGTH] ("Louisiana's Department of Corrections, which has long paid sheriffs to house state prisoners, is holding a dwindling number of inmates" and the resulting "availability of cheap jail beds in rural lockups" has led to a boom in immigration detention).

138. *See* Joleen Ferris, *Bail Reform Guts Local Jail Populations as Herkimer County Seeks Revenue Options*, WKTV (Jan. 2, 2020), https://www.wktv.com/content/news/Bail-reform-guts-local-jail-populations-Herkimer-County-seeks-revenue-options—566665181.html [https://perma.cc/7TZN-SSV3] (following bail reform, "everybody's gonna be fighting for that same [federal] inmate," meaning that the revenue generated will likely fall).

139. A new contract can also replace revenue lost when an existing one is terminated. *See, e.g.*, Michaelangelo Conte, *Deal to Bring Mercer Inmates to Hudson County Jail Could Spell End of ICE Contract, Freeholder Says*, NJ.COM (Sept. 19, 2019), https://www.nj.com/hudson/2019/09/deal-to-bring-mercer-inmates-to-hudson-county-jail-could-spell-end-of-ice-contract-freeholder-says.html [https://perma.cc/WC46-LW3Z] (officials saw housing neighboring county's detainees as "exit strategy" from "lucrative, but controversial" ICE contract to help jail "remain . . . viable" despite bail reform); *see also* Kevin Shea, *Plan to Jail Mercer Inmates in Hudson County Back on the Front Burner, with Touted Savings of $12M a Year*, NJ.COM (Sept. 12, 2019), https://www.nj.com/mercer/2019/09/plan-to-jail-mercer-inmates-in-hudson-county-back-on-the-front-burner-with-touted-savings-of-12m-a-year.html [https://perma.cc/B4DC-9MNF] (noting resistance from the correctional officers' union).

140. *See Taxable Jail Addition Revenue Bonds, Series 2010*, MERCER CNTY. PUB. BLDG COMM'N 8 (2010), https://emma.msrb.org/EP447090-EP349883-EP746744.pdf [https://perma.cc/R23S-YBWH] (county built "substantially more" beds than currently required and informed investors it would seek an increased per diem rate for federal detainees, which county officials believe would make the addition self-supporting).

141. *See* Tom Spigolon, *Sheriff Says Voters Approved Jail Paulding Needed 'to Continue to Grow*,*'* MARIETTA DAILY J. (Nov. 11, 2016), https://www.mdjonline.com/neighbor_newspapers/west_georgia/sheriff-says-voters-approved-jail-paulding-needed-to-continue-to/article_e3549568-a82f-11e6-a0ba-cfda679ca51f.html [https://perma.cc/28JS-MPKB] (explaining that the sheriff promised voters that tripling the jail's size would "keep them safe for years to come," and noting that the existing jail initially produced rental revenue until a "rapidly growing inmate population" left it routinely overcrowded).

spend $13.7 million in sales tax revenue to build a new jail with capacity for 150 (readily expandable to 256).[142]

Sometimes county officials anticipate that the excess bedspace will provide "room to grow" for the county to house its own detainees down the road.[143] Others justify their decision in purely fiscal terms: they hope that detention will create a surplus.[144] In Greene County, North Carolina, for example, a new jail opened in January 2010, more than quadrupling the county's bedspace. As its website proudly reports, this allows the county to rent beds to the State Misdemeanor Confinement Program as well as to neighboring counties; as a result, the jail "generate[s] a revenue."[145] In Utah, the state rents county jail beds to house prison "overflow": "Originally, this was a small-scale operation using temporarily unoccupied beds in the counties. In recent years, counties have built many more beds than they will need in the foreseeable future so they rent them to the State . . . ."[146]

An investigation into conditions at the Cuyahoga County, Ohio, jail in 2018 found that despite the deaths of seven detainees in four months, "the chief conversation by county officials about the jail was about how much revenue could result from a game-changing consolidation" of city jails into the county system.[147] A county administrator advised other officials that the resulting revenue might be sufficient, if enough beds could be filled, to "shore up the county

142. Marty Trillhaase, Editorial, *Waiting for the Perfect Jail Plan Is No Plan at All*, LEWISTON TRIB. (Oct. 27, 2019), https://lmtribune.com/opinion/waiting-for-the-perfect-jail-plan-is-no-plan-at/article_4d397775-87ca-5faa-8506-0c56f10c4206.html [https://perma.cc/6Z4G-LCTR].

143. *See, e.g.*, Nathan Brown, *New Jerome Jail Has Room to Grow*, MAGICVALLEY.COM (July 9, 2016), https://magicvalley.com/news/local/govt-and-politics/new-jerome-jail-has-room-to-grow/article_a0bb50c1-a8f8-55f4-91aa-9383d8bc6cd6.html [https://perma.cc/T5WX-2ZWU].

144. *See, e.g.*, Jack Norton, *Why Are There So Many People in Jail in Scranton, PA?*, VERA INST. OF JUST. (Jan. 4, 2017), https://www.vera.org/in-our-backyards-stories/why-are-there-so-many-people-in-jail-in-scranton-pa [https://perma.cc/DJK9-7B3E] (explaining that the jail renovation was done to "take advantage of potential influxes of state and federal prisoners" called "paying customers"); Christina Goldbaum, *$200 Million, Jailed Immigrants and a Democratic Bastion Under Fire*, N.Y. TIMES (Oct. 14, 2019), https://www.nytimes.com/2019/10/14/nyregion/essex-county-jail-immigrants.html [https://perma.cc/BX4L-ARBS] (reporting that a county executive justified the decision to rent jail beds to ICE, saying, "[g]overnment cannot fund itself entirely on property taxes").

145. *Jail*, GREENE CNTY., https://greenecountync.gov/departments/sheriffs-office/jail (last visited Mar. 13, 2021) [https://perma.cc/4M3V-WPZE].

146. UTAH DEP'T OF CORR., *supra* note 112, at 3. For a similar phenomenon in Kentucky, see Jack Norton & Judah Schept, *Keeping the Lights On*, VERA INST. OF JUST. (Mar. 4, 2019), https://www.vera.org/in-our-backyards-stories/keeping-the-lights-on [https://perma.cc/VD6E-JBAA].

147. Courtney Astolfi & Adam Ferrise, *What's the Story Behind How the Cuyahoga County Jail Became One of the Worst in the Nation? A Drive for Money, a Cleveland.com Investigation Finds*, CLEVELAND.COM (Nov. 23, 2018), https://www.cleveland.com/metro/2018/11/whats-the-story-behind-how-the-cuyahoga-county-jail-became-one-of-the-worst-in-the-nation-a-drive-for-money-a-clevelandcom-investigation-finds.html [https://perma.cc/V4SG-4328].

budget," leaving tax revenue allocated to jail operations available for other purposes.[148] A jail administrator presented the county council with a forecast, telling it that "[a]s long as we keep the beds filled up, I think it's a very safe projection."[149]

Contracting incentives can induce a perpetual cycle of jail growth. Initially, contracting out a small number of detainees to deal with marginal or occasional overcrowding makes reasonable financial sense, especially given that jail expansion is difficult to do incrementally. Eventually, as jail populations grow, long-term boarding of a large number of detainees becomes expensive and creates pressure to expand the local jail to bring them back in house.[150] When the expansion eventually occurs, there is a financial incentive to overbuild and contract out that additional space in order to reap the short-term revenue available from other jurisdictions and have bedspace available for purportedly inevitable growth.[151]

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148. *Id.*

149. *Id.* It is no coincidence that county officials other than the sheriff are featured most prominently in this story; Cuyahoga County is a rare jurisdiction with an appointed sheriff.

150. *See* Nathan W. Bowe, *No Tax Hikes Needed for New County Jail*, DL-ONLINE (Oct. 23, 2018), https://www.dl-online.com/news/4517907-no-tax-hikes-needed-new-county-jail [https://perma.cc/DTT2-YFCT] (reporting that bond for constructing new jail will be serviced largely with "$600,000 yearly savings from not boarding inmates in outside jails"); Linda Simmons, *Jail Overcrowding: Greene County Leaders Ask for Assistance from Another County*, KY3 (Nov. 14, 2019), https://www.ky3.com/content/news/JAIL-OVERCROWDING-Greene-County-leaders-ask-for-assistance-from-another-county-564925882.html [https://perma.cc/WTL6-KXF8] (county building new jail to relieve "logistics mess" of transporting detainees "all around Missouri"). Contracting expenses can rise precipitously when a receiving jurisdiction decides that it can get a better deal. *See* Jacob Scholl, *Weber County Jail Will No Longer House State Prison Inmates, Will Continue to Hold Federal Detainees*, STANDARD-EXAM'R (June 23, 2019), https://www.standard.net/police-fire/weber-county-jail-will-no-longer-house-state-prison-inmates/article_38910266-96e9-5c0d-a8bb-a46b5c7a0b4d.html [https://perma.cc/G79V-EBYV] (county declined to renew contract with state prison system in favor of federal contract with higher reimbursement rate). Sheriffs also consider the availability of detainee labor in determining which contracts are most attractive. *See* Jacob Dick, *Daviess County Jail Questions Federal Inmates Increase*, MESSENGER INQUIRER (Aug. 7, 2018), https://www.kentuckynewera.com/news/ap/article_1200435c-99e3-11e8-b074-d71c864ad0e7.html [https://perma.cc/4KX8-C6PH] (reporting that county officials prefer to house state prisoners because they can be required to "do our laundry and cook the food" and without them, "it would be hard to function"); *see also* Stacey Cameron, *Sheriff's Controversial Remarks About "Good" Inmates Partly Motivated by Money*, KSLA NEWS 12 (Oct. 19, 2017), https://www.ksla.com/story/36635591/sheriffs-controversial-remarks-about-good-inmates-partly-motivated-by-money [https://perma.cc/7BQ2-5DDD] (explaining that the sheriff views state prisoners as a "necessary evil to keep the lights on" and appreciates that they can "change the oil in our cars" for free).

151. *2008 General Obligation Jail Bonds*, CNTY. OF SOMERSET, ME. 22 (2008), https://emma.msrb.org/MS271105-MS267581-MD529375.pdf [https://perma.cc/9EYC-K9E3] (noting that jail size was doubled to "accommodate" projected growth while the "business plan" involved leasing available bedspace to other counties and actively pursuing federal detention contracts); Isabel Albritton, *Lincoln Parish Works to Relieve Inmate Overflow Through Jail Expansion*, MYARKLAMISS.COM, https://www.myarklamiss.com/news/local-news/lincoln-parish-works-to-relieve-inmate-overflow-through-jail-expansion (last updated Nov. 1, 2019) [https://perma.cc/A9AA-7GVH] (explaining that the sheriff was pursuing expansion funded by contracting

Vanderburgh County, Indiana, is a good example. After the state shifted prisoners serving sentences for low-level felonies from state prisons to county jails in 2014, the jail's long-standing "population crunch" worsened.[152] Meanwhile, the county sent its detainees to be housed at other counties' jails; unless it expanded its own, the sheriff warned, costs would "balloon."[153] At a hearing to discuss how to fund a jail expansion, county officials heard testimony from a federal district judge, who was invited to explain—in a striking display of carceral boosterism—that a federal detention contract could bring much-needed revenue. He sold his proposal enthusiastically, pointing out that a neighboring county "has got a heck of a deal going" and that "we could fill 50 beds here tomorrow and possibly more than that," given the growing number of federal pretrial detainees.[154] The County Council president found this presentation "encouraging[,] because it tells us we could generate some positive cash flow."[155]

The sheriff of Bulloch County, Georgia, made the connection between detention contract revenue and persistent jail growth even more transparent when he advanced the following proposal:

> Since the last addition to the jail, the Sheriff's Office has raised over $7.5 million in revenue by holding federal prisoners . . . . In the future . . . I would suggest building at least one high-security housing unit with 100 beds dedicated to holding federal prisoners. This would pay for itself as well as an additional pod. I would also suggest that in the future, any monies received from the U.S. Marshals for housing prisoners be earmarked and placed in a separate fund specifically for future jail expansion.[156]

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revenue so that the cost of "overflow" detainees would no longer require a "big dip" into the jail's budget); Debbie Rogers, *Sheriff Asks for $9 Million Jail Expansion to Handle Female Population*, SENTINEL-TRIB. (June 4, 2019), https://www.sent-trib.com/news/sheriff-asks-for-million-jail-expansion-to-handle-female-population/article_cae7ffde-86f7-11e9-8109-3310acfa06de.html [https://perma.cc/LXM8-RB8X] (reporting that the sheriff argued the expansion "could pay for itself over a few years," given expected rental revenue); Howard Greninger, *Jail Size, Cost Remain Issues as Vote Looms*, TRIB.-STAR (Aug. 11, 2018), https://www.tribstar.com/news/local_news/jail-size-cost-remain-issues-as-vote-looms/article_abe35839-1f5c-55c1-a49f-dcb0e7ca94a7.html [https://perma.cc/FL2M-ZBBE] (noting that the sheriff argued that "vision" and "foresight" required planning a jail expansion "much beyond our immediate need," and suggested that if the jail "initially" had excess space, it should house federal prisoners).

152. John T. Martin, *Meeting Vanderburgh Jail Long-Term Needs Will Take 750 Beds, Consultant Says*, EVANSVILLE COURIER & PRESS (May 14, 2019), https://www.courierpress.com/story/news/2019/05/14/consultant-vanderburgh-jails-long-term-need-750-more-beds/3671518002 [https://perma.cc/U6E8-ASYR]. The county has also been losing money on some of its beds.

153. *Id.*

154. John T. Martin, *Richard Young: Federal Inmates Could Help Fund Vanderburgh Jail Expansion*, EVANSVILLE COURIER & PRESS (May 30, 2019), https://www.courierpress.com/story/news/local/2019/05/30/federal-inmate-reimbursements-could-help-fund-vanderburgh-jail-expansion-says-richard-young/1284724001 [https://perma.cc/QL5R-K9ZA].

155. *Id.*

156. Holli Deal Saxon, *Sheriff: Jail Overcrowding Is Urgent*, STATESBORO HERALD, https://www.statesboroherald.com/local/sheriff-jail-overcrowding-urgent (last updated Sept. 23, 2019) [https://perma.cc/B5TN-FQ3C].

Frequently, however, the two primary benefits of jail expansion identified by officials who build bedspace to contract out—revenue and room to grow—do not materialize. In some cases, the demand for beds or the resulting revenue is lower than expected; sometimes, the shortfalls are so significant that jails are forced to close.[157] As one Washington jail official put it, there can be considerable competition for the commodity of people to detain: "There is a lot of pressure on the market because jurisdictions are struggling," he said, observing that "[t]here are fewer inmates out there and more jurisdictions selling."[158]

More commonly, expanded jails offer no "breathing room" because they are actually "full the day they open[ ]."[159] In the 216 county jails constructed between 1999 and 2005, "a time of declining crime rates," researchers found that the median jail population rose significantly after construction was completed.[160] This is due in part to

157. *See, e.g.*, Alissa Zhu & Jimmie E. Gates, *Issaquena County Regional Jail to Close Due to 'Financial Trouble.' Sheriff Wants to Keep It Open.*, MISS. CLARION LEDGER (Dec. 2, 2019), https://www.clarionledger.com/story/news/2019/12/02/issaquena-county-mississippi-jail-close-due-financial-trouble-sheriff-wants-keep-open/2590894001 [https://perma.cc/DL4S-KNMD]; Amanda Albright & Jordyn Holman, *A Kentucky County Is an Economic Prisoner of Its Own Jail*, BLOOMBERG (Mar. 8, 2017), https://www.bloomberg.com/news/articles/2017-03-08/kentucky-county-flirts-with-bankruptcy-as-jail-holds-it-prisoner [https://perma.cc/KR2Z-V3CJ]. Closed jail facilities are expensive to repurpose, and even to demolish. *See, e.g.*, Kris Maher, *To Help Revive Downtown, Detroit Looks Beyond a Failed Jail*, WALL ST. J. (Oct. 30, 2019), https://www.wsj.com/articles/to-help-revive-downtown-detroit-looks-beyond-a-failed-jail-11572427802 [https://perma.cc/9V6M-DLKK]; Rebecca Ellis, *Despite HUD Visit, Wapato Jail's Future Still Unclear*, OR. PUB. BROAD. (Dec. 3, 2019), https://www.opb.org/news/article/wapato-jail-homeless-hud-future-uncertain [https://perma.cc/WL5Q-LKRV]. At times, state officials simply fail to pay for bedspace they use in county jails; this appears to be a problem in Missouri. *See* NICOLE GALLOWAY, MO. STATE AUDITOR, REPORT NO. 2020-130: DEPARTMENT OF CORRECTIONS COUNTY REIMBURSEMENT PROGRAM 14–15 (2020), https://app.auditor.mo.gov/AuditReports/ViewReport.aspx?report=2020130 [https://perma.cc/KQ45-LZ7T] (showing that the Department of Corrections lacks appropriated funds sufficient to reimburse county jails for detaining state prisoners); Blake Sammann, *Missouri Jail Debt Could Force Sheriff Deputy Layoffs*, WGEM (Nov. 22, 2019), https://wgem.com/2019/11/22/missouri-jail-debt-could-force-sheriff-deputy-layoffs [https://perma.cc/Q8BV-PUJG] (reporting that sheriff's offices might "have no choice but to layoff deputies if the state doesn't reimburse them for hundreds of thousands of dollars" owed for housing state prisoners).

158. David Lester, *'Contract Inmates' Leaving Yakima County Jail*, SEATTLE TIMES (Jan. 9, 2011), https://www.seattletimes.com/seattle-news/contract-inmates-leaving-yakima-county-jail [https://perma.cc/C4AS-3SE9]. Additionally, opportunities in the bedspace market can be compromised by legal reforms that prohibit interjurisdictional transfers and limit the number of "legally available inmates." *Taxable Project Revenue Bonds (Juvenile Detention Facility Project), Series 2012*, GARZA CNTY. PUB. FACILITY CORP. 4 (2012), https://emma.msrb.org/EP834700-EP645988-EP1047603.pdf [https://perma.cc/3DKT-PFK4].

159. Michael Lang, *Is a New Jail on the Horizon for County?*, VIDETTE (Nov. 21, 2019), https://www.thevidette.com/news/is-a-new-jail-on-the-horizon-for-county [https://perma.cc/JE3N-V65P]. The way a 1999 *Denver Post* article expressed this is illustrative in its logical incoherence: "The 1990s trend of jails filling up much quicker than projected is expected to continue into the next decade . . . ." Cindy Brovsky, *Counties Race to Build More Jails*, DENVER POST (Mar. 21, 1999), https://extras.denverpost.com/news/jail0321.htm [https://perma.cc/NL9R-HJM4].

160. MAI, ET AL., *supra* note 19, at 27.

financial pressure; as one official put it, beds built to allow for future demographic growth are immediately filled because "they get paid for heads on beds."[161] Moreover, bedspace creates a vacuum for officials to fill. As will be discussed in Part III, constraints on jail bedspace can induce (or even empower) sheriffs and other decisionmakers in the criminal legal system to make more arrests and release fewer people.[162]

The availability of contract revenue is used to sell jail construction projects not only to other county officials and to voters but also to purchasers of municipal bonds, to whom revenue is often promised in repayment.[163] A report by the Utah Department of Corrections on its detention "partnership" with counties contends that contracts to house state prisoners provide a necessary "infusion of funding" to pay off construction bonds.[164] Even when detention contract revenues are not directly pledged to debt service, they are often put to that purpose.[165] In some cases, in fact, revenue from a past jail construction project is used to repay the debt incurred in building the next one.[166] Jail construction motivated by market opportunity rather than the demands of local public safety is self-propagating.

161. Editorial Board, Editorial, *On Jail, Stick to the Facts*, ASHLAND TIDINGS (Nov. 22, 2019), https://ashlandtidings.com/opinion/editorial/on-jail-stick-to-the-facts [https://perma.cc/HSJ5-LCKZ].

162. Decisionmakers in the immigration enforcement system are likewise constrained by the (un)availability of detention bedspace. *See* PATRISIA MACÍAS-ROJAS, FROM DEPORTATION TO PRISON: THE POLITICS OF IMMIGRATION ENFORCEMENT IN POST-CIVIL RIGHTS AMERICA 40–76 (2016).

163. *See, e.g.*, Winslow, *supra* note 68 (noting that revenue from housing detainees would help repay the bond debt); *City Justice Center Leasehold Revenue Refunding Bonds, Series 2009*, ST. LOUIS MUN. FIN. CORP. 8–9 (2009), https://emma.msrb.org/EP316478-EP26108-EP648121.pdf [https://perma.cc/4J7C-WYNL] (discussing repayment in part via revenues derived from boarding state prisoners).

164. UTAH DEP'T OF CORR., *supra* note 112, at 3.

165. *See, e.g.*, *Certificates of Participation (1997 Central Jail Refunding)*, CNTY. OF SAN DIEGO 4 (1997), https://emma.msrb.org/MS133027-MS108335-MD209618.pdf [https://perma.cc/Q74D-KDYT]; Bianca Reyes, *Clinton County Jail to Start Housing Some Inmates from Scott County*, WQAD, https://wqad.com/2019/12/03/clinton-county-jail-to-start-housing-some-inmates-from-scott-county (last updated Dec. 3, 2019) [https://perma.cc/89DA-PYFD] (reporting that the sheriff planned to take revenue from the detention contract and "apply it to the bond referendum [to] save the county taxpayers" money).

166. For example, Bent County, Colorado, used revenue from a private prison-building project it undertook with Corrections Corporation of America to pay back investors in its subsequent jail construction project. *Certificates of Participation (Jail Facility and County Project), Series 1998*, BENT CNTY., COLO. 7 (1998), https://emma.msrb.org/MS152592-MS127900-MD247921.pdf [https://perma.cc/Y3X3-VN6B]. *Cf.* GILMORE, *supra* note 11, at 164 (detailing how, in Corcoran, California, revenue from an initial prison construction project was used to service a loan to build a second prison).

D. If You Build It, They Will Come[167]

Sheriffs' and commissioners' decisions to increase jail capacity have profound ramifications across the criminal legal system and invite—indeed, enable—many of the mostly roundly criticized forms and uses of incarceration.

The availability of jail bedspace allows for overpolicing and overprosecution of low-level (particularly "public order") offenses; limits on bedspace, in turn, can limit these excesses. As one judge in Drew County, Arkansas, put it, he is "constrained from locking people up for misdemeanor offenses, such as on failure-to-appear warrants, because of a lack of space."[168] A growing body of scholarship on misdemeanor adjudication explains that "process costs" of pretrial detention induce guilty pleas. The fact that defendants are likely to spend more time in jail if they contest charges than if they plead guilty tends to "distort plea bargaining so much that the substantive law behind the bargained-for conviction becomes irrelevant."[169]

Because most cities, especially outside metropolitan centers, lack their own jails, most municipal courts are totally reliant on county jails; without their bedspace, the threat of jail would evaporate.[170] Constraints can therefore even prompt decriminalization of some offenses, or at least their recategorization by municipalities as citable offenses.[171] For example, officials in the city of Tuscaloosa, Alabama,

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167. Vera researchers first used this apt turn of phrase, from the classic movie *Field of Dreams*, to describe dynamics of jail expansion. Jack Norton & Jacob Kang-Brown, *If You Build It: How the Federal Government Fuels Rural Jail Expansion*, VERA INST. OF JUST. (Jan. 10, 2020), https://www.vera.org/in-our-backyards-stories/if-you-build-it [https://perma.cc/5PSQ-4PTY] (describing federal incentives for jail building).

168. John Moritz, *Arkansas Counties Moving Ahead on Jail Plan*, NW. ARK. DEMOCRAT-GAZETTE (Nov. 28, 2019), https://www.nwaonline.com/news/2019/nov/28/counties-moving-ahead-jail-plan [https://perma.cc/69G2-H7C2].

169. Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 269–70 (2015); *see also* Kohler-Hausmann, *Managerial Justice*, *supra* note 10, at 663, 670 (quoting a public defender who says that for clients going through the plea process, "[t]he main thing is to get out of jail"); Natapoff, *Misdemeanors*, *supra* note 10, at 1347 ("For those with children, jobs, or other obligations, the deprivations inflicted by a month in jail can be worse punishment than they would face if they were convicted at trial.").

170. *Cf.* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 1037 (2021) (discussing the role of jail both as penal sentence and as sanction for nonpayment of fines).

171. *See* Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 738–40 (describing how "localities vary tremendously" in categorizing low-level offenses); Alexandra Natapoff, *Misdemeanors*, *in* 1 REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE, *supra* note 97, at 73, 75 ("States, counties, and municipalities control every aspect of the petty-offense system, [including] defining and decriminalizing offenses . . . ."). There is, however, a pernicious flipside: decriminalization that falls short of legalization "eliminates the usual externalities that naturally constrain penal expansion" while continuing to impose significant harms, especially financial ones, on criminal defendants. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1100–01 (2015).

pushed to reclassify possession of a small quantity of marijuana as a citable offense so that "bedspace in the Tuscaloosa County Jail . . . could be used toward more serious matters."[172] One state senator supported the idea in light of "our overcrowdedness."[173] The availability of jail bedspace greases the wheels of misdemeanor "justice."[174]

Empty jail bedspace also makes possible a variety of other coercive processes beyond misdemeanor pleas. It enables the carceral sanctioning of technical parole and probation violations, including failures to satisfy work requirements and pay fines and fees; the threat of jail makes possible an entire system of surveillance of and resource and labor extraction from people convicted of crimes.[175] Without available jail beds, indigent parents cannot be compelled through civil contempt to pay child support that they are unable to afford.[176]

In jurisdictions where a significant proportion of state prisoners are held in local jails, the supply of bedspace affects felony sentencing as well, preventing reconsideration of lengthy sentences even when admittedly warranted. In Louisiana, with the promise of generous reimbursement, sheriffs expanded their jails to house prisoners serving long sentences. As the former general counsel for the state Department of Corrections put it, "If the sheriffs hadn't built those extra spaces, we'd either have to go to the Legislature and say, 'Give us more money,' or we'd have to reduce the sentences, make it easier to get parole and commutation—and get rid of people who shouldn't be here."[177]

Constraints on county jail availability even alter the behavior of federal law enforcement officers, prosecutors, and judges. For example,

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172. Jason Morton, *Tuscaloosa Seeks Citation, Not Jail, for Minor Marijuana Offenders*, TUSCALOOSA NEWS (Dec. 7, 2017), https://www.tuscaloosanews.com/news/20171207/tuscaloosa-seeks-citation-not-jail-for-minor-marijuana-offenders [https://perma.cc/D38W-WHEG].

173. *Id.*

174. Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1677–78 (2019) (book review) ("[E]ven managerial justice deploys the punitive pains and burdens of incarceration in a wide variety of ways.").

175. *See, e.g.*, *Karnes County Public Facility Corporation Lease Revenue Bonds, Series 1995*, KARNES CNTY. PUB. FACILITY CORP. app. A at ii, 18, app. C at 9–10 (1995), https://emma.msrb.org/MS108504-MS83812-MD162925.pdf [https://perma.cc/LGU9-4FLY] (proposed jail expansion would permit incarceration of tens of thousands of people for parole violations and failure to pay child support); Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 317–19 (2020) (discussing community supervision and labor programs as conditions of incarceration or probation).

176. *See* KARNES CNTY. PUB. FACILITY CORP., *supra* note 175, at app. A at ii, 18, app. C at 9–10; Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 106 (2008) ("Despite their economic limitations, indigent child support obligors often end up accumulating thousands of dollars in arrearages, making them prime candidates for contempt proceedings.").

177. Cindy Chang, *Louisiana Is the World's Prison Capital*, TIMES-PICAYUNE (May 13, 2012), https://www.nola.com/news/crime_police/article_8feef59a-1196-5988-9128-1e8e7c9aefda.html [https://perma.cc/V9NF-UHY4].

according to a market research report, the lack of "adequate bed resources" for rent by the Marshals Service in jails in the Southern District of California contributed to the adoption of a policy requiring the Marshals Service to obtain permission from the U.S. Attorney's Office prior to making an arrest. In practice, this meant that people charged with federal misdemeanors in the Southern District—primarily border-crossing offenses—were not incarcerated, unlike in other districts across the country.[178] ICE, too, depends on the availability of local carceral infrastructure. The agency's collaboration with county jails accounts for over a third of its interior (nonborder) arrests.[179] In a number of jurisdictions, sheriffs have justified their refusal to honor immigration detainers and comply with administrative warrants in terms of limited jail bedspace.[180] Conversely, jail expansion helps to fuel our nation's deportation machine.

When sheriffs and commissioners opt to increase jail bedspace, their decisions not only cost taxpayers a tremendous amount of money; they also create carceral vacuums for diverse institutional users of bedspace to fill with people who admittedly "shouldn't be [t]here."[181] To fully understand their responsibility for incarceration's admitted excesses, it is critical to appreciate that these same sheriffs also have significant power to manage the use of available bedspace. Part III tells this chapter of the story.

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178. *Imperial Regional Detention Facility Project*, INDUS. DEV. AUTH. OF THE CNTY. OF LA PAZ, ARIZ. app. C at 8–9 (2013), https://emma.msrb.org/ER682079-ER528172-ER930781.pdf [https://perma.cc/KG6T-E4Q5] (noting that existing population levels are "somewhat artificial," and that the "priority system for incarceration" is a "reflection of space availability rather than the numbers of individuals who should be detained"); *see also id.* at app. C at 11 ("[d]etentions as a percentage of prosecutions declined from 91% to 48% between 2005 and 2012," in part due to "availability of custody beds"). As Ingrid Eagly has explained, the U.S. Attorney in the Southern District of California under W. Bush opposed mass processing of illegal entry cases and the post-arrest detention that would accompany it, and this position persisted under Obama. Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 2004–07, 2005 n.191 (2020). But even once the Trump Administration implemented Operation Streamline, detainees charged with illegal entry were forced to "sleep[ ] on the crowded floors of Border Patrol stations" rather than being held in Marshals Service custody to "relieve overcrowding in the federal jail system." Max Rivlin-Nadler, *California Border District Reverses Course on a Key Component of Operation Streamline*, INTERCEPT (Oct. 5, 2018), https://theintercept.com/2018/10/05/operation-streamline-san-diego-california-immigration [https://perma.cc/XK38-NSWB].

179. *See Immigration and Customs Enforcement Arrests*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SYRACUSE UNIV., https://trac.syr.edu/phptools/immigration/apprehend [https://perma.cc/F2W2-XHH8] (providing data through May 2018; "Apprehension Method / Agency" is "CAP Local Incarceration").

180. *See* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 50 B.C. L. REV. 1703, 1755–56 & n.263 (2018); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 291–94 (2016) (discussing local fiscal constraints on enforcement of federal immigration policy).

181. Chang, *supra* note 177.

III. JAILED BODIES: THE DEMAND SIDE

A wide array of actors together determine how many people are in jails. One thinks first of police making arrests, prosecutors making charging decisions, and judges setting bail. But the sheriffs who run jails also have underappreciated control over the demand for jail bedspace. They can and do increase or limit the number of people they confine in several ways, some of which become legally permissible or politically feasible only when their jails are full; crucially, sheriffs are themselves largely responsible for setting this threshold in deciding whether or not to expand their jails. This Part narrows in on sheriffs not to suggest that they are the sole determinants of jail population levels—they certainly are not—but because their combination of powers is unique. A sheriff's decision to build bedspace must be viewed in context, as a choice: he could have done something else.[182]

First, sheriffs *are* the police responsible for a substantial percentage of arrests, especially in rural areas. As a result, they have discretion to arrest more or fewer people by (de)prioritizing certain types of enforcement or by issuing or declining to issue citations or summonses in lieu of arrest. Second, they have limited but significant authority as jailers to release people from or retain them in custody. Though the scope of their power varies by state, they can effectively override the decisions of other actors in the local criminal legal system, including the decision of a municipal police officer to make a custodial arrest, the decision of a prosecutor to request and a judge to impose bail, and the decision of a court to order a particular sentence following conviction.[183] Third, they can decide what political use to make of

182. The baseline claim advanced here is a simple one: on the highway of local incarceration, sheriffs control not only the number of lanes, but also some major on- and off-ramps. As a result, however, they also have considerable discretion over *which* people get entangled, and to what *degree*, in the criminal legal system's dragnet. More empirical research on these fronts is sorely needed. For some evidence of the effects of race on policing by sheriffs, see *infra* notes 368–370 and accompanying text. There are important reasons, especially of racial and economic justice, to prefer that the potential targets of criminal prosecution exit the carceral process earlier rather than later; that is to say, if a person ought not be jailed for public urination, far better that he not be arrested at all than that he be released from jail with an ankle monitor. *See generally* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS (2020) (arguing that "alternatives" to prison, including ostensibly progressive ones, replicate carceral control and continue to impose grossly disproportionate burdens on people of color and poor communities).

183. On some occasions, sheriffs even override the decisions of other actors to release or retain detainees despite lacking the legal authority to do so. *See, e.g.*, Williams v. Dart, 967 F.3d 625, 630 (7th Cir. 2020) (plaintiffs alleged that sheriff of Cook County, Illinois, disagreed with revisions to pretrial release policy and so detained individuals despite payment of bail; although he gave lip service to judicial authority in describing his "administrative review," involving "refer[ral] . . . back to the court for further evaluation," actual practice was to do "nothing, for days and even weeks"); Connor Sheets, *These Sheriffs Release Sick Inmates to Avoid Paying Their Hospital Bills*,

bedspace scarcity: push for expansion or outsourcing, or rely on it to induce police chiefs, district attorneys, judges, and others to exercise their respective authority to reduce the number of people incarcerated.

A. Arrest Powers: Sheriffs as Law Enforcement Chiefs

In most of the country,[184] sheriffs are the only law enforcement officials who simultaneously supervise large-scale policing and detention operations.[185] Although city dwellers may not realize it, sheriffs' deputies are responsible for a significant proportion of the low-level arrests made across the country. For example, in 2016, sheriffs' offices made about one-fifth of the roughly 470,000 reported nationwide arrests for possession of marijuana.[186] (Local police departments made about two-thirds, state law enforcement agencies made about one-tenth, and a variety of other law enforcement agencies made the remainder.) In less urbanized parts of the United States—and especially in truly rural areas beyond the jurisdictions of municipal

PROPUBLICA (Sept. 30, 2019), https://www.propublica.org/article/these-sheriffs-release-sick-inmates-to-avoid-paying-their-hospital-bills [https://perma.cc/H64A-STN2] (reporting that sheriffs released pretrial detainees without judicial approval to avoid liability for the expense of hospitalizations); THAD SITTON, THE TEXAS SHERIFF: LORD OF THE COUNTY LINE 3 (2006) ("There was something called a 'Decker hold.' Once it was noted beside a prisoner's name by High Sheriff Decker, it meant that no bond, no writ—virtually no power on earth—could open that prisoner's cell door until the hold was lifted." (internal quotation marks omitted)).

184. As reflected in federal arrest data, sheriffs' offices exist but engage in very limited or no policing in Delaware and Massachusetts. FBI, UNIFORM CRIME REPORTING DATA: ARRESTS BY AGE, SEX, AND RACE, SUMMARIZED YEARLY, UNITED STATES, 2016 (ICPSR 37057) (2018), https://doi.org/10.3886/ICPSR37057.v1 [https://perma.cc/3WSD-YJ35] (author's analysis); *see also* Del. Op. Att'y Gen. 12-IIB03 (2012), 2012 WL 1244473 (no statutory or common law authority to arrest); Commonwealth v. Gernich, 67 N.E. 3d 1196, 1201 (Mass. 2017) (no power to make warrantless arrest unless offense involves breach of peace in deputy's presence).

185. Their employees, too, have overlapping roles: especially in rural counties, there is often "no distinction between 'road deputies' and 'jailers.' " Falcone & Wells, *supra* note 6, at 131; *see also* Eric D. Poole & Mark R. Pogrebin, *Deputy Sheriffs as Jail Guards: A Study of Correctional Policy Orientation and Career Phases*, 15 CRIM. JUST. & BEHAV. 190, 192 (1988) (jail duty seen as "dirty work" or a "rite[ ] of passage that must be endured before [deputies'] law enforcement careers can begin"). Although some large cities have substantial jails, they are not run by police chiefs or anyone within their chains of command. The only analogous arrangements exist on the federal level. For a fascinating history of concerns about conflicts of interest between the law enforcement functions of the Department of Justice and its detention arm (latterly housed within the Bureau of Prisons), see Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 278–86 (2013).

186. FBI, UNIFORM CRIME REPORTING DATA, *supra* note 184 (author's analysis). For state-specific figures, see Appendix I. In Georgia, Idaho, Montana, North Dakota, and Wyoming, sheriffs' offices made more than a quarter of these arrests, and in Louisiana and South Carolina, they made more than a third. Sheriffs' offices made roughly the same proportions of arrests for drug possession generally.

police forces—sheriffs' offices make an even greater share of the arrests for low-level crime.[187]

Sheriffs have the discretionary authority to limit arrests made by their own deputies.[188] First, they can—indeed, must—choose how to prioritize proactive enforcement efforts.[189] Like other law enforcement officials, they have broad power to arrest even for very minor crimes.[190] A given number of deputies assigned to police low-level crime will fill jail beds much more quickly than will the same number assigned to investigate serious violent crime because investigations of marijuana possession are much less time-intensive and higher yield than investigations of murder.[191] This can have powerful ramifications for the demographic composition of those incarcerated in a sheriff's jail; a recent empirical study found that "the targeting of crime types appears to be a primary mechanism by which sheriffs alter the [racial] composition of arrests."[192] Although sheriffs may be disinclined to acknowledge that they are deprioritizing enforcement of drug or public-order laws, they publicly profess to exercise their arrest discretion in other contexts. Some promise not to enforce gun laws they feel violate the Second Amendment; others exercise their wide discretion regarding

187. It is impossible to measure this with precision using FBI Uniform Crime Reporting data. Sheriffs' offices and city police departments operate in jurisdictions with narrow geographical bounds, coded with various indicators of rurality; statewide law enforcement and other agencies do not. Comparing sheriffs' offices with local police departments is illustrative, though. Within metropolitan statistical areas, sheriffs' offices make about one-fifth as many marijuana possession arrests as do local police departments. Outside of metropolitan statistical areas, sheriffs' offices make over one-half as many. The author's analysis of Texas data shows that in 2019, sheriffs' deputies made about four times as many vehicle stops as police officers did on county roads, while police officers made about nineteen times as many vehicle stops as sheriffs' deputies did on city streets. *See Racial Profiling Reports: Law Enforcement Agency Requirements*, TEX. COMM'N ON L. ENF'T, https://www.tcole.texas.gov/content/racial-profiling-reports (last visited Mar. 13, 2021) [https://perma.cc/QQV8-LAQ9].

188. *Cf.* Falcone & Wells, *supra* note 6, at 138 (arguing that sheriffs' offices are more willing than police departments to acknowledge existence of low-level discretion).

189. *See* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* YALE L.J. F. 848, 896–99 (2019) ("Something important happens before a case gets to a prosecutor: bureaucrats decide where to look for crimes.").

190. *See* Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 153 (2020) ("[*Atwater*] permit[s] police to fill the nation's jails for offenses deemed by state legislators too petty to warrant incarceration.").

191. *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1819–21 (1998) (making this point with respect to vice crimes and street crimes more generally); Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113, 132 (2016) ("[A]rrests for serious crimes normally happen after lengthy investigations, while arrests for minor crimes happen via police officers proactively monitoring the streets and responding to visible wrongdoing.").

192. George Bulman, *Law Enforcement Leaders and the Racial Composition of Arrests*, 57 ECON. INQUIRY 1842, 1855–57 (2019).

enforcement of domestic violence or immigration laws.[193] During the COVID-19 pandemic, some have refused to enforce mask ordinances.[194]

In some states, statutes and ordinances ostensibly prohibit law enforcement officers from refraining to initiate criminal process, especially when judicial warrants are involved.[195] In practice, though, "full" enforcement is never possible.[196] Washington law, for example, imposes a mandatory duty to "make complaint of all violations" that come to a sheriff's attention,[197] and the attorney general has opined that a sheriff "cannot forego or delay making arrests because it would be costly or inconvenient for the jail to book and house more people."[198] But state court judges are unable to compel sheriffs whose jails are full to arrest or book defendants—even those for whom they have issued warrants.[199]

Second, sheriffs have the authority to instruct their deputies to issue citations (alternately called summonses or appearance tickets) in lieu of warrantless arrest in certain categories of cases.[200] In almost all states, arresting officers can cite and release arrestees for at least some

193. *See* Kerry Picket, *Sheriffs May Go to Jail to Protect Second Amendment Sanctuaries, Kentucky Congressman Says*, WASH. EXAM'R (Jan. 02, 2020), https://www.washingtonexaminer.com/news/sheriffs-may-go-to-jail-to-protect-second-amendment-sanctuaries-congressman-says [https://perma.cc/CA53-NKWK]; Emily M. Farris & Mirya R. Holman, *Public Officials and a "Private" Matter: Attitudes and Policies in the County Sheriff Office Regarding Violence Against Women*, 96 SOC. SCI. Q. 1117, 1126–28 (2015); Emily M. Farris & Mirya R. Holman, *All Politics Is Local? County Sheriffs and Localized Policies of Immigration Enforcement*, 70 POL. RSCH. Q. 142, 142, 152 (2017). On the "constitutional sheriffs" movement, whose adherents "believe that the sheriff has the final say on a law's constitutionality in his county," see Ashley Powers, *The Renegade Sheriffs*, NEW YORKER (Apr. 23, 2018), https://www.newyorker.com/magazine/2018/04/30/the-renegade-sheriffs [https://perma.cc/3K33-S426] (describing the "practice" of "getting 'unarrested' " by the sheriff of Liberty County, Florida).

194. Teo Armus, *'Don't Be a Sheep': Sheriffs Rebel Against New Statewide Mask Requirements*, WASH. POST (June 26, 2020), https://www.washingtonpost.com/nation/2020/06/26/sheriffs-mask-covid [https://perma.cc/6BUQ-3YJC].

195. *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 557–58 & nn.26–27 (1960).

196. *Id.* at 560–61 (emphasis omitted).

197. WASH. REV. CODE § 36.28.011 (2021); *see also* State v. Twitchell, 378 P.2d 444, 447 (Wash. 1963).

198. Wash. Op. Att'y Gen. 2004 No. 4 (2004), 2004 WL 3250948, at *5.

199. *See* Philip J. Van de Veer, *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 SEATTLE U. L. REV. 847, 857–60 (2003) ("[T]he traditional contempt sanction for willful failure to serve the warrant is not available to the judge when law enforcement's noncompliance is caused by jail overcrowding . . . .").

200. *See* Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 334 (2016) (arguing that summonses and citations "offer substantial cost savings for municipalities in officer time, transportation costs, and detention costs"); *id.* at 335–36 (history of underuse); *see also* CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 153–58 (2019) (reviewing this authority); Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 967–73 (2020) (same).

misdemeanors.[201] In Illinois, Iowa, Louisiana, Maine, Montana, New Jersey, New York, North Dakota, and Oregon, citations can even be issued in lieu of arrest for some or all felonies.[202] Most provisions are permissive rather than mandatory, vesting officers with tremendous discretion; even "shall" provisions contain a number of highly subjective exceptions.[203] A sheriff could mandate the use of citations as a matter of office policy, but this is uncommon; a national survey suggests that in most departments, line officers retain full discretion.[204]

Sheriffs can and sometimes do use this authority to manage the number of people in their jails.[205] When the population of the jail in Clay County, Florida, neared capacity, the sheriff began "encouraging his deputies to issue a notice to appear in misdemeanor offenses, like shoplifting."[206] A number of Texas sheriffs have recently adopted policies of citing, rather than arresting, people found in possession of small quantities of marijuana, motivated by the realization that such arrests "have caused jail overcrowding."[207] These sheriffs were certainly free—but had declined—to have their deputies cite and release in the absence of capacity constraints.

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201. *See* Appendix II.

202. *See* Appendix II.

203. *See, e.g.*, MINN. R. CRIM. P. 6.01(1) (2021) (requiring detention where it "reasonably appears" that detention will "prevent bodily harm" to another, "further criminal conduct will occur," or "a substantial likelihood exists that [the suspect] will not respond to a citation"); OHIO REV. CODE ANN. § 2935.26(A) (LexisNexis 2021) (enumerating when arrest is mandated, including when an offender "requires medical care" or "cannot or will not offer satisfactory evidence of his identity"); *but see* PA. R. CRIM. P. 519(B) (2021) (requiring arrest where the defendant failed to comply with sex offender registration requirements or was arrested in a domestic violence case). Officers are more commonly, though not always, obligated to make a custodial arrest when they stop someone with an outstanding warrant. *See, e.g.*, N.J. CT. R. 3:4-1(b) (2021); *but see* LA. CODE CRIM. PROC. ANN. art. 211.1 (2020) (permitting citation in lieu of arrest on an outstanding misdemeanor warrant).

204. INT'L ASS'N OF CHIEFS OF POLICE, CITATION IN LIEU OF ARREST: EXAMINING LAW ENFORCEMENT'S USE OF CITATION ACROSS THE UNITED STATES 12 (2016), https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Citation%20Final%20Report%202016.pdf [https://perma.cc/P7TZ-9H59].

205. But, it appears, decreasingly so. In 1984, there were fifty-one admissions to jail for every one hundred arrests; that is to say, roughly half of those arrested were immediately released. SUBRAMANIAN ET AL., *supra* note 19, at 22 & n.78. In 1994, the ratio was seventy to one hundred; by 2016, it was ninety-nine to one hundred. S. REBECCA NEUSTETER, RAM SUBRAMANIAN, JENNIFER TRONE, MAWIA KHOGALI & CINDY REED, VERA INST. OF JUST., GATEKEEPERS: THE ROLE OF POLICE IN ENDING MASS INCARCERATION 3 (2019), https://www.vera.org/downloads/publications/gatekeepers-police-and-mass-incarceration.pdf [https://perma.cc/6WYQ-2DEQ].

206. Christy Turner, *Clay County Sheriff Addresses Potential Overcrowding in Jail*, ACTION NEWS JAX (July 22, 2019), https://www.actionnewsjax.com/news/local/clay-county-sheriff-addresses-potential-overcrowding-in-jail/969142957 [https://perma.cc/D8HK-GYND].

207. Brittany Ford, *WilCo Sheriff's Office Adopts Cite and Release Policy for Small Amounts of Marijuana*, CBS AUSTIN (May 1, 2019), https://cbsaustin.com/news/local/wilco-sheriffs-office-adopts-cite-and-release-police-for-small-amounts-of-marijuana [https://perma.cc/B7JW-9LCF].

B. Release Powers: Sheriffs as Jail Administrators

In many states, sheriffs also have the statutory authority to release (or not) some of those brought to or held in their jails, including those incarcerated by or on behalf of other arresting agencies.[208] Many of these provisions give them discretion not only over how many but also over which detainees to release; they are authorized to determine who must be incarcerated and who need not be. These powers, which have not been previously cataloged, vary dramatically in scope.[209]

1. Jailhouse Cite-and-Release

In over a dozen states, a sheriff can elect to cite and release some arrestees brought to his jail after being arrested by another agency.[210] His control of the jail's bedspace entitles him to override the decision of a police officer he does not employ and over whom he otherwise has no authority. Because this Article is concerned with the respective ambits and motivations of institutional actors, these sheriff-as-jailer cite-and-

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208. The baseline rule—from which the provisions cataloged here represent important deviations—is that sheriffs generally cannot choose whether to incarcerate someone. Some state codes contain a clear mandate. *See, e.g.*, GA. CODE ANN. § 42-4-4(b) (2021) (duty to not release prisoner until end of sentence); GA. CODE ANN. § 42-4-12 (2021) (misdemeanor to "refuse[ ] to receive and take charge" of person charged with or guilty of indictable offense). Elsewhere, the absence of express authority to release detainees has been interpreted to preclude sheriffs from doing so. *See, e.g.*, Wash. Op. Att'y Gen. No. 25 (1982), 1982 WL 172650, at *1 (stating that "the fact that a given county jail may already by overcrowded . . . would not justify a refusal by the sheriff or other custodian to accept prisoners duly ordered into his custody" or the decision to "release other prisoners already under confinement in order to make room for the new ones").

209. With one notable exception: one thoughtful piece did observe this phenomenon a decade ago, noting that it is "often appointed administrators in a county sheriff's department, rather than judges or elected officials, who determine who gets released early." Lara Hoffman, *Separate But Unequal—When Overcrowded: Sex Discrimination in Jail Early Release Policies*, 15 WM. & MARY J. WOMEN & L. 591, 597–98 (2009); *id.* at 599–603 (discussing the mechanics of—and sex discrimination in—release decisions in multiple counties). But the appointed administrators Hoffman described take orders from elected sheriffs.

For technical assistance reports recognizing the existence of book-and-release as distinct from cite-and-release, see Pretrial Servs. Res. Ctr., *A Second Look at Alleviating Jail Crowding: A Systems Perspective*, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST. 8–11 ex.1 (Oct. 2000), https://www.ncjrs.gov/pdffiles1/bja/182507.pdf [https://perma.cc/RQ2E-ERC6]; Debra Whitcomb, Bonnie P. Lewis & Margaret J. Levine, *Citation Release*, U.S. DEP'T OF JUST. 13–15 (Mar. 1984), https://www.ncjrs.gov/pdffiles1/Digitization/94200NCJRS.pdf [https://perma.cc/K6YP-TQUG]; *see also Criminal Justice Section Standards: Pretrial Release*, AM. BAR ASS'N 10-2.2 (2007), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk [https://perma.cc/389E-BHYW] (identifying these two junctures).

210. *See* Appendix III. Where a sheriff has the statutory authority to release, he might nonetheless have a contractual obligation to detain those held for other jurisdictions. *See, e.g.*, UTAH CODE ANN. § 17-22-5.5(4) (LexisNexis 2021) (clarifying that prisoner-release provision does not authorize sheriff to "modify provisions of a contract" or "to house in a county jail persons sentenced to the Department of Corrections").

release provisions are critically distinct from the sheriff-as-police provisions cataloged above. The effects are the same: someone is not jailed. But the incentives for their exercise are crucially different. While a police chief has no responsibility, fiscal or managerial, over jail bedspace, a sheriff does.

In Garland County, Arkansas, for example, the sheriff responded to persistent overcrowding by exercising his authority to cite and release misdemeanor arrestees; over less than two months in late 2019, the 365-bed jail released about fifty arrestees on misdemeanor citations, primarily for charges of public intoxication, disorderly conduct, driving while intoxicated, and criminal trespassing.[211] He would have been free to release these people even if his jail had enough room to hold them, but he did not do so absent the impetus of limited bedspace.

In most states, this authority is limited to misdemeanor cases; in a few, it extends to some felonies as well.[212] Ordinarily, sheriffs' power to cite in lieu of booking extends to the same offenses as officers' power to cite in lieu of arrest, but in Minnesota it is even broader: arresting officers may release only those charged with misdemeanors, but booking officers may release anyone, even those charged with serious felonies.[213]

2. Pretrial Diversion

In certain jurisdictions, sheriffs also exercise some control over who is permitted to enter pretrial diversion. For example, sheriff's office employees in Wayne County (Detroit), Michigan, are responsible for identifying those misdemeanor detainees with mental illness who will be "pulled . . . out of the jail" and placed into community-based treatment.[214] In Harris County (Houston), Texas, sheriff's deputies can

211. David Showers, *County Jail Continues to Contend with Overcrowding*, SENTINEL-REC. (Dec. 8, 2019), https://www.hotsr.com/news/2019/dec/08/county-jail-continues-to-contend-with-o [https://perma.cc/4BYV-GX6U].

212. IOWA CODE § 805.1 (2021); MINN. R. CRIM. P. 6.01(2) (2021); *cf.* ARK. R. CRIM. P. 5.2(c) (2021) (authorizing detention officer to cite and release someone arrested for a felony, but only upon prosecutor's recommendation); VT. R. CRIM. P. 3(e), (f) (2021) (person arrested for misdemeanor "shall" be released (absent exceptions), whereas person arrested for felony "may be continued in custody").

213. *Compare* MINN. R. CRIM. P. 6.01(1) (2021) (at arrest), *with* MINN. R. CRIM. P. 6.01(2) (2021) (at booking). In Illinois, by contrast, sheriffs have narrower power than do officers. *See* 725 ILL. COMP. STAT. 5/107-12 (2021) (permitting arresting officer to cite and release in any case but sheriff to do so only when arrest is for Class C misdemeanor or petty offense).

214. James David Dickson, *Wayne County Jail's Mental Health Misdemeanor Problem*, DETROIT NEWS (Dec. 28, 2019), https://www.detroitnews.com/story/news/local/wayne-county/2019/12/29/wayne-county-jail-mental-health-misdemeanor-problem/2607877001 [https://perma.cc/3ZQS-VZZX].

encourage an arresting officer not to book someone with a mental illness, sending him or her instead to a diversion center where officers are not allowed and services are provided on a voluntary basis. There is a desk set up in the jail's booking area specifically to funnel arrestees towards this program.[215]

3. Overcrowding Release

In other states, sheriffs' authority to release detainees is expressly predicated on and intended to relieve jail overcrowding.[216] In some cases, they are even empowered to act like judges, determining the constitutionality of conditions, setting population caps, and reducing sentences.

The broadest grant of this authority exists in Arkansas. There, sheriffs who conclude that overcrowding in their jails has rendered conditions of confinement unconstitutional may release or refuse to accept detainees at their discretion.[217] To return to Garland County:

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215. Telephone Interview with Virginia Ryan, Jail Population Manager, Harris Cnty. Jail (Jan. 24, 2020). This program existed prior to the election of the current, reform-oriented sheriff, Ed Gonzalez, but he has championed it. Samantha Ketterer & Keri Blakinger, *Mental Health Diversion Center Opens in Midtown*, HOUS. CHRON., https://www.chron.com/news/houston-texas/houston/article/Mental-health-diversion-center-opens-in-midtown-13271981.php (last updated Oct. 1, 2018) [https://perma.cc/ELM9-9P27]. As Ingrid Eagly has documented, jail overcrowding litigation in the 1970s prompted the creation of a distinct process of prebooking screening by prosecutors in Harris County, who reject a significant proportion of low-level charges. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1172–73 (2013); *see also* Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 859–65 (2019) (providing details of Harris County's prosecutorial prebooking screening process and examples of low-level charges that prosecutors rejected).

216. Some states have enacted emergency overcrowding release laws with respect to their prison populations; there, the commissioner of corrections is usually the official authorized to initiate releases. *See* Bradford J. Tribble, *Prison Overcrowding in Alaska: A Legislative Response to the* Cleary *Settlement*, 8 ALASKA L. REV. 155, 167 n.68 (1991) (in 1991, at least thirteen states had provisions allowing for early release to relieve overcrowding; of those, provisions in Arkansas, Georgia, Louisiana, Mississippi, Ohio, Tennessee, Texas, and Washington remain in effect; provisions in Connecticut, District of Columbia, Florida, Oklahoma, and South Carolina have been repealed). Jail releases are likely more politically palatable, especially to rural, conservative electorates, because the people being released have generally been accused or convicted of low-level criminal activity, rather than convicted of more serious offenses. Notably, Michigan has repealed its prison-release law but not its jail-release law. *See id.*

217. *See* ARK. CODE ANN. § 12-41-503 (2021):

> (a) County sheriffs and other keepers or administrators of jails within the State of Arkansas are responsible for managing the populations and operations of their respective facilities in compliance with the laws and the Arkansas Constitution and within the requirements of the United States Constitution. (b) Neither a county sheriff nor another keeper or administrator of a jail shall refuse to accept any prisoner lawfully arrested or committed within the jurisdiction of the supporting agency of the jail except as necessary to limit prisoner population in compliance with subsection (a) of this section;

when overcrowding forced jail administrators to house detainees in the booking area, the sheriff determined that such conditions are "a violation of inmate rights" and invoked this provision.[218] Although the statute does not require this, the sheriff consulted with the county court, seeking the judges' "input" on which detainees to release prior to the completion of their misdemeanor sentences. The sheriff also implemented intake restrictions.[219] In this remarkable paradigm, sheriffs serve in a quasi-judicial capacity; they are at once constitutional arbiter and bail setter.[220]

In a few states, sheriffs' release powers come to bear once a numerical population cap is reached. Oregon's jail overcrowding statute requires counties to opt in, but allows them to confer on sheriffs similarly broad and discretionary release powers.[221] Either a county board of commissioners or county court can implement a population cap; after consultation with other relevant stakeholders, it may prescribe population-reduction measures to be taken in the event of overcrowding, including "authorization . . . for the sheriff to order adults in custody released."[222] Although a county's order might do so, this statute imposes no limits on which detainees a sheriff may release to alleviate overcrowding. In Utah, it is the sheriff himself who sets a maximum operating capacity for his jail, although, as in Oregon, it must

see also Ark. Op. Att'y Gen. No. 2007-240 (2007), 2007 WL 3352510, at *2–3 ("[T]he sheriff may release prisoners of a county jail if such a release is necessary to comply with constitutional safeguards or provisions pursuant to A.C.A. § 12-41-503(b) . . . without necessarily a promise to appear at appropriate times."); Ark. Op. Att'y Gen. No. 2011-164 (2012), 2012 WL 424323, at *1 n.2 (recognizing that this provision "authoriz[es] [a] sheriff to refuse to accept prisoners where necessary in order to manage the jail in compliance with constitutional requirements"); Tom Sissom, *State Reports Show Many Jails Overcrowded*, ARK. DEMOCRAT-GAZETTE (Oct. 28, 2019), https://www.arkansasonline.com/news/2019/oct/28/state-reports-show-many-jails-overcrowd [https://perma.cc/KEB7-WDKE] (eight of ten most populous counties in Arkansas have overcrowded jails; one, with operational capacity of three hundred, "has released up to 20 detainees a week"; the sheriff of another county "closes the jail" when population reaches capacity, releasing detainees on a one-for-one basis if necessary to admit someone facing violent felony or domestic abuse charges, with the jail closed more often than open over past two years).

218. Showers, *supra* note 211.

219. These population-reduction efforts may have forestalled jail expansion in the county. *See* Hot Springs Sentinel-Record, *Proposed County Budget Would Add Women's Unit at Arkansas Jail*, ARK. DEMOCRAT-GAZETTE (Oct. 26, 2019), https://www.arkansasonline.com/news/2019/oct/26/proposed-county-budget-would-add-womens-unit-arkan [https://perma.cc/3QKD-MVYQ] (county adopted a "wait-and-see approach" to increasing capacity, while jail supervisors manage population through "a triage of sorts," "mak[ing] judgments on which inmates present the greatest criminal liability or propensity for violence").

220. This is all the more striking because Arkansas sheriffs, like their counterparts in many other states, are precluded from practicing law in the jurisdiction where they serve. *See* ARK. CODE ANN. § 16-22-210 (2021).

221. OR. REV. STAT. ANN. §§ 169.042-169.046 (2020).

222. *Id.* § 169.046(2) (also providing that the "sheriff shall immediately notify all police agencies in the county to make maximum use of citations in lieu of custody").

be approved by the county's legislative body. Once this threshold is reached, the sheriff has the authority to release prisoners to supervised release or alternative incarceration programs according to criteria he establishes or to modulate admission based on a policy he imposes.[223] A federal court hearing a conditions case about a Utah jail would have to convene three judges and make extensive findings about noncompliance with past remedial orders in order to set a population cap and release order; the jail's sheriff can do so with the stroke of a pen.[224]

In states where release authority is contingent upon a county-imposed population cap, jailers have particularly direct control over the number of people they incarcerate. A few years ago, Lane County, Oregon, closed jail dorms due to cost constraints and simultaneously implemented a population cap and release plan.[225] In Multnomah County, Oregon, a couple of hours north, the sheriff and commissioners similarly empowered themselves to cut the jail population by opting to shutter part of its bedspace; this left the jail constantly near capacity and necessitated frequent releases.[226]

In other cases, the scope of a sheriff's overcrowding release authority is more bounded. In certain states, only detainees with low-level charges can be released. In Louisiana, for example, a sheriff whose jail exceeds its rated capacity can declare a state of emergency and then reduce the jail population by citing arrestees and furloughing sentenced prisoners, but only those charged with or convicted of nonviolent

223. UTAH CODE ANN. § 17-22-5.5(2) (LexisNexis 2021); *see also* Hoffman, *supra* note 209, at 597 n.34 (explaining that in Salt Lake County, Utah, the county commission and not a court order sets the jail population cap).

224. *See* 18 U.S.C. § 3626(a)(3) (provision of the Prison Litigation Reform Act governing prisoner release orders).

225. *See* Anderson, *supra* note 91, at 478–79 (2014) (budget cuts in 2013 caused release of over a thousand detainees as sections of jail facilities were closed due to lack of personnel). Something similar happened in Jefferson County, Colorado, despite the absence of a population-capping statute. *See* Elise Schmelzer, *Jefferson County Sheriff's Office May Release Inmates Early or Refuse to Book Arrestees to Meet 2020 Budget*, DENVER POST (Dec. 6, 2019), https://www.denverpost.com/2019/12/06/jefferson-county-sheriffs-office-jail-release [https://perma.cc/4QL2-26EX] (explaining that the sheriff's office closed a floor of the jail, reducing the jail capacity, to facilitate a $5.5 million budget cut).

226. *See* Katie Shepherd, *Overcrowding Caused Multnomah County to Release More than 160 People from Jail Since July*, WILLAMETTE WK. (Mar. 26, 2018), https://www.wweek.com/news/courts/2018/03/26/overcrowding-caused-multnomah-county-to-release-more-than-160-people-from-jail-since-july [https://perma.cc/3S9F-ZDYG]; Nina Mehlhaf, *Hundreds of Inmates Released in Metro Area Due to Overcrowding*, KGW8, https://www.kgw.com/article/news/investigations/hundreds-of-inmates-released-in-metro-area-due-to-overcrowding/283-517966521 (last updated Feb. 13, 2018) [https://perma.cc/W2RU-MXG3].

ordinance violations may be released.[227] Some states' statutes involve county judges in the process.[228]

Michigan has codified by far the most elaborate provision for release of jail detainees due to overcrowding, with tiers of increasing authority and shifting responsibility as a jail approaches its rated capacity.[229] Although a number of officials have significant discretion in its implementation, this is one of a few jail-overcrowding provisions to mandate release when rated capacity is reached. Releases begin before the jail hits capacity, but at this stage, judges retain the power to veto the release of any particular detainee on public safety grounds.[230]

When population exceeds capacity, the sheriff declares a state of emergency and notifies county judges, commissioners, and other law enforcement.[231] These officials are free to "attempt to reduce the prisoner population" through the plethora of "means which are already within the scope of their individual and collective legal authority."[232] Some of the enumerated options are within the ambit of judges and prosecutors: accelerated court calendaring, bail reduction, diversion, and alternative sentencing. Many others are expressly within the sheriff's wheelhouse, like "alternative booking, processing, and housing arrangements," such as the use of appearance tickets, work release, and community confinement.[233] Sheriffs and county officials are also empowered to free up space by terminating agreements to house detainees for other jurisdictions.[234] The statute does list as one potential response to overcrowding—the penultimate item in a list of seventeen—"recommend[ing] to the county board of commissioners [ ] construction

227. LA. STAT. ANN. § 15:764 (2021); *see also* La. Att'y Gen. Op. No. 05-0230 (2006), 2006 WL 374181, at *1–2 (concluding that a sheriff has the "inherent power" to deem the jail unsafe and unfit and discontinue its operation after transferring detainees); La. Att'y Gen. Op. No. 10-0014 (2010), 2010 WL 2071089, at *3–4 (discussing a parish's financial responsibility for detainees transferred when jail is unsafe); La. Att'y Gen. Op. No. 16-0151 (2016), 2016 WL 6122481, at *2 (concluding that a parish may not impose "a cap on the number of prisoners whose care the parish will fund").

228. *See, e.g.*, CAL. PENAL CODE § 4024.1 (West 2021) (setting forth procedures for accelerating the release of detainees during a bed shortage); NEV. REV. STAT. § 211.240 (2021) (same).

229. During the COVID-19 pandemic, Governor Whitmer of Michigan issued an executive order authorizing officials to employ these release provisions even when their jails were not above capacity and without regard to the various procedural requirements. Mich. Exec. Order No. 2020-29 (Mar. 29, 2020).

230. MICH. COMP. LAWS § 801.51a (2021); *see also, e.g.*, Rebecca Russell, *Overcrowding at Barry County Jail Causes State of Emergency, Early Release of 16 Inmates*, FOX 17 (Nov. 9, 2018), https://fox17online.com/2018/11/09/overcrowding-at-barry-county-jail-causes-state-of-emergency-early-release-of-16-inmates [https://perma.cc/M3X9-S7VM].

231. MICH. COMP. LAWS §§ 801.52-801.54 (2021).

232. *Id.* § 801.55.

233. *Id.* § 801.55(*l*).

234. *Id.* § 801.55(f).

of new jail facilities and funding for construction."[235] The Michigan legislature plainly did not intend for this to be the sole or even default option.

If those already-authorized measures are insufficient, the sheriff reports information regarding detainees' offenses, bonds, and sentences to the chief circuit judge, who reduces bail amounts and sentence lengths for those she deems to pose a low risk to public safety.[236] The extent of the resulting releases depends considerably on the judge's discretion, but there is a backstop.[237] If the overcrowding has not ended within a month of the sheriff's declaration, he acquires quasi-judicial authority to reduce the sentences of all convicted prisoners in the jail by up to 30%; if that does not suffice, the sheriff is empowered to close the jail to new admittees, deferring acceptance of those charged with or convicted of certain crimes.[238]

In all of these states, a sheriff who limits the supply of bedspace in his jail dramatically expands his power to reduce demand for that bedspace. It is precisely *because* he and the commissioners in his county have declined to build—or have been prevented from doing so—that release is authorized or, in Michigan, required.

4. Court Orders

In some states, sheriffs are also empowered to release detainees as a result of litigation challenging the overcrowding that can occur when they do not expand their jails.[239] In Riverside County, California,

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235. *Id.* § 801.55(p).

236. *Id.* § 801.56; *see also, e.g.*, Christina Hall, *Macomb County Jail May Release Inmates Due to Overcrowding*, DETROIT FREE PRESS (Nov. 10, 2014), https://www.freep.com/story/news/local/michigan/macomb/2014/11/10/macomb-county-jail-overcrowded/18802103 [https://perma.cc/889R-E9FH] (noting that states of emergency were declared fourteen times between 2003 and 2014).

237. *See* Amy Waechter, *County Officials Held Prisoner to Jail Overcrowding:* Muskegon County Board of Commissioners v. Muskegon Circuit Judge, 9 T.M. COOLEY L. REV. 481, 490 (1992) (judge directed sheriff to transfer rather than release detainees, but court of appeals ordered him to stop interfering with sheriff's duties under the overcrowding-release provision).

238. MICH. COMP. LAWS §§ 801.57-801.58 (2021) (chief circuit judge may override bar on acceptance in individual cases, on recommendation of either the sheriff or sentencing judge); *see* Sam Fry, *Sheriff Parker: Jail Overcrowding Is Getting Worse*, HILLSDALE DAILY NEWS (July 23, 2019), https://www.hillsdale.net/news/20190723/sheriff-parker-jail-overcrowding-is-getting-worse [https://perma.cc/6W7Q-9UV5]. Although a sheriff is required to end a state of emergency after seventy days even if sufficient population reduction has not occurred, the act also contemplates reinvocation. MICH. COMP. LAWS §§ 801.59(b), 801.63 (2021).

239. Ordinarily, courts (mostly federal) become involved in capping jail populations in the course of civil prisoners' rights litigation; such caps were much more common prior to the passage of the Prison Litigation Reform Act. *See* Albert C. Price, Charles Weber & Ellis Perlman, *Judicial Discretion and Jail Overcrowding*, 8 JUST. SYS. J. 222 (1983); *see also* Wayne N. Welsh, *Jail Litigation in California: An Empirical Assessment*, 71 PRISON J. 30, 40–41 (1991) (describing two paradoxical "adaptations to jail litigation": "(1) system expansion" and "(2) increased use of pre-

the five-jail system has released tens of thousands of detainees early to comply with a federal court order.[240] By replacing an existing facility with one five times the size, at a cost of about $375 million, the county will be able to avoid some such releases. In Marion County, Ohio, a county court order in place for two decades permitted the release of low-level detainees to avoid overcrowding. The jail relied on this authority on a daily basis.[241] But in 2019, a newly elected judge withdrew the order. In his view, the sheriff had usurped his own role; using this release power rather expanding the jail "undermine[d] the authority and respectability of all the courts . . . and the justice system in our community."[242]

5. Sentence Credits and Supervised Release

Finally, sheriffs in many states have the authority to determine how and for how long detainees serve sentences. In states across the country, the law allows sheriffs to shorten or lengthen sentences by granting more or fewer good-time credits.[243] Sheriffs can also release

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trial and post-trial alternatives"; criticizing the use of alternatives as "stop-gap measures only, pending new jail construction," given that "building has continually proven to be an ineffective solution to overcrowding"). In some historical cases, state court judges even ordered sheriffs to expand jail capacity. Welsh, *supra*, at 35. Sometimes, state courts take the initiative to respond to limited bedspace at the jails that hold detainees appearing before them as criminal defendants. In Kansas City, Missouri, the council struggled to find contract bedspace to house municipal court defendants after Jackson County doubled its per diem rate. Sam Zeff, *Kansas City Needs a New Place for Its Inmates, Some Councilmembers Don't Want a New Jail*, KCUR (Apr. 17, 2019), https://www.kcur.org/post/kansas-city-needs-new-place-its-inmates-some-councilmembers-dont-want-new-jail [https://perma.cc/37HQ-DN7G]. The municipal court observed that it "would face a complicated population control problem" and took the unusual step of hiring its own "population control manager to make sure that only those who needed to be locked up are, in fact, in jail." *Id.*

240. Jeff Horseman, *Riverside County's $376 Million Indio Jail Could Open by Early 2020*, PRESS-ENTER. (Dec. 17, 2019), https://www.pe.com/2019/12/16/riverside-countys-376-million-indio-jail-could-open-by-early-2020 [https://perma.cc/H6YX-UHH7]. The magnitude of these releases is due in part to the realignment of prisoners from California's state prisons to its county jails. *See, e.g.*, Magnus Lofstrom & Steven Raphael, *Impact of Realignment on County Jail Populations*, PUB. POL'Y INST. OF CAL. 2 (June 2013), https://www.ppic.org/content/pubs/report/R_613MLR.pdf [https://perma.cc/3C9K-C96D].

241. Volpenhein, *supra* note 64.

242. *Id.* The editorial board of the local newspaper has urged officials to "investigate why other counties get by on much less jail space [per capita] than Marion County" does. *Our View: Marion County Jail Levy Deserves Scrutiny*, MARION STAR (Dec. 22, 2019), https://www.marionstar.com/story/news/local/2019/12/22/our-view-marion-county-jail-levy-deserves-scrutiny/2681430001 [https://perma.cc/W9H9-388Y]. The rescission of the release order prompted the sheriff to rent bedspace while county commissioners proposed a tax increase to fund a jail expansion. *See* Sarah Volpenhein, *Marion County Sending Record Number of Jail Inmates to Other Counties*, MARION STAR (Dec. 15, 2019), https://www.marionstar.com/story/news/local/2019/12/15/marion-county-sending-record-number-jail-inmates-other-counties/4411662002 [https://perma.cc/BF4D-6577].

243. *See* GA. CODE ANN. § 42-4-7(b) (2021); LA. STAT. ANN. § 15:571.3 (2020); N.J. STAT. ANN. § 2A:164-24 (West 2021); OR. REV. STAT. ANN. § 169.110 (2020); TEX. CODE CRIM. PROC. ANN. art. 42.032 (West 2021); WASH. REV. CODE § 9.92.151 (2021); W. VA. CODE § 7-8-11 (2021); *see also* Ana

detainees on various forms of supervision. In Arkansas, the sheriff is free to decide which sentenced prisoners serve their sentences "on electronic monitoring, on weekends, or by any other lawful alternative to continual detention in the county jail that rehabilitates the convicted person or benefits the county when this does not conflict with any court orders."[244] In Maine, sheriffs may grant sentenced prisoners furloughs of unlimited length to facilitate medical, mental-health, and substance-use treatment and are responsible for assigning them to community confinement programs.[245] California law allows sheriffs to assign sentenced prisoners to work release, during which participants sleep at home.[246] Arizona sheriffs can establish and select detainees to participate in work release and (with the consent of the county board of supervisors) home detention programs.[247] In certain Tennessee counties, sheriffs have "sole discretion" to release detainees on furlough.[248] And in Wisconsin, the home detention statute gives sheriffs—not judges—unfettered authority to determine who participates;[249] as the state court of appeals has explained, "the sheriff manages the jail, the court does not."[250]

Yáñez-Correa & Molly Totman, *Costly Confinement and Sensible Solutions: Jail Overcrowding in Texas*, PUB. POL'Y CTR., TEX. CRIM. JUST. COAL. 45–46 (2010), https://www.texascjc.org/system/files/publications/Costly%20Confinement%20Sensible%20Solutions%20Report%20%28Oct%202010%29.pdf [https://perma.cc/9VZL-A772] (advocating that sheriffs afford additional good-time credit). Avlana Eisenberg has recognized that prison officers' discretionary decisions to revoke good-time credit are a form of resistance to decarceration. Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 111 (2016). Her focus was on individual decisions by correctional officers, but some sheriffs have not only the authority to approve individual revocations based on disciplinary infractions but also the power to set jail-wide policy regarding how much credit is accrued.

244. ARK. CODE ANN. § 12-41-503(c) (2021).

245. ME. STAT. tit. 30-A, §§ 1556, 1659-A (2021). Recall that rates of mental illness and substance use among jailed people are extremely high. *See supra* note 46 and accompanying text.

246. CAL. PENAL CODE § 4024.2 (West 2021); *see also* Noah D. Zatz, *The Carceral Labor Continuum: Beyond the Prison Labor/Free Labor Divide*, *in* LABOR AND PUNISHMENT (Erin Hatton ed.) (forthcoming 2021) (observing functional similarity to community service but that this "arrangement proceeds under the sheriff's authority over defendants sentenced to jail time, not under a court's authority to substitute probation for incarceration").

247. ARIZ. REV. STAT. ANN. § 11-459 (2021).

248. TENN. CODE ANN. § 41-2-143(a)–(b) (2021).

249. WIS. STAT. § 302.425(2) (West 2021).

250. State v. Galecke, 702 N.W.2d 392, 395 (Wis. Ct. App. 2005); *see also* State v. Schell, 661 N.W.2d 503, 509 (Wis. Ct. App. 2003) ("The decision to place a person on home monitoring is no doubt informed by the particular . . . budgetary and space constraints of each sheriff's office and county jail. The sheriff, perhaps more than any other person, is in the best position to undertake these analyses.").

C. Informal Pressures: Sheriffs as County Politicians

In addition to the formal mechanisms for jail population management discussed above, sheriffs wield a lot of soft power.[251] Their control over jail bedspace enables them to influence the behavior of local police, prosecutors, and judges by constraining the supply of carceral capacity.[252] Of course, many choose not to exercise this influence, opting instead to push for jail expansion or contract for additional bedspace.

In Douglas County, Nebraska, the jail reached capacity during the summer of 2019; sending detainees to nearby facilities was not possible because they, too, were full. In response, jail officials "sent out a plea."[253] At the sheriff's behest, the Omaha Police Department, which uses a significant portion of the jail's bedspace, "reminded officers of the standard policy" on when to cite and release. Thanks to this effort, as well as the cooperation of the county's probation service, the jail's population decreased markedly.[254] In Stanly County, North Carolina, the sheriff has sought and obtained the district attorney's approval to release detainees due to overcrowding.[255] In some places, sheriffs and

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251. While this Section focuses on sheriffs' informal but direct controls over jail population levels, they also have formal but indirect influence in some states. In Georgia, for example, bondsmen must be "approved by the sheriff" and comply with "all rules and regulations established by the sheriff." GA. CODE ANN. § 17-6-50(b)(4) (2021); *see Training for Bail Bondsman Jobs in Georgia*, BOUNTYHUNTEREDU.ORG, https://www.bountyhunteredu.org/georgia/georgia-bondsman (last visited Mar. 14, 2021) [https://perma.cc/MUR6-CUTZ] (observing that this local licensure requirement "often results in a close relationship between [sheriffs] and bail companies"). These bondsmen have broad discretion to set the rates criminal defendants and their families must pay to obtain release from jail. *See* GA. CODE ANN. § 17-6-30 (2021). They can use it to alter the force (and ameliorate—or worsen—the disparate impact) of judges' decisions regarding bail. *See generally* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994).

252. To the extent that county jails hold prisoners from other jurisdictions—federal, state, or local—jailers' decisions about bedspace will have even broader effects, albeit more attenuated ones, because a given county's jail will be one of multiple possible sources of detention capacity. *See, e.g.*, *Spokane Co. Jail Will Not Recognize Some Warrants for Probation, Parole Violations*, KREM2 (Dec. 23, 2019), https://www.krem.com/article/news/local/spokane-co-jail-will-not-recognize-some-warrants/293-acffbf28-17b2-4205-a240-7566ceec47fc [https://perma.cc/6EPW-7XR4].

253. Ruta Ulcinaite, *Douglas County Jail Population Decreasing*, 3 NEWS NOW (Dec. 7, 2019), https://www.3newsnow.com/news/local-news/douglas-county-jail-population-decreasing [https://perma.cc/Q8MB-TCNB].

254. *Id.*; *see also* Max Bryan, *Sheriff: Old, New Measures to Keep Jail Population Down*, TIMES REC. (Nov. 3, 2019), https://www.swtimes.com/news/20191103/sheriff-old-new-measures-to-keep-jail-population-down [https://perma.cc/Q658-H3WM] (sheriff asks local police departments to join in using signature bond program "to keep the population from swelling to numbers seen in years prior"); Mehlhaf, *supra* note 226 (when jail reaches 95% capacity a "red alert . . . gets dispatched to all cars in the field, so they'll . . . be diligent of what [they are] booking " (internal quotation marks omitted)).

255. Evan Moore, *Inmates Released from Jail Due to Overcrowding*, STANLY NEWS & PRESS (Aug. 5, 2019), https://www.thesnaponline.com/2019/08/05/inmates-released-from-jail-due-to-overcrowding [https://perma.cc/62UX-ED9L].

their employees convene an array of county officials in an ongoing population-management effort.[256] Staff at Canyon County, Idaho's overcrowded jail "work daily with prosecutors, defenders, and judiciary to identify inmates who can be released early to make room."[257] According to a jail captain, this process has made judges "more lenient."[258]

Some urban Texas sheriffs with particularly dangerous jails say that they have taken hands-on approaches to ensuring that "nonviolent inmates are not languishing in a jail cell," although their efforts on this front very much remain works in progress.[259] On a weekly basis, the sheriff of Bexar County (San Antonio), Texas, has been "generating a list of all of the people who were just here on a misdemeanor, nothing else, with less than a $2,500 bond," and "physically sitting down with pretrial services and probation, all the stakeholders, every week, and going, 'OK, what about this guy? He's been here for two weeks already. Can we get him out?' "[260] Although the sheriff does not see these initiatives as his "responsibility," he says that "if that's what it's going to take to keep them from dying in my jail, then we're going to do it."[261]

In Harris County (Houston), Texas, the sheriff has hired a full-time jail population manager; she has created an online dashboard that shows judges information about everyone on their dockets who remains in pretrial detention.[262] The sheriff's office identifies the detainees to be

256. Processes for making decisions about pretrial detention and jail population management will likely be complex—and, ideally, coordinated—in large urban jurisdictions. *See, e.g.*, VERA INST. OF JUST., LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT, at i–iii (2011), https://www.vera.org/downloads/Publications/los-angeles-county-jail-overcrowding-reduction-project-final-report/legacy_downloads/LA_County_Jail_Overcrowding_-_Executive_Summary.pdf [https://perma.cc/V6GR-3ZVK] (discussing the need for coordination in Los Angeles County). Such decisions are made more unilaterally in smaller jurisdictions.

257. Madeline White, *High-Risk Suspects Released Due to Canyon County Jail's Overcrowding*, IDAHO NEWS 6 (Mar. 27, 2019), https://www.kivitv.com/news/hundreds-of-high-risk-suspects-released-due-to-canyon-county-jails-inability-to-house-them [https://perma.cc/DP4J-RJLP].

258. *Id.*

259. Scott Huddleston, *Sheriff Details Multi-pronged Plan to Fix San Antonio Jail Woes*, SAN ANTONIO EXPRESS-NEWS (Nov. 15, 2019), https://www.expressnews.com/news/local/article/Sheriff-details-multi-pronged-plan-to-fix-San-14838330.php [https://perma.cc/ZP7W-Y7YM].

260. *Id.*

261. *Id.* (twelve detainees died in the jail in one year); *see also* Emily Baucum, *Family of Man Who Died at Bexar County Jail Files Federal Civil Rights Lawsuit*, FOX29 (Dec. 16, 2019), https://foxsanantonio.com/news/local/family-of-man-who-died-at-bexar-county-jail-files-federal-civil-rights-lawsuit [https://perma.cc/E4PE-NNWK] (describing the death of a detainee in the jail).

262. Telephone Interview with Virginia Ryan, *supra* note 215. Ryan previously held a similar position in New Orleans and discussed both jurisdictions. For the public-facing version of this dashboard, *see Jail Population Statistics*, HARRIS CNTY., TEX., https://charts.hctx.net/jailpop (last visited Jan. 24, 2021) [https://perma.cc/VXZ5-9Q8J]. This sheriff and these judges were elected together in a recent wave of progressive victories. *See* Keri Blakinger, *The Beto Effect: Transforming Houston's Criminal Justice System*, MARSHALL PROJECT (Feb. 25, 2020),

considered for release and sends this information to the judges. Although some judges' practices have not changed, others have begun coming weekly to the jail's intake center and signing recognizance bonds en masse, for numerous defendants at a time, without individual hearings. The sheriff has plans to allocate a housing pod to hold those likely to be released on recognizance, so that they stay out of the main jail and "never put on an orange jumpsuit."[263] These and other reforms could not be more urgent, as illustrated by the case of Preston Chaney, a man who died of COVID-19 after spending three months at the Harris County Jail due to his inability to pay a $100 bond; he was facing charges that he stole lawn equipment and frozen meat.[264]

As policing scholars have noted, the fact that sheriffs run jails gives them not only the incentive to keep people out of jail unnecessarily (at least when at capacity), but also the information—what Andrew Crespo calls the "systemic facts"—necessary to do so.[265] The fact that overcrowding-release statutes in a number of states require sheriffs to report data about those they are incarcerating to other actors in the criminal legal system reflects a simple but important reality: sheriffs have access to and have aggregated these data, while courts, prosecutors, and police chiefs often do not or have not.

In New Orleans, Louisiana, for example, the chief of police wanted to ensure that his officers were using summonses instead of arresting whenever authorized but lacked any efficient way of figuring out who had been booked. The jail began providing him with a weekly spreadsheet of hundreds of detainees being held on summons-eligible

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https://www.themarshallproject.org/2020/02/25/the-beto-effect-transforming-houston-s-criminal-justice-system [https://perma.cc/8T9M-DU7B].

263. Telephone Interview with Virginia Ryan, *supra* note 215.

264. Gabrielle Banks & Samantha Ketterer, *'Deep Indifference to Human Suffering' at Harris County Jail, Lawyers Say*, HOUS. CHRON., https://www.houstonchronicle.com/news/houston-texas/crime/article/harris-county-jail-indifference-human-suffering-15926278.php (last updated Feb. 6, 2021) [https://perma.cc/57FR-JJFX] ("[T]he sheriff arranged access to video bail hearings, but very few judges took him up on it.").

265. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2109–10 (2016); *see also* Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 614 (2016) (discussing the functioning of sheriffs' office databases and their lack of interface with other county criminal legal system agencies); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2204 (2014) ("[I]nteragency disputes led the local sheriff's office to cut off the city police department and several other agencies' access to a county-maintained law enforcement records system, severely hampering police and prosecutor operations."). *But see* William A. Crozier, Brandon L. Garrett & Arvind Krishnamurthy, *The Transparency of Jail Data*, 55 WAKE FOREST L. REV. (forthcoming 2021) (manuscript at 117), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741638 [https://perma.cc/NBG2-7CMC] (describing administrative database to which Durham, North Carolina, judges, law enforcement officers, prosecutors, and public defenders share access, containing detailed "information regarding pretrial conditions and status of any given criminal defendant").

charges. Armed with these lists, an assistant chief spoke to every officer in the department during roll call; after three months, virtually no one was being arrested on these low-level charges.[266] Similarly, the city manager of Tucson, Arizona, requested the "help[ ]" of the Pima County Jail to "identify inappropriate law enforcement bookings," such as bookings of "chronic offenders" charged with "minor crimes."[267] The city wanted to keep the jail population "as low as practicably possible," but the jail had better data on the work of Tucson's police than their own department did.[268]

IV. SHERIFFS' INCENTIVES

As this Article has demonstrated, sheriffs have significant power over both the supply of and the demand for jail bedspace, and therefore play a critical and distinctive role in determining how many people are incarcerated in thousands of counties across America. This Part explores their motivations for exercising that authority in a carceral direction: to expand jail capacity and population.

Many scholars believe that the fragmentation of roles in our criminal legal systems—namely, that different officials are responsible for law enforcement and incarceration—causes misalignment of incentives. Because the people who determine how many people are incarcerated do not bear the costs of incarceration, this line of thinking goes, they operate without self-restraint. But sheriffs complicate this story; although they *do* unify these roles to a significant degree, sheriffs remain aggressive and effective proponents of jail building. Instead, system fragmentation may serve to obscure who and what is responsible for carceral growth. As this Part argues, sheriffs' bureaucratic interests in budget maximization and labor relations are an important engine of jail growth and help to explain their resistance to policy shifts like bail reform and jailhouse cite-and-release.

A. Role Consolidation and Fragmentation

A sheriff whose jail is full has a wide array of options within his discretion: He can work with county commissioners to embark on a jail-

266. Telephone Interview with Virginia Ryan, *supra* note 215.

267. Memorandum from C.H. Huckelberry, Cnty. Adm'r, to Pima Cnty. Bd. of Supervisors Regarding City of Tucson Intergovernmental Agreements for Animal Care Services and Prisoner Housing 3 (June 2, 2015), https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Administration/CHHmemosFor%20Web/June%202015/June%202,%202015%20-%20City%20of%20Tucson%20Intergovernmental%20Agreements%20for%20Animal%20Care%20Services%20and%20Prisoner%20Housing.pdf [https://perma.cc/3ENQ-QGXM] [hereinafter Huckelberry Memo].

268. *See id.*

building campaign, with the knowledge that new beds will most likely be filled.[269] He can send detainees to other jurisdictions at a cost to the taxpayer or decide to free up beds by no longer accepting detainees from other jurisdictions. He can tell his deputies to stop arresting intoxicated homeless people, instruct his booking officers to release those arrested by local police departments for drug possession, shorten sentences through an overcrowding release valve, accelerate accrual of good-time credits, or call the local prosecutor and urge her not to seek money bail in shoplifting cases.

Although these powers are significant individually, they are especially remarkable in combination. *Each is exercised in the shadow of the others*; they are not independent choices, but alternatives.[270] Sheriffs run the only state- or local-level agencies that "unify the inputs to the criminal justice system—law enforcement—with the outputs of the system—incarceration."[271] Sheriffs with empty beds lose formal and informal powers to decarcerate; they gain incentives (and others gain opportunities) to do the opposite.

The literature has identified the fragmentation in our criminal legal system as a significant explanation for its overgrowth, but this Article's account of sheriffs casts some doubt on its explanatory power. Beginning with Frank Zimring and Gordon Hawkins, scholars have focused on prosecutors' "correctional free lunch," proposing to force those who choose to charge defendants with crimes to bear or at least consider the cost of prisons.[272] In an article that deserves tremendous

269. *See* MAI ET AL., *supra* note 19, at 27–30 (citing examples of jail expansion leading "key institutional players [in the] local justice system to simply use a now more readily available resource: jail beds"); Wayne N. Welsh, Henry N. Ponetll, Matthew C. Leone & Patrick Kinkade, *Jail Overcrowding: An Analysis of Policy Makers' Perceptions*, 7 JUST. Q. 341, 359 (1990) ("Once we find some more jail beds, we're going to fill those suckers up as fast as we can.").

270. Consider, by analogy, the impact of the congressional ICE bed quota on incentives for and rates of immigration enforcement. *See generally* Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77 (2016).

271. W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1076 (2014) (emphasis omitted) (proposing reforms designed to achieve this); *see also* Thomas A. Henderson, *The Relative Effects of Community Complexity and of Sheriffs Upon the Professionalism of Sheriff Department*s, 19 AM. J. POL. SCI. 107, 109–10 (1975) (sheriff department is "ideal setting" to study "determinants of public policy," as a "coherent government unit to implement policy in a specific functional area . . . headed by a single individual rather than a multimember body").

272. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 211–15 (1991); *cf.* W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 84 (2014) ("[T]he correctional free lunch might even turn into a profit opportunity, as overcrowded state prisons pay local facilities to house state prisoners."). There is no question that it matters who bears the cost of imprisonment. *See* Aurélie Ouss, *Misaligned Incentives and the Scale of Incarceration in the United States*, 191 J. PUB. ECON., no. 104285, Sept. 2020 (finding that shift in cost burden of juvenile incarceration from state to counties resulted in stark drop). But the magnitude and direction of the effect turns on the precise interests of the particular decisionmakers. *See id.* at 8,

credit for grappling with the jail-related incentives of actors in local criminal legal systems, Adam Gershowitz suggests putting prosecutors in charge of jail budgets.[273] But his core assumption—that "[i]f prosecutors were responsible for jail budgets [while controlling jail population inflows], they would want jails to be less crowded, less expensive, and easier to manage"—is predicated on the view that "sheriffs [who are currently responsible for jail budgets] have little control over how many inmates they receive."[274] This analysis is called into question when one appreciates that sheriffs are responsible for jail budgets and do control jail population levels to a significant, and crowding levels to an even greater, extent. Sheriffs do not have nearly as much discretion as do prosecutors, but at least for sheriffs, role consolidation alone has not disincentivized bedspace expansion.[275]

Although a theory that foregrounds fragmentation and the resulting misalignment of incentives does not appear to explain sheriffs' decisionmaking, it provides insight into sheriffs' rhetorical justification and—to the extent their self-description has been uncritically accepted—our impoverished understanding of their role. As Richard Bierschbach and Stephanos Bibas argue, because criminal legal policy is made by a "mishmash" of "loosely coordinated institutions," officials are able to "obscure[ ] responsibility and accountability" for pro-carceral decisions as well as for the attendant costs.[276] In the world of the sheriff, fragmentation may be less explanation than excuse.

How is it that sheriffs, though in some jurisdictions criticized for the harshness of jail conditions, have largely avoided blame for decades of carceral growth? Through dissembling rhetoric, they have managed to portray themselves as passive facilitators, rather than shapers, of

11 (suggesting that much of observed drop was due to diversion or dismissal by probation officers, who have broad discretion and are highly cost-sensitive).

273. Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677 (2016).

274. *Id.* at 680, 685–87; *cf.* Barkow, *supra* note 185, at 279 (recounting the contrary concern of a representative that incorporation of the federal prison system into the Department of Justice was "eminently improper" because "one responsible for administering prisons would have incentives to see them fully occupied").

275. *See also* Daniel J. D'Amico, *The Social Provision of Punishment and Incarceration*, 76 AM. J. ECON. & SOC. 1107, 1113, 1124–25 (2017) (concluding from comparative study that "centralized bureaucracies incentivize excessive rather than optimal" levels of incarceration).

276. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 189–90 (2017); *see also* PFAFF, *supra* note 22, at 144–45 (prosecutors "disingenuous[ly]" portray mounting costs of prosecutions they decided to pursue as "unavoidable financial hurricane that leaves shattered county services and infrastructure in its wake"); Su, *supra* note 33, at 857–58 (noting the greater fragmentation in rural governments).

local criminal legal policy.[277] When they release people from jail, they generally say they have "no choice"—that the releases were "forced."[278] By contrast, they emphasize the impact of decisions made by other criminal legal system players; judges, prosecutors, and probation, parole, and police officers are "variables in the Justice System" who dictate how many jail beds are "normally . . . needed," and therefore must be funded by taxpayers.[279]

These dynamics have long been at play even in debates over inhumane treatment of detainees, for which sheriffs do not disavow responsibility entirely. A study of a Texas jail published in the mid-1970s observed that the "overlapping of jurisdiction for the operational aspects of the jail" between the sheriff and the commissioners "often results in ambiguity and repeated disclaimers of responsibility, both of which foster inaction" on improvement of jail conditions.[280] But the increasingly complex web of interjurisdictional detention arrangements has only contributed to further displacement of blame. As Amada Armenta put it, officers involved in immigration enforcement through a 287(g) agreement in effect at the jail in Nashville "wielded their relative powerlessness as a shield against accusations that they [are] committing injustices. . . . Instead, they point to other agencies and actors who they believe are more culpable."[281]

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277. A similar self-conception of reactive passivity has long been recognized among state prison planners vis-à-vis local criminal legal systems. *See* ZIMRING & HAWKINS, *supra* note 272, at 62, 211–13.

278. Brovsky, *supra* note 159; *see also Virtual Jail Statistics, 2013-2018*, BENTON CNTY. SHERIFF'S OFF., OR., https://www.co.benton.or.us/sites/default/files/fileattachments/sheriff039s_office/page/2599/12_december_virtual_jail.pdf (last visited Mar. 14, 2021) [https://perma.cc/6Y7T-7CUA] (chart representing "inmates who should have been held, but were released due to lack of space").

279. *Virtual Jail Statistics*, BENTON CNTY. SHERIFF'S OFF., OR., https://www.co.benton.or.us/sheriff/page/virtual-jail-statistics (last visited Mar. 14, 2021) [https://perma.cc/HQZ4-GDUU].

280. Bernard Ortiz de Montellano, *Jailhouse Politics: A Study of the Bexar County (Texas) Jail*, 1 J. CONTEMP. L. 30, 40–41 (1974); *see also* Welsh et al., *supra* note 269, at 346–47, 361–63 (identifying different forms of blame avoidance by county officials as "powerful heuristic for research into jail policy").

281. AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 119–20 (2017). Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g), authorizes the attorney general to delegate authority to state and local law enforcement officers to enforce federal immigration law. For a history of the development of the 287(g) program, see Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253 (2018). Although some 287(g) agreements of the "task force" model initially permitted immigration enforcement on the beat, independent of any criminal law violation, these were eliminated by the Obama Administration due to concerns about racial profiling; jails are now the sole, and indeed have always been the primary, sites of 287(g) immigration enforcement. *Id.* at 1270–71, 1280. For an intriguing student note questioning the authority of sheriffs to enter into 287(g) agreements unilaterally, see Gregory Taylor, Note, *Dillon's Rule: A Check on Sheriffs' Authority to Enter 287(g) Agreements*, 68 AM. U. L. REV. 1053 (2019).

Sheriffs' reluctance to acknowledge their own authority over jail population levels has generally gone unchallenged, but it has come into stark relief during the COVID-19 pandemic. In a number of jurisdictions, sheriffs have clear statutory authority to release detainees to protect them in emergency situations.[282] Despite confirmation from state officials, sheriffs not only refused to exercise this power, but claimed that they could not release anyone from detention absent a court order or prosecutor's agreement.[283]

B. Jailers as Bureaucrats

There is another more basic flaw in applying to jails the traditional account of fragmentation and misaligned incentives as contributors to carceral growth: it assumes that government officials involved in incarceration treat the provision of bedspace as a cost they would prefer not to bear. In the case of sheriffs, this Article posits, the reverse is often true. Sheriffs want more spending on incarceration—and thus more incarceration—because it is their job to incarcerate.[284] "[A]dditional appropriations for the office" will, they hope, "result in a long [and] successful tenure as sheriff."[285]

A brief historical detour offers helpful perspective. Before the salary revolution described by legal historian Nicholas Parillo took hold in American government, sheriffs generally operated on a fee system that tied their personal compensation directly to their performance of various services, like serving process.[286] The fee system also allowed

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282. *See, e.g.*, CAL. GOV'T CODE § 8658 (West 2021) (authorizing release when "emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent"); MISS. CODE ANN. § 47-3-7 (2021) (authorizing release when "any infectious or contagious disease shall appear in the vicinity of any jail").

283. *See, e.g.*, Div. of L. Enf't, Cal. Dep't of Just., *Information Bulletin: COVID-19 and Statutory Authority Under Government Code Section 8658, No. 2020-DLE-05* (Apr. 14, 2020), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/2020-dle-05.pdf [https://perma.cc/TW6T-LEYC] (confirming authority); Aparna Komarla, *Santa Rita Jail Does Not Administer or Recommend COVID-19 Testing Prior to Quarantine Release*, DAVIS VANGUARD (Oct. 5, 2020), https://www.davisvanguard.org/2020/10/santa-rita-jail-does-not-administer-covid-19-testing-prior-to-quarantine-release/ [https://perma.cc/BU2Z-QPK2] (jail commander taking the position that "the jail has no authority to release individuals early").

284. Spending on jailing is more likely to be treated as a cost by county commissioners; however, they may, depending on how a construction project is financed, see a jail project as a source of revenue and employment (which it is their job to generate), rather than as a fiscal hit.

285. ASS'N OF ARK. CNTYS., ARKANSAS COUNTY SHERIFFS 2018 PROCEDURES MANUAL 15 (2018), https://www.arcounties.org/site/assets/files/4815/county_sheriffs.pdf [https://perma.cc/8AJ4-BGSZ].

286. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE (2013); *see* Richard W. Harding, John Rynne & Lisa Thomsen, *History of Privatized Corrections*, 18 CRIMINOLOGY & PUB. POL'Y 241, 243 (2019) (jail fee system in United Kingdom); Raymond Moley, *The Sheriff and the Constable*, 146 ANNALS AM. ACAD. POL. & SOC. SCI. 28 (1929) (jail fee system in United States).

them to profit personally from detention contracts; as late as 1921, the Montana Supreme Court held that a sheriff, not the county, was the "proper party" to a federal detention contract and that funds he received for the subsistence of detainees "were not in any sense public funds and had no place in the county treasury."[287] Some sheriffs—like those in Alabama who claimed the right to pocket state-appropriated jail food funds—clung fast to the remnants of these arrangements until very recently.[288]

Although the fee system has been abolished, modern sheriffs' desire to build and fill bedspace may still be driven by their mundane interests as agency heads and employers as much as by their views on incarceration.[289] In this view, sheriffs are striving to ensure the viability and growth of the criminal legal apparatus of which they are an integral part and hence to shore up and augment their institutional power. There is both theoretical and evidentiary support for this understanding.

A view of sheriffs as bureaucrats finds support in the budget-maximizing model put forward by public choice theorist William Niskanen, who suggests that officials may be motivated to increase their budgets in order to increase their own and their employees' salaries, electoral and job security, and political and professional power.[290] Ariel Kleiman has argued that Niskanen's model may help to explain upward pressure on criminal legal fees.[291] As she points out, the fact that a criminal legal agency is a "monopolistic provider of a mandatory service" to criminal defendants makes these agencies' incentives distinctive and problematic.[292]

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287. Majors v. Lewis & Clark Cnty., 201 P. 268, 270 (Mont. 1921).

288. *See* Connor Sheets, *Here's How Federal Inmates Made an Alabama Sheriff $1.5 Million*, AL.COM (Dec. 30, 2018), https://www.al.com/news/2018/12/heres-how-federal-inmates-made-an-alabama-sheriff-15-million.html [https://perma.cc/CS22-7Q99]; Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 463–65 (2011).

289. *See* Hoeffel & Singer, *supra* note 6, at 322 n.4 (gesturing at this important point).

290. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36–42 (1971); *see also* Hoeffel & Singer, *supra* note 6, at 321–22 (arguing that "sheriffs' offices function much like any other government bureaucracy," that "[t]he bigger they get and the more resources they command, the more powerful they are and the better positioned they are to command more and more resources," and suggesting that sheriffs benefit politically from having more employees because of increased voter outreach, and benefit from having larger jails because of ability to dole out contracts); Ortiz de Montellano, *supra* note 280, at 42–43 (observing that jails can be "a source of power and patronage" for local officials); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1384–85 (2018) (arguing that "the reach of the criminal justice system" is in part "the product of disaggregated institutions—both state and nonstate actors—making choices that they view as rational responses to discrete organizational incentives").

291. Kleiman, *supra* note 114, at 537–38, 546 n.172.

292. *Id.* at 536–38.

These features are, if anything, even more striking in the jail context, again due to the practice of bedspace contracting. Although a municipality has a monopoly on the power to impose nonvoluntary criminal legal system fees, it can do so only on those "users" whose cases fall within its jurisdiction. Courts, prosecutors, and probation systems do not generally offer their services to or seek revenue from other jurisdictions, but sheriffs search far and wide for "users" to fill their jail beds. Kleiman also notes that the criminal defendants on whom fees are imposed are often unable to challenge their treatment by voting, as many states disenfranchise those who owe criminal legal system debt.[293] The lack of political recourse is even more complete when it comes to jail detainees being held for other jurisdictions, who will not even have ties in or return to the community in which they are confined.

These theories appear to be borne out. Empirical evidence suggests that sheriffs who run jails indeed receive higher salaries, and those with larger jails command more resources, have more employees, and dole out larger contracts.[294] Subtler evidence that carceral bureaucracy impacts sheriffs' decisionmaking arises in a variety of other arenas as well.

Sheriffs who run jail bureaucracies understand bail reform as a grave threat because it may lead to jail closure. Sheriffs who opposed legislative reforms enacted (and subsequently retrenched) in New York described the resulting reductions in their population levels as an "off-the-cliff dive," and one jail administrator revealingly complained that "[w]e *lost* 25% of our population."[295] They heard Governor Cuomo's administration project hundreds of millions in long-term cost savings to county governments; far from rejoicing, they were distressed by his suggestion that "[i]n the longer term, local jails should be able to reduce

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293. *Id.* at 538.

294. Ronald Helms, *Locally Elected Sheriffs and Money Compensation: A Quantitative Analysis of Organizational and Environmental Contingency Explanations*, 33 CRIM. JUST. REV. 5, 18 (2008) (regression analysis of sheriff salaries showed that those who operate jails are paid significantly more and hypothesized that this is because operating jails is a "key source of organizational complexity and administrative contingency").

295. Joseph Spector, Chad Arnold, Jonathan Bandler & Steve Lieberman, *Bail Reform Results in Hundreds of Empty Jail Cells*, TIMES HERALD-REC. (Jan. 23, 2020), https://www.recordonline.com/news/20200123/bail-reform-results-in-hundreds-of-empty-jail-cells [https://perma.cc/ZWM5-EMN4] (emphasis added). Similar opposition has occurred in other states. *See, e.g.*, Taylor Torregano, *Manatee County Sheriff Leads New Effort to Keep Law Requiring Some Inmates to Serve 85 Percent of Their Sentence*, WWSB (Feb. 5, 2020), https://www.mysuncoast.com/2020/02/06/manatee-county-sheriff-leads-new-effort-keep-law-requiring-some-inmates-serve-percent-their-sentence [https://perma.cc/4JV4-ZR44]; Helen Wilbers, *Callaway County Sheriff: Reforms Endanger Community*, NEWS TRIB. (Jan. 5, 2020), https://www.newstribune.com/news/local/story/2020/jan/05/callway-county-sheriff-reforms-endanger-community/810930 [https://perma.cc/X6GD-N68Z].

staffing and potentially close housing units."[296] "Savings" of this sort would hit their budgets and cost deputies' jobs, especially valuable in rural economies.[297] They feared being "put out of business."[298]

Sheriffs' reactions to two other efforts to reduce reliance on pretrial detention reinforce the impression that they may be motivated less by genuine policy commitments than by bureaucratic interests. Jocelyn Simonson notes that community-funded bail-outs, which seek the release of a large number of detainees at once, encounter "jailhouse actors" who are "obstructionist to the farthest extent possible."[299] That jailers feel threatened not only by campaigns to change bail laws but also by campaigns to *comply* with them (albeit en masse) suggests that their opposition is motivated more by the existential threat posed by jail-emptying than by substantive concerns about who should be detained pretrial.

Similarly, sheriffs frequently lament that their jails have become their communities' largest providers of mental health and addiction care, but then oppose diversion of resources from the budgets to fund alternatives to incarceration.[300] Instead, they advocate for investment in jail-based services—that is, additional funding for their offices. Sheriffs in New York told legislators and the press that they opposed bail reform because people no longer incarcerated would be "missing out" and may never have a "chance to come clean."[301]

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296. Joe Mahoney, *New York Sheriffs Not Seeing Financial Savings from Bail Changes*, AUBURN CITIZEN (Jan. 28, 2020), https://auburnpub.com/news/local/crime-and-courts/new-york-sheriffs-not-seeing-financial-savings-from-bail-changes/article_a58f538d-9880-5cc8-926f-03fb644d5fcc.html [https://perma.cc/5NAN-BX54].

297. The director of the New York State Sheriffs' Association was careful to challenge the suggestion that labor costs could be reduced, arguing that "[i]f you have one person in a cell block or 20, you need the same number of officers," due to state "staffing mandates imposed on jail administrators" (which are primarily intended to protect detainees, not deputies). *Id.*

298. Jessica Pishko, *When a Sheriff's Jail Is Emptied*, APPEAL (Jan. 24, 2020), https://theappeal.org/politicalreport/sheriffs-and-bail-reform-the-badge [https://perma.cc/M5SJ-MLHV].

299. Jocelyn Simonson, *The Place of 'The People' in Criminal Procedure*, 119 COLUM. L. REV. 249, 267–68 (2019).

300. *See, e.g.*, E. Fuller Torrey, Aaron D. Kennard, Don Eslinger, Richard Lamb & James Pavle, *More Mentally Ill Persons Are in Jails and Prisons than Hospitals: A Survey of the States*, TREATMENT ADVOC. CTR. (2010), https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf [https://perma.cc/8YZZ-QLYH] (reporting a consensus among Colorado sheriffs that "coping with the challenges posed by housing mentally ill inmates is the top problem facing sheriff's offices statewide"; quoting a Florida sheriff saying that "[j]ails have become asylums for thousands of inmates with mental illnesses whose problems and needs far exceed what jails can provide").

301. *Bail Reform: Suffolk County Sheriff Says Law Is Preventing Some Inmates from Receiving Needed Help*, CBS NEW YORK (Jan. 10, 2020), https://newyork.cbslocal.com/2020/01/10/bail-reform-inmate-help [https://perma.cc/HD82-8VW7]; Joseph Spector, Chad Arnold, Jonathan Bandler & Steve Lieberman, *Impact of Ending Most Cash Bail in NY: Hundreds of Empty Jail Cells*, EVENING TRIB. (Jan. 27, 2020), https://www.eveningtribune.com/news/20200127/impact-of-ending-most-cash-bail-in-ny-hundreds-of-empty-jail-cells [https://perma.cc/54LC-K9EM]; *see also*

Further evidence of the primacy of sheriffs' bureaucratic interests can be found in the explanations they give for their disinclination to cite and release someone brought to jail for booking. Often, they justify their resistance not in terms of the appropriateness of incarcerating arrestees but in terms of professional respect.[302] As one Indiana sheriff recently said, "there's no way I can . . . tell a police officer I don't have room for your criminal"; releasing arrestees "feels like a slap in the face" to the arresting officers, whether employed by his office or a municipal police department.[303]

A recent election in Snohomish County, Washington, illustrates vividly the extent to which sheriff decisionmaking is driven not just by views on crime and punishment but also by the demands of running and maintaining control of a bureaucracy. In 2019, a sergeant in the sheriff's office, Adam Fortney, challenged sitting sheriff Ty Trenary. The key focus of his campaign was opposition to Trenary's policy to not book misdemeanor arrestees who were under the influence of drugs.[304] Although Fortney did accuse Trenary of being insufficiently "tough on crime," his messaging concentrated more heavily on the policy's impact on deputies than on public safety. Fortney argued that Trenary did not appreciate the "impacts those jail restrictions [have on] the men and

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Maki Becker, *Fewer Inmates, More Larcenies: Sifting Through Bail Reform Controversy*, BUFF. NEWS (Feb. 8, 2020), https://buffalonews.com/news/local/crime-and-courts/fewer-inmates-more-larcenies-sifting-through-bail-reform-controversy/article_a584a4d4-97a6-5273-a758-0e81639521f2.html [https://perma.cc/S8TV-UEAH] (thirty people have died in one of quoted sheriff's jails in last fifteen years).

302. Falcone & Wells, *supra* note 6, at 49 (describing sheriffs' "symbiotic relationship" with personnel, in contrast to "structural antagonism" and "natural alienation" of police officers from administrators). Sheriffs also celebrate jail construction as job creation and fear the loss of jobs that would accompany termination of a detention contract. *See, e.g.*, Stole, *supra* note 137 (sheriff "proud" that expanding jail has allowed him to "create over 200 jobs, and it's very meaningful in our parish, . . . not only the pay but they get health benefits"); Kirsti Marohn, *Sherburne County Proposes Expanding Jail for More ICE Detainees*, MPRNEWS (June 4, 2019), https://www.mprnews.org/story/2019/06/04/sherburne-county-proposes-expanding-jail-for-more-ice-detainees [https://perma.cc/R9WL-SHXG] (sheriff expressed concern that "[l]osing the ICE contract would cost about 63 jobs in the sheriff's office, while expanding the jail would create at least 61 more jobs").

303. Isaiah Seibert, *Who's in the Vanderburgh County's Jail? A Look at the Population on One Day*, EVANSVILLE COURIER & PRESS (Oct. 21, 2019), https://www.courierpress.com/story/news/2019/10/21/snapshot-inmate-population-vanderburgh-county-jail/3835613002 [https://perma.cc/C2RQ-NKZD]. Of course, this reflects an important and unexamined carceral assumption: that a police officer has done her job well by putting a person in jail. Consider, by analogy, the description of a prosecutor's role as obtaining convictions. *Cf. Criminal Justice Standards: Prosecution Function*, AM. BAR ASS'N 3-1.2(b) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition [https://perma.cc/ERG7-8ZL4] ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

304. Jason Rantz, *Snohomish County Sheriff Candidate: 'We Haven't Had Support for Six Years*,*'* 770 KTTH (Oct. 31, 2019), https://mynorthwest.com/1575933/snohomish-sheriff-adam-fortney [https://perma.cc/WS65-KHAJ] (policy prompted by deaths in custody).

women" he employed,[305] who "aren't really able to do their jobs."[306] Deputies were "frustrate[d]," he said, and did not feel "supported."[307] Arresting someone and being turned away, he said, "has a horrible impact on morale."[308]

Trenary, the incumbent, responded on policy grounds: "[Y]ou can't arrest your way out of the opioid or drug crisis," he said, touting innovations he had implemented, including outreach teams with social workers, a "one-stop shop for treatment, detox, and wrap-around services," and a medication-assisted opioid treatment program. But his campaign did not address the frustration of his employees.[309] While he was supported by a "long list of elected and executive leaders," Fortney, his challenger, was endorsed by the rank and file, including the deputies' association and a number of police unions across the county.[310] Fortney won; in his victory speech, he promised to "open[ ] up the jail for business again."[311]

V. DECARCERAL REGULATION AND RESISTANCE

The remainder of this Article focuses on what policymakers and the public can do with the account it provides of jails and jailers. It begins from a simple premise about which there is growing consensus: far too many people are in jail in America.[312] The economic and political

305. Hana Kim, *An Uncomfortable Race for Snohomish County Sheriff Comes Down to One Key Difference*, Q13 FOX (Oct. 31, 2019), https://q13fox.com/2019/10/31/an-admittedly-uncomfortable-race-for-snohomish-county-sheriff-comes-down-to-one-key-difference [https://perma.cc/4Q27-ZAZ5]

306. Stephanie Klein, *Trenary Loses to Fortney in Snohomish County Sheriff Race*, 770 KTTH (Nov. 6, 2019), https://mynorthwest.com/1583829/snohomish-county-sheriff-election [https://perma.cc/DLG6-Q44J].

307. King 5 Staff, *Snohomish County Sheriff Concedes Election Before Results Drop on County Site*, KING 5 (Nov. 5, 2019), https://www.king5.com/article/news/politics/elections/snohomish-county-sheriff-election/281-c210cbd2-daa4-4741-a964-3d1c3f2b9025 [https://perma.cc/DA8E-T5XL]; Rantz, *supra* note 304.

308. Rantz, *supra* note 304.

309. Klein, *supra* note 306.

310. Kim, *supra* note 305.

311. King 5 Staff, *supra* note 307. Shortly after the election, the county executive proposed taking control of the jail away from the sheriff. Ben Watanabe, *County Exec Suggests Taking Jail Oversight Away from Sheriff*, HERALDNET (Nov. 18, 2019), https://www.heraldnet.com/news/county-exec-suggests-taking-jail-oversight-away-from-sheriff [https://perma.cc/J4N6-3Z3P].

312. The extent of consensus can certainly be overstated. *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018). Some scholars have begun to follow activists' lead in questioning incarceration wholesale, interrogating whether it is the only, or the best, way to enforce society's behavioral norms and promote public safety. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460–73 (2018). But even the incrementalists agree that "[w]hatever it did before," when incarceration rates were lower, carceral

dynamics of jail expansion and population management this Article has elucidated are among the numerous indications that jail size has become dangerously untethered from reasonable judgments about social control. From a deeper understanding of jail finance and governance, this Part argues, emerges not only evidence of carceral excess but also promising decarceral tools, some of which advocates have begun to employ. It highlights two very different avenues to disincentivize and deter jail overgrowth: state and federal judicial and administrative regulation, and local elections and budgeting.

A. Regulating Jail Contracting as Public Enterprise

In recent years, state courts and federal agencies have begun to recognize that jail contracting has become a public enterprise and to conclude that the constraints imposed on sheriffs and commissioners should reflect this turn. They have taken seriously the sheriff of Rapides Parish, Louisiana, who called himself a jail "CEO," and the commissioners of Jefferson County, Pennsylvania, who celebrated their ability to rent "a lot" of juvenile detention beds at a lucrative rate as "good news."[313] These developments, which arise in arenas as diverse as state-court adjudication of labor disputes and federal agency regulation of tax exemption, may prove useful in efforts to strip jailing of its revenue motive.

For much of American history, jails were seen by courts and legislatures as elements of local governance so essential that they warranted special exemption from fiscal limitations.[314] This view

"growth now almost certainly imposes a net social loss." PFAFF, *supra* note 22, at 115. The tools discussed in this Section will be of interest to those across the decarceral spectrum.

313. Brooke Buford, *The Business of Being Sheriff: Crunching the Numbers at RPSO*, KALB (Mar. 6, 2019), https://www.kalb.com/content/news/The-Business-of-Being-Sheriff-Crunching-the-numbers-at-RPSO—506787291.html [https://perma.cc/EZK7-DB6M]; Linda Harris, *Jefferson County Jail Will Take Juveniles from Indiana County, Pennsylvania*, HERALD-STAR (Nov. 30, 2019), https://www.heraldstaronline.com/news/local-news/2019/11/jefferson-county-jail-will-take-juvenile-inmates-from-indiana-county-pennsylvania [https://perma.cc/5DFK-6A9Z].

314. *See, e.g.*, Potter v. Douglas Cnty., 87 Mo. 239, 241–44 (1885) (concluding that if a constitutional debt limit applied to sheriff's jailing expenses, counties without sufficient revenue would be in a "lamentable . . . predicament," "bereft . . . of all means for the safe keeping of that dangerous class of persons"); Durritt v. Buxton, 39 S.W. 56, 57 (Ark. 1897) (recognizing the continuing validity of a special act authorizing the county court to contract for the building of a jail without prior appropriation); Gladwin v. Ames, 71 P. 189, 189–90 (Wash. 1903) (holding that a municipal warrant for building a city jail was valid despite the city exceeding the limit of its indebtedness because it is "absolutely necessary for the protection, and therefore for the existence of the city, that some provision should be made for the compulsory detention of criminals"); Collingsworth Cnty. v. Allred, 40 S.W.2d 13, 16–17 (Tex. 1931) (construing a constitutional amendment precluding the legislature from authorizing the issuance of municipal bonds to not impair the rights of counties to issue bonds for jail construction, in light of the "absolute necessity of creating debts to build courthouses and jails" and the "most disastrous consequences" that would

reflected governmental practice in the early republic; jails were among the first public buildings erected in newly formed counties.[315] As the Florida Supreme Court explained forcefully in 1952:

> A county jail or courthouse stands in a different class from any other county building or any other county undertaking. The erection of a county jail or courthouse serves not only a county purpose, but it is an absolute and indispensable county necessity. A county government could not exist without a county jail and a courthouse. . . . Without jails or places of detention and incarceration, we would have confusion, disorder, chaos and anarchy.[316]

Jail exceptionalism in state and local finance law has continued into the present in many jurisdictions.[317] Some state courts still permit jail financing mechanisms in violation of constitutional debt limits, though, as in West Virginia, they may now justify this treatment in terms of the importance of providing acceptable conditions of confinement.[318] In Nevada, a fiscal note is required for any legislation that would reduce local government revenues or increase

result if counties were unable to do so); State v. Santa Rosa Cnty., 105 So. 2d 365, 368 (Fla. 1958) (confirming consistent holding that "jails are essential to the existence of county government and do not have to be approved by a vote of the freeholders"); Chism v. Jefferson Cnty., 954 So. 2d 1058, 1097 (Ala. 2006) (Parker, J., dissenting), *as modified on reh'g* (Oct. 5, 2006) (quoting statement from 1901 legislative debate over constitutional debt limit that "the reason counties should create debts are very few[—]to build court houses and jails, and bridges, and roads"); *cf.* Luter v. Pulaski Cnty. Hosp. Ass'n, 34 S.W.2d 770, 771–72 (Ark. 1931) (recounting differing judicial positions as to whether county could contract to spend more than annual revenue to erect or repair jail and legislative response thereto, but confirming agreement that jails were "absolutely necessary in the administration of the state government").

315. The first book of minutes of the commissioners of Carroll County, Maryland, reflects that their initial task was finding a site for a county jail. Prior to its construction, prisoners were housed in a private home, outfitted by the sheriff with "chains and rings." Mary Ann Ashcraft, *Carroll Yesteryears: Carroll County's Beginnings Included a Jail, Free Schools*, CARROLL CNTY. TIMES (Dec. 7, 2019), https://www.baltimoresun.com/maryland/carroll/lifestyles/cc-lt-carroll-yesteryears-120719-20191206-i632yug5bngx3eqygbvllz4wea-story.html [https://perma.cc/G8P9-DEH5]. One early act of the first judges of Gloucester County, Vermont—who initially met in the "howling wilderness," wearing snowshoes—was to commission the sheriff to build a jail "out of logs." Harold Goldman, *The Wild East: Law and Justice in Vermont's Earliest Courts, 1768-1775*, 20 VT. BAR J. & L. DIG. 35, 36 (1994). The "monumental rock features" marking the intersection of the westward Oregon and California trails came to be known as the "Courthouse and Jail Rocks." *Courthouse and Jail Rocks*, NAT'L PARK SERV., https://www.nps.gov/nr/travel/scotts_bluff/courthouse_jail_rocks.html (last visited Mar. 14, 2020) [https://perma.cc/QDS6-AZTA].

316. State v. Fla. State Improvement Comm'n, 60 So. 2d 747, 749 (Fla. 1952); *see also id.* at 752 (declining to extend this treatment to county hospitals).

317. In economic terms, this treatment is animated by the view that jails are public goods with positive externalities that taxpayers can be expected to underfund. *See* Daniel J. D'Amico, *The Business Ethics of Incarceration: The Moral Implications of Treating Prisons Like Businesses*, 31 REASON PAPERS 125, 125–26 (2009); Daniel J. D'Amico, *The Prison in Economics: Private and Public Incarceration in Ancient Greece*, 145 PUB. CHOICE 461, 463 (2010).

318. *See* State *ex rel.* W. Va. Reg'l Jail & Corr. Facility Auth. v. W. Va. Inv. Mgmt. Bd., 508 S.E.2d 130, 138 (W. Va. 1998) (permitting legislature to evade constitutional debt limitation in using proceeds of state insurance taxes to finance jail-construction bonds considering importance of meeting constitutional confinement standards).

expenditures—except if it does so by increasing jail populations.[319] A couple of years ago, following the transfer of many state prisoners to county jails, the Indiana legislature authorized counties to impose additional income taxes exclusively for the purpose of jail building.[320] And, as in Washington, the sparse restrictions on detention contracting imposed by state law often incentivize rather than inhibit ongoing participation in the bedspace market.[321]

As jails have increasingly sought revenue from the bedspace market, however, some courts have begun to recognize the significance of this departure from their traditional, core function and to deviate from the privileged treatment jail finance was previously afforded.[322] In 2008, the Wisconsin Court of Appeals heard a dispute between the sheriff of Ozaukee County and a union representing his deputies.[323] The sheriff had created a new unit at the behest of the county circuit court to improve security at the county courthouse. A major function of the unit, however, was to transport federal and state detainees housed in the Ozaukee County Jail pursuant to detention contracts.[324] The parties agreed that the sheriff's appointment of deputies to this unit had not complied with the union's collective bargaining agreement.[325] The parties also acknowledged "the well-settled law that a sheriff may not be restricted in whom he or she assigns to carry out his or her constitutional duties if he or she is performing immemorial, principal, and important duties characterized as belonging to the sheriff at common law."[326] The case turned on whether the transportation of contract detainees was such a "constitutionally protected" duty.[327]

The court held for the union, focusing repeatedly on the fact that this was a "money-generating" task.[328] Although creation of the unit

319. NEV. REV. STAT. § 218D.435 (2021).

320. H.B. 1263, 2018 Leg., Reg. Sess. (Ind. 2018).

321. *See, e.g.*, WASH. REV. CODE § 70.48.090 (2021) (only limits on freedom to contract arise "when state funds are provided to construct or remodel a jail in one governing unit that will be used to house prisoners of other governing units"; then, termination is prohibited or penalized).

322. *But see* Cent. La. Bank & Tr. Co. v. Avoyelles Par. Police Jury, 493 So. 2d 1249, 1257–58 (La. Ct. App. 1986) (recognizing that the sheriff undertook to expand parish jail and police jury incurred debt to fund expansion based on an understanding that it would house more detainees for other jurisdictions, but rejecting challenge to issuance of debt on this ground).

323. Ozaukee Cnty. v. Lab. Ass'n of Wis., 763 N.W.2d 140 (Wis. Ct. App. 2008).

324. *See id.* at 143.

325. *Id.*

326. *Id.* at 144 (citing Wis. Pro. Police Ass'n v. Cnty. of Dane, 316 N.W.2d 656 (Wis. 1982)).

327. *Id.*

328. *Id.* at 148; *see also* Milwaukee Deputy Sheriff's Ass'n v. Clarke, 772 N.W.2d 216, 222–23 (Wis. Ct. App. 2009) (further relying on this distinction). Over a century earlier, the Wisconsin Supreme Court recognized a different category of county detention facilities as characteristically revenue generating: "insane asylums." Kyes v. St. Croix Cnty., 83 N.W. 637, 638 (Wis. 1900). Our jails have become mental health institutions in more ways than one.

had been prompted by the county court's request for extra security, the court explained, "[t]he transport of other entities' prisoners in order to provide prisoners bed space in exchange for revenue is separate and distinct."[329] The court also saw that transportation of contract detainees was uncoupled from—and did not serve—the interests of the local criminal legal system. "These noncounty prisoners," it said, "are not held at the behest of the Ozaukee court and will have no occasion to go before the Ozaukee court."[330] Growth-favoring deregulatory treatment was inappropriate when jailing was done for profit, not public safety.

In 2016, the Supreme Judicial Court of Maine was asked to decide whether Somerset County would be able to profit from its contract with the Marshals Service.[331] Somerset County

> significantly overbuilt its new county jail with a clear intent to recoup construction costs by using its surplus capacity to house inmates from courts of other jurisdictions (principally the federal courts) and apply the boarding fees to retirement of the construction debt. The boarding capabilities of the Somerset County Jail create[d] a quasi-proprietary income-generating mechanism for the County.[332]

This quickly brought it into conflict with the state Board of Corrections, responsible for managing state subsidies for jail operations and overseeing the supply of jail bedspace. After commissioners directed surplus revenue from the detention contract towards future capital improvements at the jail and spent the remainder to service its jail-construction debt, the Board withheld state subsidy funds as an offset.[333] The majority and dissent both recognized that Somerset County sought to "profit" off its excess bedspace, but their attitudes to this endeavor differed markedly.[334] The dissent protested that "[f]or all of its forward thinking and planning, Somerset County's reward" was to lose its state subsidy funds, which were "replaced with the Board's disheartening suggestion that it seek debt reduction funds through yet another tax on the residents of Somerset County."[335] The majority, though, was dismayed by the county's attempt at jail profiteering, recognizing it as an obstacle to the Board's efforts to

329. Ozaukee Cnty. v. Lab. Ass'n of Wis., 763 N.W.2d 140, 146 (Wis. Ct. App. 2008).

330. *Id*. The county pointed to three examples from the mid-nineteenth century in support of its position that sheriffs had "long administered [the] jail to do more than house inmates who will be appearing before the county court," one of which involved the brief incarceration in the Milwaukee County Jail of a person detained by a U.S. Marshal as a fugitive slave. *Id*. at 146–47. *See generally* Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020) (suggesting that the legal profession reckon with its tradition of citing cases involving slavery as authority).

331. Somerset Cnty. v. Dep't of Corr., 133 A.3d 1006, 1008 (Me. 2016).

332. *Id*. at 1018 (Mead, J., dissenting).

333. *Id*. at 1010–11 (majority opinion).

334. *See id*. at 1020 (Mead, J., dissenting).

335. *Id*. at 1019.

create a "coordinated correctional system" with the right amount of carceral capacity.[336]

Federal agencies have likewise recognized—and regulated—the ways that county jails are being used as engines of municipal profit. In the past half-decade, the Internal Revenue Service's Tax Exempt and Government Entities Division has initiated a number of investigations into whether it was improper to characertize municipal bonds used to finance jail construction as tax exempt when a significant portion of the bedspace was rented out.[337] Generally, interest on state and local bonds is excluded from gross income for purposes of federal taxation.[338] But this tax exemption does not apply to bonds that meet the "private business use" and "private security or payment" tests.[339] The division has concluded that jails filled in large part through federal detention contracts fail these tests.[340]

For example, bonds were issued to finance the construction of a 440-bed jail facility in Glades County, Florida.[341] While the Glades

336. *Id.* at 1016 (majority opinion).

337. *See* Matt Clarke, *Jails in Trouble as IRS Investigates Tax-Exempt Bonds*, PRISON LEGAL NEWS (Aug. 31, 2015), https://www.prisonlegalnews.org/news/2015/aug/31/jails-trouble-irs-investigates-tax-exempt-bonds [https://perma.cc/2QXY-UDKG]. These investigations remain a priority of the division. *See* Tax Exempt & Gov't Entities Div., *Fiscal Year 2020 Program Letter*, INTERNAL REVENUE SERV. 4, https://www.irs.gov/pub/irs-prior/p5313--2019.pdf (last visited Mar. 14, 2021) [https://perma.cc/G8P2-YDTD].

338. 26 U.S.C. § 103(a). This tax advantage makes them appealing to investors.

339. *Id.* § 103(b)(1); *id.* § 141(b)(1) (more than 10% of bond proceeds for private business use); *id.* § 141(b)(2) (more than 10% of bond debt service to be derived directly or indirectly from payments for or secured by private business property).

340. *See, e.g.*, Letter from Allyson D. Belsome, Manager, Tax Exempt Bonds Field Operations, to Jeffrey Cox, Fin. Manager, Baker Corr. Dev. Corp. 2 (July 18, 2017), https://emma.msrb.org/ER1070348-ER838489-ER1239351.pdf [https://perma.cc/GDD2-SH9D]; *Notice of Material Event, Baker County Correctional Development Corporation First Mortgage Revenue Bonds (Baker County Detention Center Project) Series 2008*, BAKER CNTY. CORR. DEV. CORP. 1 (Sept. 27, 2016), https://emma.msrb.org/ES824855-ES647222-ES1042341.pdf [https://perma.cc/PS9C-49M2]; *Notice of Filing of Trust Instruction Proceeding, Hearing Date and Related Matters, Baker Corr. Dev. Corp. First Mortgage Revenue Bonds (Baker County Detention Center Project) Series 2008*, UMB BANK, NAT'L ASS'N 1, 7 (May 15, 2017), https://emma.msrb.org/EP994203-EP770945-EP1172717.pdf [https://perma.cc/2DGA-6RF8]; Letter from Allyson D. Belsome, Manager, Tax Exempt Bonds Field Operations, to Pamela Heltner, Otero Cnty., N.M. 2 (August 4, 2017), https://emma.msrb.org/EP1023716-EP793227-EP1194794.pdf [https://perma.cc/QU2C-Z8TA]; *Notice of Material Event, Otero County, New Mexico Jail Project Revenue Bonds, Series 2007*, OTERO CNTY, N.M. 1 (Dec. 7, 2016), https://emma.msrb.org/ES996859-ES780692-ES1182002.pdf [https://perma.cc/4DM8-DETY]. *See generally* Clarke, *supra* note 337 (detailing the recent IRS crackdown on misuse of tax-exempt bonds for jail construction projects).

341. *Notice of Material Tax Event, Glades Correctional Development Corporation First Mortgage Revenue Bonds (Glades County Detention Center Project) Series 2006*, UMB BANK, NAT'L ASS'N (Feb. 13, 2017), https://emma.msrb.org/ES1009263-ES790584-ES1191826.pdf [https://perma.cc/NK3C-SLQ9] [hereinafter Glades County Notice]; *see also* Jacob Kang-Brown & Jack Norton, *More Than a Jail*, VERA INST. OF JUST. (July 5, 2018), https://www.vera.org/in-our-

County Sheriff's Office was to manage the facility and house some of its own detainees there, the jail was intended primarily to house ICE and Marshals Service detainees.[342] Expected revenue from the rental of about 85% of the bedspace to these federal agencies was used to secure the debt.[343] As the financial report for the project put it, the project was "viewed as a means to address the County's own need and as an opportunity to offer beds for rental to the[se] Federal agencies, producing economic benefits to the County."[344] As a result, the IRS determined that the bonds met the private business tests and had been improperly classified as tax exempt.[345] Notably, Glades County's federal detention contract would have fallen within a regulatory exception to the private business use rule if the contract had been short-term and the property's construction had not been "financed for a principal purpose" of providing it for use by the federal agencies.[346] Like the court in Maine, the IRS has concluded that when a jail is purpose-built to raise revenue as a provider of detention services, rather than built primarily to serve the local criminal legal system, it should not benefit from the preferential treatment afforded to core public functions.[347]

During previous administrations, the Department of Justice's Office of the Inspector General has also criticized the department's practice of allowing localities to profit (in some cases, handsomely) from reimbursement that exceeds the "actual, allowable, and allocable costs associated with operation of the facility that benefit federal

backyards-stories/glades-county-more-than-a-jail [https://perma.cc/K35U-KHAW] (explaining how Glades County became a "hub of incarceration, immigration detention, and deportation").

342. Glades County Notice, *supra* note 341, at 1–2.

343. *Id.* at 2.

344. *Id.* at 2–3.

345. *Id.* at 4. Branches of the federal government may not speak in unison. In a similar case, Baker County, Florida's jail bonds were reclassified; officials obtained a federal rural development loan, as discussed *infra*, to help the county cover the cost of redeeming the bonds and reissuing them as taxable securities. Jack Norton & Jacob Kang-Brown, *Federal Farm Aid for the Big House*, VERA INST. OF JUST. (Oct. 22, 2018), https://www.vera.org/in-our-backyards-stories/federal-farm-aid-for-the-big-house [https://perma.cc/LD4A-A53K].

346. *See* 26 C.F.R. §§ 1.141-3(d)(3)(i) (2021) (the exception); *id.* § 1.141-3(f) (examples).

347. The division has also been investigating the taxability of bonds issued to finance privately managed prisons and jails. *See* Rev. Proc. 97-13, 1997-5 I.R.B. 18 (detailing when a management contract will result in private business use). When a management contract includes profit sharing, IRS regulations dictate that "private payments will arise if the [facility] houses other prisoners (such as those of a neighboring jurisdiction) for a fee." Bob Eidnier, *IRS Scrutiny Puts Prison Financings on Lockdown*, PUB. FIN. TAX BLOG (Nov. 12, 2014), https://www.publicfinancetaxblog.com/2014/11/irs-scrutiny-puts-prison-financings-on-lockdown [https://perma.cc/S6S6-76TP]. While fees can be used to cover operating expenses attributable to detainees held for other jurisdictions, "if the fees provide any contribution toward overhead or financing cost, then the issuer will realize net private payments that count against the private payment limit [for tax exemption]." *Id.* In this context as well, the IRS recognizes that when a local government's decision to expand jail bedspace is financed (and the debt incurred in doing so is serviced) by renting that bedspace out, the project is no longer motivated by a public purpose.

detainees."[348] The nuances of the Inspector General's dispute with the Office of the Federal Detention Trustee and Justice Management Division are beyond the scope of this Article. For present purposes, the important observation is that since receiving statutory authorization to make payments in excess of costs to localities with detention contracts, federal officials have eagerly departed from past practice to do so, often without bothering to modify the language of their contracts to reflect the change.[349] As these audits recognize, reimbursement at a rate beyond operational costs serves to ensure that jail bedspace remains available for federal use.[350] The logical conclusion they do not expressly acknowledge is that profit will also incentivize carceral growth.

As these state and federal examples suggest, the motivators of detention policy may be easiest to glimpse, and thus to regulate, in intergovernmental interstices. Much as Emma Kaufman's study of interstate prisoner transfers and Ben Grunwald and John Rappaport's work on "wandering" police officers excavate deep questions of law and policy (a jurisdiction's obligations to those it punishes and the adequacy of administrative police accountability mechanisms, respectively) by putting a relatively narrow subset of inter- rather than intra-entity actions under microscopic focus, studying interjurisdictional markets

348. U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., AUDIT DIV., OVERSIGHT OF INTERGOVERNMENTAL AGREEMENTS BY THE UNITED STATES MARSHALS SERVICE AND THE OFFICE OF THE FEDERAL DETENTION TRUSTEE, AUDIT REPORT 07-26, at 130 (2007), https://oig.justice.gov/reports/USMS/a0726/final.pdf [https://perma.cc/D72L-HBBQ]. This is not to suggest that all or even most jurisdictions with federal detention contracts end up experiencing net economic benefit. In the prison-building context, "[a]lthough empirical studies suggest that [economic] benefits are minimal to none, local politicians and their constituents certainly *believe* they exist." PFAFF, *supra* note 22, at 88 & 262 n.23 (citing Amy K. Glasmeier & Tracey Farrigan, *The Economic Impacts of the Prison Development Boom on Persistently Poor Rural Places*, 30 INT'L REG'L SCI. REV. 274 (2007); Gregory Hooks, Clayton Mosher, Thomas Rotolo & Linda Laboa, *The Prison Industry: Carceral Expansion and Employment in US Counties, 1969-1994*, 85 SOC. SCI. Q. 37 (2004)); John Eason, *Prisons as Panacea or Pariah? The Countervailing Consequences of the Prison Boom on the Political Economy of Rural Towns*, 6 SOC. SCI. 7 (2017); *cf.* Felicia Arriaga, *Banking on Immigrants*, SCALAWAG (May 27, 2019), https://www.scalawagmagazine.org/2019/05/north-carolina-ice [https://perma.cc/4PZ3-ABPN] (although officials "initially highlighted cost recovery as a reason to adopt 287(g)" immigration enforcement deputization agreements, "program costs covered by local government far outpaced federal reimbursements"). For an unusually rigorous assessment of the comparative costs of different approaches to rural county jail expansion, see Mark A. Edelman & Adrian J. Mayer, *An Analysis of Costs by Size of Jail for Selected Counties in Iowa* (Iowa State Univ., Econ. Staff Paper 289, 1997), https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1289&context=econ_las_staffpapers [https://perma.cc/5XC2-GNG2].

349. U.S. DEP'T OF JUST., *supra* note 348, at 9–17.

350. *Id.*; *see also* U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., AUDIT DIV., THE UNITED STATES MARSHALS SERVICE'S COOPERATIVE AGREEMENT PROGRAM, AUDIT REPORT 05-28 (2005), https://oig.justice.gov/reports/USMS/a0528/final.pdf [https://perma.cc/C39E-FGL8] (declining use of direct capital investment in jails in exchange for guaranteed bedspace).

for jail bedspace illuminates covert but powerful drivers of local jail expansion.[351]

More practically, these junctures could also provide an opportunity for meaningful pressure in a decarceral direction. At the federal level, a quirk of tax law presently deems an Ohio jail holding ICE detainees—but not one renting space to the state or another county, even one in Kentucky—to be put to private business use. A Congress genuinely interested in addressing mass incarceration could disincentivize overexpansion of county jails across America by altering this rule and making clear that bonds used to build a jail to hold detainees for any other jurisdiction will be taxable.[352] At the state level, the market in jail bedspace currently operates without centralized regulation in most jurisdictions; it could be constrained by statutory restrictions on construction and the use of detention revenue, by replacement of per capita fees with a different reimbursement model, by conversion to a regional jail system, or by a cap-and-trade program.[353]

B. The Ballot and the Budget

At the local level, decarceral strategies include nascent efforts to elect more progressive sheriffs as well as campaigns, primarily targeting commissioners, to cut back funding for jails. Both approaches face challenges but hold promise.

Unlike police chiefs[354] and corrections commissioners,[355] their

351. Kaufman, *supra* note 134; Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020).

352. Such a move would reduce overall counties' incentives to build the jail bedspace on which federal agencies rely; however, it would actually increase the relative appeal of expansion to accommodate a federal detention contract, which is disfavored under current tax law.

353. *See* Eisenberg, *supra* note 243, at 126 (shifting from per capita reimbursement model would realign incarceration incentives for county jails holding state prisoners as well as for private prisons); John Eck, Cheryl L. Johnson & Francis T. Cullen, *The Small Prison*, *in* THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE (Francis T. Cullen, Cheryl L. Johnson & Mary K. Stohr eds., 2013) (proposing cap-and-trade). Of course, it would be critical to study any less-than-direct mode of regulation to determine whether it actually had a decarceral effect.

354. *See* Fred W. Rainguet & Mary Dodge, *The Problems of Police Chiefs: An Examination of the Issues in Tenure and Turnover*, 4 POLICE Q. 269, 269 (2001) (average police chief tenures of 2.5 to 5.5 years); Yudu Li & Ben Brown, *Police Chief Turnover in Texas: An Exploratory Analysis of Peer-Evaluation Survey Data Pertinent to Police Performance and Turnover*, 22 POLICE Q. 391, 393 (2019) (average police chief tenures of four to six years).

355. *See* Michael Zoorob, *There's (Rarely) a New Sheriff in Town: The Incumbency Advantage for County Sheriffs* (2020) (manuscript at 1–2, 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3485700 [https://perma.cc/P4VY-NXXP]. Per the author's review, as of the beginning of 2020, thirty-one states' heads of correctional agencies had been replaced in the preceding two years (in one case, twice); all but four had been replaced in the preceding five years. Only two, in Louisiana and Wyoming, had been in office over a decade.

closest analogues, sheriffs are almost always elected,[356] but this does not necessarily make them more accountable.[357] Historically, at least, sheriffs—who are almost always white and male[358]—have been unusually insulated from electoral pressures.[359] Rural local elections tend to be low-turnout affairs, with local politics controlled by business interests.[360] Even against this backdrop, sheriffs have enjoyed striking levels of job security. Their tenures in office are extraordinarily long: an average of eleven years and as long as half a century.[361] When they run for reelection, they are frequently unopposed and enjoy an incumbency advantage that "far exceeds that of other local offices and even members of Congress."[362]

Also unlike police chiefs and corrections commissioners, sheriffs are not directly accountable to other elected government officials because they generally cannot be removed from office except in cases of extreme misconduct.[363] In a survey of police chiefs and sheriffs about

356. Sheriffs in Rhode Island and a few counties in other states are appointed rather than elected. Other than in Indiana, New Mexico, West Virginia, and some Colorado counties, they have no term limits. NAT'L SHERIFFS' ASS'N, *supra* note 52.

357. *Cf.* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1594 n.322 (2017) (view of law enforcement insurer that "sheriffs tend to be more resistant [to pressure from insurers] than police chiefs because sheriffs are elected rather than appointed"). Margo Schlanger is certainly correct that sheriffs are more likely than governors to get bad press coverage and face electoral consequences from a damages award in a conditions case. Schlanger, *supra* note 18, at 1681–82. But it is probably true that sheriffs, who rarely lose elections for any reason, rarely lose them due to jail (mis)management. To the extent that bad press coverage about their jails does matter to sheriffs, it is likely to induce jail building; sheriffs are unlikely to be blamed for high taxes. On the limits of local news coverage of sheriffs, see also Lindsey Meeks, *Undercovered, Underinformed: Local News, Local Elections, and U.S. Sheriffs*, 21 JOURNALISM STUD. 1609, 1610 (2020).

358. Bulman, *supra* note 192, at 1843 (only 4% of counties had a Black sheriff at any time between 1991 and 2015); *Confronting the Demographics of Power: America's Sheriffs*, REFLECTIVE DEMOCRACY (June 2020), https://wholeads.us/research/americas-sheriffs/ [https://perma.cc/3JMQ-DRN8] (90% of sheriffs are white men).

359. When a sheriff is voted out of office, it commonly reflects voters' rejection of his ethical (usually, financial) impropriety, rather than his policy positions. *See, e.g.*, Joseph Cranney, *SC Voters Usher in New Wave of Sheriffs After Scandals. Advocates Eye Reforms.*, POST & COURIER (Nov. 4, 2020), https://www.postandcourier.com/news/sc-voters-usher-in-new-wave-of-sheriffs-after-scandals-advocates-eye-reforms/article_14e451f0-1dfb-11eb-8a11-23e4bc6f877d.html [https://perma.cc/UDQ9-HVWB].

360. Su, *supra* note 33, at 856–58, 886.

361. Zoorob, *supra* note 355, at 13–14.

362. Zoorob, *supra* note 355, at 2; *see also* Hoeffel & Singer, *supra* note 6, at 319, 323–25. There is reason to believe that handovers of power between sheriffs are frequently mediated by other elected county or state officials empowered to fill vacancies in the office until the next election occurs. *See, e.g.*, Zara Ahmed, *Flint Police Chief Resigns, Enters Genesee County Sheriff's Race*, MLIVE (Nov. 8, 2019), https://www.mlive.com/news/flint/2019/11/flint-police-chief-resigns-enters-genesse-county-sheriffs-race.html [https://perma.cc/3RAJ-8GJD] (current sheriff was appointed when previous one retired and has since been reelected five times).

363. *See, e.g.*, GA. CODE ANN. § 15-16-26 (2021) (permitting removal from office only by the governor, upon recommendation of review commission of two other sheriffs and attorney general);

conditions that might jeopardize their positions, both expressed similar concerns about a variety of issues, with one glaring difference: 44% of chiefs identified "political pressure from other government officials" as a very serious issue, while only 18% of sheriffs did.[364]

There is also reason to question whether the policy positions of sitting sheriffs are easily shaped by the electoral process. Political scientist Dan Thompson, who has compiled the largest available database of sheriff elections, found evidence that Democratic and Republican sheriffs from politically similar counties make similar immigration enforcement decisions, indicating that partisan contests may have little effect on policy choices.[365] His analysis suggests that sheriffs' decisionmaking is influenced less by the pressure of competitive elections and more by candidate entry and selection.[366] In brief: "candidates for sheriff need law enforcement credentials to run," and this requirement produces candidates that fall within a "narrow band of the ideological spectrum."[367]

That said, there are historical and contemporary bases for guarded optimism that electoral politics can, at least in some jurisdictions, influence criminal legal policymaking by sheriffs. Two

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see also Jason Pohl & Ryan Gabrielson, *We Revealed California Jails are in Crisis. Gavin Newsom Is Calling for More Oversight*, SACRAMENTO BEE (Nov. 14, 2019), https://www.sacbee.com/news/investigations/california-prisons/article237336684.html [https://perma.cc/JPF4-HLC7] ("challenging local sheriffs could prove more difficult" than other aspects of governor's criminal legal reform platform; proposed bill allowing counties to create sheriff oversight bodies with subpoena power was shelved after opposition from state sheriffs' association, whose lobbyist said, "[s]heriffs and jails are already overseen or monitored"). The relative frequency with which sheriffs engage in egregious misbehavior is itself evidence of their self-perceived impunity. *See, e.g.*, Tony Bartelme, *Not Exactly Mayberry: SC Sheriffs Earn 2019 Newsmaker of the Year for Scandalous Behavior*, POST & COURIER (Dec. 21, 2019), https://www.postandcourier.com/news/sc-sheriffs-earn-2019-newsmaker-of-the-year-for-scandalous-behavior/article_3287a316-1847-11ea-bef3-673772ca16df.html [https://perma.cc/6QJ6-WPDM].

364. Zoorob, *supra* note 355, at 15–16.

365. Daniel M. Thompson, *How Partisan Is Local Law Enforcement? Evidence from Sheriff Cooperation with Immigration Authorities*, 114 AM. POL. SCI. REV. 222, 227–29 (2020).

366. *Id.* at 224. Qualified and credible challengers with divergent policy perspectives are especially hard to come by in rural areas. *Cf.* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1537 (2020) (showing based on national survey of local prosecutor elections that "incumbents are rarely contested and almost always win"; revealing "stark divide between rural and urban prosecution," in that rural areas "rarely hold contested elections and sometimes are not able to field even a single candidate for a prosecutor election," such that elections are "not a likely source of reform").

367. Thompson, *supra* note 365, at 224. In many states, the requirement of law enforcement experience is *de jure*, but elsewhere it is essentially *de facto*; over 95% of sheriffs have prior law enforcement experience. *Id.* at 224 n.4. One key area for further research is how those sheriffs without such experience differ in terms of jail policy. The emergence of "progressive" prosecutors has involved recruitment of candidates without prosecutorial (and often with criminal defense) experience. *See* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1424–25 (2021). Any similar trend in the profession of sheriff might involve candidates with social service backgrounds, at least in states where they would be eligible for election.

recent studies provide evidence that Black sheriffs, and the sheriffs that Black voters elect, exercise their discretion to arrest fewer Black people for low-level crimes.[368] One showed that following the passage of the Voting Rights Act, Black people were arrested at lower rates in areas it covered "with a large number of newly enfranchised black voters," and that this decrease was driven by a drop in low-level arrests by sheriffs' deputies.[369] Another found that in the rare instances when Black sheriffs replace white sheriffs, arrests of Black people go down, particularly for less-serious offenses.[370]

Recently, concerted mobilizations have unseated an increasing number of sheriffs. In 2014 and 2016, two metropolitan sheriffs notorious for their egregiously improper jail management were forced or voted out of office.[371] A study of sheriff elections during the 2018 midterm—a referendum on the presidential administration—found that in a dozen elections where "local campaigns [were] nationalized" by a focus on immigration enforcement, incumbents were much less safe; more than half lost.[372] Now, for the first time, national advocacy groups are investing in sheriff elections, led by a group called Sheriffs for Trusting Communities, and coordinated local organizing is underway.[373] This effort has notched a few significant victories already, including in 2020 races in Cobb and Gwinnett Counties in Georgia's

368. Similar studies of electoral impacts on sheriffs' decisions to expand bedspace and release incarcerated people are sorely needed.

369. Giovanni Facchini, Brian G. Knight & Cecilia Testa, *The Franchise, Policing, and Race: Evidence from Arrests Data and the Voting Rights Act* 30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27463, 2020), https://www.nber.org/papers/w27463 [https://perma.cc/W4BU-DZM6] (finding no corresponding pattern for arrests of white people).

370. Bulman, *supra* note 192, at 1850–53.

371. Lee Baca of Los Angeles County, California, and Joe Arpaio of Maricopa County, Arizona, both lost their jobs thanks to hard-fought organizing and litigation campaigns. *See* Shelby Grad, *The Rise and Fall of Lee Baca, L.A. County's Onetime 'Teflon Sheriff'*, L.A. TIMES (Mar. 15, 2017), https://www.latimes.com/local/lanow/la-me-baca-story-20170315-story.html [https://perma.cc/3JWM-GWZL]; Fernanda Santos, *Joe Arpaio's Surprising Legacy in Arizona*, POLITICO MAG. (Nov. 10, 2019), https://www.politico.com/magazine/story/2019/11/10/joe-arpaio-arizona-latino-activists-elected-office-229906 [https://perma.cc/2UZV-MA4U]. For a detailed history of the campaign against Arpaio, see Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2316–38 (2020). These sheriffs were outliers: both had been involved in extensive litigation regarding civil rights abuses, and both were subsequently convicted of federal crimes. *See* Matt Hamilton, *Former Los Angeles County Sheriff Lee Baca Is Now a Prison Inmate in Texas*, L.A. TIMES (Feb. 5, 2020), https://www.latimes.com/california/story/2020-02-05/former-los-angeles-county-sheriff-lee-baca-is-now-a-prison-inmate-in-texas [https://perma.cc/7GN2-4J4D].

372. Michael Zoorob, *Going National: Immigration Enforcement and the Politicization of Local Police*, 53 POL. SCI. & POL. 421, 424 (2020) (but observing that the "presence of challengers" is a "scope condition" limiting electoral pressure on sheriffs).

373. *Id.* at 423; SHERIFFS FOR TRUSTING COMMUNITIES, https://www.trustingsheriffs.org (last visited Jan. 20, 2021) [https://perma.cc/F8X8-YWLN]; *see also* Ouziel, *supra* note 6, at 550 n.98 (providing examples of local efforts across the country).

metro Atlanta area and in Charleston County, South Carolina.[374] In all three, the successful challengers (two Black men and a white woman) promised to immediately terminate 287(g) agreements with ICE.[375] In Hamilton County, Ohio, a whistleblower who was fired after complaining about excessive use of force against jail detainees was elected sheriff.[376]

Given the challenges to electoral accountability for sheriffs, advocates have pursued strategies that go after jailers' pocketbooks in addition to their badges. Decarceral organizers have increasingly demanded reductions not simply in the number of people incarcerated but also in the funding for and number of jail beds.[377] They appreciate that fiscal constraints on bedspace may more durably undermine carceral excess than changes in policing, prosecutorial, and adjudicative practice. While a district attorney's bail practices and a police chief's or sheriff's cite-and-release policy can be changed in a memo or an election, building a jail costs tens or hundreds of millions of dollars over a period of years, and significant budget cuts would block new construction and necessitate closures and layoffs, changes that are harder to reverse.[378]

Campaigns to block funding for jail expansions or defund existing jails have made tremendous strides in recent years. In Los Angeles, for example, a powerful coalition of organizers combined efforts to curtail the sheriff's power with a push to siphon money away from jail construction and towards alternatives to incarceration. In 2020, it won passage of Measure R, which gave a civilian oversight board subpoena power to investigate complaints against the sheriff and also authorized it to draft a plan to reduce jail population levels, and Measure J, which dedicated 10% of local revenue (hundreds of millions of dollars per year) to community investment and alternatives to

374. Daniel Nichanian, *ICE Suffered Blows in the South in Last Week's Elections*, APPEAL (Nov. 12, 2020), https://theappeal.org/politicalreport/sheriffs-2020-immigration [https://perma.cc/DB4S-YG6L].

375. *Id.*

376. Maria Cramer, *Woman Who Says She Was Fired for Being a Lesbian Is Elected Sheriff*, N.Y. TIMES (Nov. 8, 2020), https://www.nytimes.com/2020/11/08/us/charmaine-mcguffey-sheriff-hamilton.html [https://perma.cc/Q33P-Q5BY].

377. During the Civil Rights Movement, limited jail capacity also proved critical in challenging abuses at the hands of sheriffs. As Dr. Martin Luther King, Jr., put it in 1960, "If we fill up his jails, the white man will have no place to put us." Ray Cromley, *Negroes Plan to Extend 'Sit-ins*,*'* N.Y. WORLD-TELEGRAM & SUN (Apr. 26, 1960).

378. HENRICHSON ET AL., *supra* note 19, at 21–23 (discussing the impact of fixed and step-fixed costs on savings from population reduction); PFAFF, *supra* note 22, at 99 (observing that marginal reductions in incarcerated population result in no savings in wages, utilities, and even spending on food); Marie Gottschalk, *Democracy and the Carceral State in America*, 651 ANNALS AM. ACAD. POLI. & SOC. SCI. 288, 291 (2014) ("The only way to seriously reduce spending on corrections is to shut down penal facilities and lay off correctional staff.").

incarceration.[379] Shortly after the sheriff defied the first such subpoena, advocates convinced the county board of supervisors to move towards closing the county's largest jail facility—and released a benefit album featuring Aloe Blacc and Vic Mensa entitled *Defund the Sheriff*.[380] Such campaigns have occurred not only in major metropolitan centers but also in communities like Douglas County, Kansas, where a coalition of nonprofits has fought to stop commissioners from issuing a jail-expansion bond without a vote.[381]

Close attention to jail finance suggests a few strategic choices decarceral activists may wish to explore in advancing their agendas.[382] It could be helpful to increase direct and indirect electoral control over issuance of jail construction financing instruments by advocating that any debt issuance occur in the form of general obligation bonds, which are often roundly rejected by voters, even in conservative jurisdictions, and by criticizing elected officials for circumventing voter control when other mechanisms are used.[383] To the extent that proposed ballot measures bundle additional spending on jail construction with more

379. Alene Tchekmedyian, *On Heels of Sheriff's Department Scandal, L.A. County Voters Overwhelmingly Back Stronger Oversight*, L.A. TIMES (Mar. 5, 2020), https://www.latimes.com/california/story/2020-03-05/voters-support-measure-r-oversight-sheriffs-department [https://perma.cc/C4G7-HBVK]; Jaclyn Cosgrove, *L.A. County Voters Approve Measure J, Providing New Funding for Social Services*, L.A. TIMES (Nov. 3, 2020), https://www.latimes.com/california/story/2020-11-03/2020-la-election-tracking-measure-j [https://perma.cc/E2JH-G8KF].

380. Cindy Chang, *L.A. Sheriff Will Defy Subpoena From Oversight Commission on Jail Conditions*, L.A. TIMES (May 20, 2020), https://www.latimes.com/california/story/2020-05-20/l-a-county-sheriff-will-defy-subpoena-from-oversight-commission-to-testify-about-jail-conditions [https://perma.cc/M27D-H2H5]; Alene Tchekmedyian, *L.A. County Seeks Plan to Close Aging Men's Central Jail in a Year*, L.A. TIMES, https://www.latimes.com/california/story/2020-07-07/mens-central-jail-closure-plan (last updated July 8, 2020) [https://perma.cc/FC8K-H2YN]; *Defund the Sheriff (The Album)*, JUSTICELA, https://justicelanow.org/sheriffalbum (last visited Jan. 21, 2021) [https://perma.cc/E6CL-9NKH].

381. Mackenzie Clark, *Douglas County Commission Illegally Blocking Vote, Petition Against Jail Expansion Funding, Legal Action Alleges*, LAWRENCE J.-WORLD (Mar. 16, 2020), https://www2.ljworld.com/news/county-government/2020/mar/16/douglas-county-commission-blocking-petition-jail-expansion [https://perma.cc/TYG4-RVDM].

382. Groups like Californians United for a Responsible Budget have grappled in nuanced ways with the mechanisms of carceral finance. Though some rural communities have vigorous organizing efforts, relatively little reporting covers them. *But see* Jack Norton, *"We Are Not Going to Rest": Organizing Against Incarceration in Upstate New York*, VERA INST. OF JUST. (Sept. 3, 2019), https://www.vera.org/in-our-backyards-stories/we-are-not-going-to-rest [https://perma.cc/T77G-VJ4A] (describing efforts in Binghamton, New York).

383. Although unsuccessful, the Detroit Justice Center brought a lawsuit to challenge the lack of adequate notice regarding a jail construction bond issued by Wayne County, Michigan, in 2018. *See* Press Release, Detroit Just. Ctr., Detroit Justice Center Sues Wayne County in Federal Court to Defend Public's Right to Referendum on New Jail (July 18, 2018), https://www.detroitjustice.org/blog/2018/7/18/h3bpress-releasebh3detroit-justice-center-sues-wayne-county-in-federal-court-to-defend-publics-right-to-referendum-on-new-jail [https://perma.cc/Q3UJ-Z2YX] (detailing groups' allegations of "sham notice" surrounding bonds and providing a link to the complaint); Buni v. Cnty. of Wayne, No. 18-CV-12243, 2019 WL 1570820, at *1 (E.D. Mich. Apr. 11, 2019) (granting the county's motion to dismiss).

popular investment in alternatives to incarceration, advocates will want to consider pushing for disaggregation.[384] When sheriffs and commissioners spend public funds to advocate for passage of jail-funding measures, this misuse of taxpayers' money should be challenged—and seized as an opportunity to highlight the ways that these officials' interests and those of county residents have diverged.

Other strategies that push stakeholders to seriously consider alternatives to incarceration are worth pursuing as well. Investors in municipal securities could be encouraged to divest from jail construction, either through corporate accountability or shareholder campaigns or through research demonstrating that these are unsafe investments in light of bail and other criminal legal reforms.[385] Local advocates could prepare their own alternative population projections that account for the possibility of a decreased need for jail beds; estimating concretely the savings that would accrue to taxpayers from building and staffing less jail bedspace might win over skeptics.[386] Just as the movements for police reform and abolition are grappling more seriously of late with the ways in which municipal finance systems can

384. Including funding for alternatives to incarceration in jail bond issues placed on ballots may induce voter support for otherwise unpopular jail construction. *Cf.* Marie Gottschalk, *The World's Warden: Crime, Punishment, and Politics in the United States*, 55 DISSENT 58, 59–60 (2008) (voters approved prison construction "slickly packaged as part of a billion-dollar bond measure that included money for state parks and homes for the mentally handicapped"). This strategy is increasingly employed in some jurisdictions. *See* E-mail from Gini Pingenot, Legis. Dir. of Colorado Cntys., Inc., to Author (Oct. 14, 2019) (on file with author) ("Most of the jail-related [ballot] questions I've seen of recent are much broader than simply 'jail reconstruction/construction.' Most counties also seek support for wrap-around services and diversion activities to keep low-level offenders out of jail."). In some cases, bond issues that will result in unabated carceral growth have been marketed, disingenuously, as funding innovative solutions. *See, e.g.*, Spencer Joseph & Elita Goyer, *Measure A Could End Revolving Jail Door Problems*, ACTION NEWS NOW (Dec. 27, 2019), https://www.actionnewsnow.com/content/news/Measure-A-could-end-revolving-jail-door-problems-566532121.html [https://perma.cc/5YAM-25MN] (sales tax measure described as "help[ing] the revolving door finally meet an end"); *Ordinance No. SCC 2019-05*, CNTY. OF SHASTA, https://www.elections.co.shasta.ca.us/wp-content/uploads/2019/12/executed.CoCo_.Sales_.Tax_.Res_.030320.Ballot.Ord_.2019-05.100119.pdf [https://perma.cc/L29Z-3T5L] (4% of revenue from said measure allocated for treatment and rehabilitation programs, while 50% designated for detention operations).

385. *See* Kevin Pranis, *Doing Borrowed Time: The High Cost of Back-Door Prison Finance*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS IMPRISONMENT (Tara Herivel & Paul Wright eds., 2008).

386. Indeed, this is among the demands the JusticeLA Coalition made of the Board of Supervisors. *About L.A. County's Jail Expansion Plan*, JUSTICELA, https://justicelanow.org/jailplan (last visited Jan. 21, 2021) [https://perma.cc/HNW3-8ZL6] ("Establish and apply a methodology to calculate local jail and probation savings from current and projected population reductions and report on projected plans to spend the anticipated state-level justice allocations."). A pro bono team of quantitative policy experts able to produce custom reports for activists in jurisdictions around the country would provide an incredibly valuable service.

impede or promote change, the movement to end mass incarceration at the local level must do so as well.[387]

CONCLUSION

To many Americans, particularly wealthy people who live in big cities, jails and prisons are vaguely synonymous, and sheriffs ride horses in old Westerns. Mass incarceration is a monolith. But to those who feel shame rather than pride at our country's place on the carceral leaderboard—who do not think that people should be locked in cages because they are Black or poor or lack housing or use drugs—it is important to understand whose decisions and incentives have created our current calamity and what specifically can be done about it. To those subject to the coercive force of our criminal legal system, and to their loved ones, the dynamics of carceral expansionism are matters of freedom—even of life and death.

Jails and jailers are an important and underexplored piece of the puzzle. Over the course of a year, they confine more people than our nation's prisons, and the availability of jail bedspace impacts everything from misdemeanor justice to immigration detention. Sheriffs and commissioners have pursued expansion by relying on projections that ignore the possibility of policy shifts, circumventing taxpayer opposition through creative financing mechanisms, and eagerly participating in interjurisdictional jail bedspace markets. Unlike any other officials, sheriffs sit at the nexus of carceral supply and demand, advocating for and facilitating jail growth while exercising significant control over the number of people they incarcerate through their tripartite policing, correctional, and political powers. But this role consolidation does not incentivize carceral restraint. Their desire for bedspace expansion is as much about their interests as bureaucrats and employers as it is about their views on criminal legal policy. Judicial and administrative regulation of jailing-for-profit and local electoral and budgetary advocacy hold promise as avenues for undermining the incentives that fuel mass incarceration.

387. *See, e.g.*, Alyxandra Goodwin, Whitney Shepard & Carrie Sloan, *Police Brutality Bonds: How Wall Street Profits from Police Violence*, ACTION CTR. ON RACE & ECON. 9, 15, 20 (June 2020), https://acrecampaigns.org/wp-content/uploads/2020/06/ACRE_PBB_2020_2.pdf [https://perma.cc/BH9S-CVFQ] (drawing attention to incentives of local governments, banks, and investors in borrowing to cover costs of settlements and judgements in police brutality cases).

APPENDIX I

TABLE 1: PERCENTAGE OF STATEWIDE MARIJUANA POSSESSION ARRESTS MADE BY SHERIFFS[388]

State	Percentage	State	Percentage
Alabama	23%	New Hampshire	< 1%
Arizona	17%	New Jersey	< 1%
Arkansas	19%	New Mexico	18%
California	17%	New York	11%
Colorado	12%	North Carolina	17%
Georgia	28%	North Dakota	28%
Idaho	27%	Ohio	15%
Indiana	19%	Oklahoma	11%
Iowa	19%	Oregon	13%
Kansas	16%	Pennsylvania	< 1%
Kentucky	5%	South Carolina	35%
Louisiana	44%	South Dakota	14%
Maine	14%	Tennessee	19%
Maryland	15%	Texas	22%
Michigan	16%	Utah	21%
Minnesota	15%	Vermont	6%
Mississippi	23%	Virginia	20%
Missouri	12%	Washington	17%
Montana	29%	West Virginia	12%
Nebraska	19%	Wisconsin	24%
Nevada	12%	Wyoming	28%

388. FBI, *supra* note 184 (author's analysis).

APPENDIX II

TABLE 2: AUTHORITY TO CITE AND RELEASE AT ARREST[389]

State	Provision	Scope
Alabama	ALA. CODE § 11-45-9.1 (2021)	Class C Misdemeanors
Arizona	ARIZ. REV. STAT. ANN. § 13-3903 (2021)	Misdemeanors, Petty Offenses
Arkansas	ARK. R. CRIM. P. 5.2(a) (2021)	Misdemeanors
California	CAL. PENAL CODE §§ 853.5, 853.6 (West 2021)	Misdemeanors, Infractions
Colorado	COLO. REV. STAT. § 16-3-105 (2021)	Misdemeanors, Petty Offenses
Delaware	DEL. CODE ANN. tit. 11, § 1907 (2021)	Misdemeanors
Florida	FLA. R. CRIM. P. 3.125 (2021); FLA. STAT. § 162.23 (2021)	Misdemeanors, Ordinance Violations
Georgia	GA. CODE ANN. § 17-4-23 (2021)	Certain Misdemeanors
Idaho	IDAHO CODE § 19-3901 (2021)	Misdemeanors and Infractions Triable by Magistrates
Illinois	725 ILL. COMP. STAT. 5/107-12(a) (2021)	All Offenses Without Arrest Warrant
Indiana	IND. CODE § 35-33-4-1(f) (2021)	Misdemeanors
Iowa	IOWA CODE § 805.1 (2021)	All Offenses Except Stalking and Those Ineligible for Bond
Kansas	KAN. STAT. ANN. § 22-2408 (2021)	Misdemeanors
Kentucky	KY. REV. STAT. ANN. § 431.015 (West 2021)	Certain Misdemeanors
Louisiana	LA. CODE CRIM. PROC. ANN. art. 211 (2020)	Felony Theft of Less Than $1,000 Misdemeanors
Maine	ME. STAT. tit. 17-A, § 15-A (2021)	All Offenses
Maryland	MD. CODE ANN., CRIM. PROC. § 4-101(c)(1)(i) (LexisNexis 2021)	Certain Misdemeanors

389. All states authorize, and some require, issuance of citations for certain traffic offenses. *See* INT'L ASS'N OF CHIEFS OF POLICE, CITATION IN LIEU OF ARREST: EXAMINING LAW ENFORCEMENT'S USE OF CITATION ACROSS THE UNITED STATES, FINAL REPORT (2016), https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Citation%20Final%20Report%202016.pdf [https://perma.cc/7MRN-UTEP]; INT'L ASS'N OF CHIEFS OF POLICE, CITATION IN LIEU OF ARREST: EXAMINING LAW ENFORCEMENT'S USE OF CITATION ACROSS THE UNITED STATES, LITERATURE REVIEW 9 (2016), https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf [https://perma.cc/N848-ZM8G].

State	Provision	Scope
Michigan	MICH. COMP. LAWS § 764.9c (2021)	Certain Misdemeanors, Ordinance Violations
Minnesota	MINN. R. CRIM. P. 6.01(1)(a) (2021)	Misdemeanors
Mississippi	MISS. CODE ANN. § 99-3-18(1) (2021)	Misdemeanors
Missouri	MO. REV. STAT. § 544.560 (2021)	Misdemeanors
Montana	MONT. CODE ANN. § 46-6-310 (2021)	All Offenses
Nebraska	NEB. REV. STAT. § 29-422 (2021)	Misdemeanors, Infractions, Ordinance Violations
Nevada	NEV. REV. STAT. § 171.1771 (2021)	Misdemeanors, Ordinance Violations
New Hampshire	N.H. REV. STAT. ANN. 594:14 (2021)	Misdemeanors, Ordinance Violations
New Jersey	N.J. CT. R. 3:4-1(a) (2021)	Certain Felonies, Misdemeanors
New Mexico	N.M. STAT. ANN. § 31-1-6 (2021)	Petty Misdemeanors
New York	N.Y. CRIM. PROC. LAW §§ 140.20(2), 150.20, 150.75 (McKinney 2021)	Some Class E Felonies, Misdemeanors
North Carolina	N.C. GEN. STAT. § 15A-302 (2021)	Misdemeanors, Infractions
North Dakota	N.D. R. CRIM. P. 5(e) (2021)	All Offenses Committed in Presence of Officer
Ohio	OHIO CRIM. R. 4(F) (2021); OHIO REV. CODE ANN. § 2935.26 (LexisNexis 2021)	Misdemeanors, Minor Misdemeanors
Oklahoma	OKLA. STAT. tit. 22, § 209 (2021)	Misdemeanors, Ordinance Violations
Oregon	OR. REV. STAT. ANN. §§ 133.055, 133.070 (2020)	Class C and Certain Other Felonies, Misdemeanors, Ordinance Violations
Pennsylvania	PA. R. CRIM. P. 519(B) (2021)	Certain Misdemeanors
South Carolina	S.C. CODE ANN. §§ 56-7-10, 56-7-15, 56-7-80 (2021)	Certain Misdemeanors, Offenses Committed Within Presence of Officer and Within Jurisdiction of Magistrates or Municipal Court, Ordinance Violations
South Dakota	S.D. CODIFIED LAWS § 23-1A (2021)	Petty Offenses
Tennessee	TENN. CODE ANN. § 40-7-118 (2021)	Certain Misdemeanors
Texas	TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2021)	Certain Misdemeanors
Utah	UTAH CODE ANN. § 77-7-18 (LexisNexis 2021)	Misdemeanors, Infractions
Vermont	VT. R. CRIM. P. 3(f) (2021)	Misdemeanors

State	Provision	Scope
Virginia	VA. CODE ANN. § 19.2-74 (2021)	Certain Misdemeanors, Ordinance Violations
Washington	WASH. REV. CODE § 10.31.100 (2021)	Gross Misdemeanors or Misdemeanors Committed in Presence of Officer
West Virginia	W. VA. CODE § 62-1-5a (2021)	Certain Misdemeanors Committed in Presence of Officer
Wisconsin	WIS. STAT. § 968.085 (2021)	Misdemeanors
Wyoming	WYO. STAT. ANN. § 7-2-103 (2021)	Misdemeanors

APPENDIX III

TABLE 3: AUTHORITY TO CITE AND RELEASE AT BOOKING[390]

State	Provision	Scope
Arkansas	ARK. R. CRIM. P. 5.2(b) (2021)[391]	Misdemeanors
California	CAL. PENAL CODE §§ 853.5, 853.6 (West 2021)[392]	Misdemeanors, Ordinance Violations
Florida	FLA. R. CRIM. P. 3.125(c) (2021)[393]	Misdemeanors
Illinois	725 ILL. COMP. STAT. 5/107-12(d) (2021)[394]	Class C Misdemeanors, Petty Offenses
Iowa	IOWA CODE § 805.1 (2021)[395]	All Offenses Except Stalking and Those Ineligible for Bond
Minnesota	MINN. R. CRIM. P. 6.01(2) (2021)[396]	Felonies, Gross Misdemeanors
Mississippi	MISS. CODE ANN. § 99-3-18 (2021)[397]	Misdemeanors
Missouri	MO. REV. STAT. § 544.560 (2021)[398]	Misdemeanors

390. With respect to provisions that reference booking processes or officers, note that booking services are ordinarily packaged into intergovernmental detention arrangements and agreements; when someone arrested by a city police department is brought to the county jail, she is booked by an employee of the sheriff's office. *See, e.g.*, CAL. PENAL CODE § 853.6(*l*) (West 2021) (" '[A]rresting agency' includes any other agency designated by the arresting agency to provide booking or fingerprinting services."); Huckelberry Memo, *supra* note 267.

391. "When a person is arrested for any misdemeanor, the ranking officer on duty at the place of detention to which the arrested person is taken may issue a citation in lieu of continued custody."

392. "In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate . . . [and] the person is not released prior to being booked and the officer in charge of the booking or the officer's superior determines that the person should be released, the officer or the officer's superior shall prepare a written notice to appear in a court."

393. "If the arresting officer does not issue notice to appear [for a misdemeanor offense] . . . the booking officer may issue notice to appear if the officer determines that there is a likelihood that the accused will appear as directed . . . ."

394. "In any case in which a person is arrested for a Class C misdemeanor or a petty offense and remanded to the sheriff other than pursuant to a court order, the sheriff may issue such person a notice to appear."

395. "[I]f a warrantless arrest has been made [for a bailable offense other than stalking], a citation may be issued in lieu of continued custody."

396. "When an officer brings a person arrested without a warrant for a felony or gross misdemeanor to a police station or county jail, the officer in charge of the police station, sheriff in charge of the jail, or officer designated by the sheriff may issue a citation and release the defendant . . . ."

397. "If the person is not released prior to being booked and the officer in charge of the booking or his superior determines that the person should be released, such officer or superior shall prepare such written notice to appear in court."

398. "When any sheriff or other officer shall arrest a party by virtue of a warrant upon an indictment, or shall have a person in custody under a warrant of commitment on account of failing

State	Provision	Scope
Nebraska	NEB. REV. STAT. § 29-422 (2021)[399]	Misdemeanors, Infractions, Ordinance Violations
Ohio	OHIO CRIM. R. 4(F) (2021)[400]	Misdemeanors
Tennessee	TENN. CODE ANN. § 40-7-120(b) (2021)[401]	Misdemeanors
Texas	TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2021)[402]	Misdemeanors
Vermont	VT. R. CRIM. P. 3(f) (2021)[403]	Misdemeanors
Wyoming	WYO. STAT. ANN. § 7-2-103 (2021)[404]	Misdemeanors

to find conditions for release . . . , and the conditions for release required are specified on the warrant, or if the case is a misdemeanor, such officer may set the conditions for release, and discharge the person so held from actual custody."

399. "[Except in cases involving protection or restraining orders,] any peace officer shall be authorized to issue a citation in lieu of arrest or continued custody for any offense which is a traffic infraction, any other infraction, or a misdemeanor and for any violation of a city or village ordinance." *See also* Alan G. Gless, *Arrest and Citation: Definition and Analysis*, 59 NEB. L. REV. 279, 319 (1980) ("[C]itations can be used not only as a substitute for an arrest, but also after an actual arrest as a substitute for the bail procedure.").

400. "[I]n misdemeanor cases where a person has been arrested with or without a warrant, the arresting officer, the officer in charge of the detention facility to which the person is brought or the superior of either officer, without unnecessary delay, may release the arrested person by issuing a summons unless it appears that issuance of a summons will not reasonably assure the person's appearance."

401. "A sheriff or sheriff's designee may, at a county jail, issue a release citation to any person who has been arrested for a violation of law which is punishable as a misdemeanor and who has been booked and processed for that violation."

402. Imposing a duty on "the person having custody of the person arrested" to bring him before a magistrate, but authorizing "a peace officer who is charging a person" with certain misdemeanors to "issue a citation to the person" instead. *See also* McVea v. Swan, No. 5:14-CV-073-RP, 2015 WL 4404926, at *2, *8–9 (W.D. Tex. July 17, 2015) (interpreting this provision to give detention officers cite-and-release authority).

403. "Continuation of Custody for Misdemeanor Offenses. A person who has been arrested without a warrant for a misdemeanor offense shall be released on citation if [none of the enumerated exceptions continue to apply]."

404. "(c) [A person charged with a misdemeanor] may be released from custody upon the directive of: (i) The arresting officer; (ii) The district attorney or, for cases being prosecuted in municipal court, the city attorney; (iii) Another peace officer designated by the sheriff or, for cases being prosecuted in municipal court, the chief of police. (d) The citation for a person in custody may be issued by the arresting officer or by another peace officer designated by: (i) The district attorney or the city attorney for cases being prosecuted in municipal court; or (ii) The sheriff or the chief of police for cases being prosecuted in municipal court."