

# REVERSING THE RURAL JAIL POPULATION BOOM

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## I. INTRODUCTION

In many places in the United States, perspectives on the necessity of jail incarceration are changing. There is now significant public discussion on the failures of traditional policing, the importance of bail reform, and the urgency of shifting investments out of jails and law enforcement and towards mental health, drug treatment programs, and other community services.<sup>2</sup> These discussions have been centered in large, urban areas such as New York City, Los Angeles, and Philadelphia, where high-profile criminal justice reformers have developed themselves as champions for doing things differently.<sup>3</sup> Indeed, their pushes for policy change, and the work of community advocacy groups that have held them accountable, have made an impact on the number of people in jail in cities: From 2013 through 2019, urban areas saw an 18 percent overall decrease in their jail populations and a 22 percent decrease in the rate of jail incarceration.<sup>4</sup>

Overall, U.S. jail populations have dropped from a high of 785,533 in 2008 to 758,420 in 2019.<sup>5</sup> Even still, the scale of jail incarceration is enormous: 10.7 million people were booked into a jail during 2018.<sup>6</sup> In the wake of reactions to the COVID-19 pandemic, jail populations reached a low of 575,500 in mid-2020, which has since crept back to 633,200 in late 2020.<sup>7</sup> But this national trend contains two diverging tendencies: As urban jail populations declined, many rural localities have instead expanded their carceral footprint.<sup>8</sup> This means that jail incarceration in the U.S. is now increasingly a rural phenomenon. Rural places comprise approximately two-thirds of all U.S. counties and about 14% of the national population, while people in jail in rural counties represent 21% of people in jail across the country.<sup>9</sup>

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2. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (2014), <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>; ARTHUR RIZER, THE SQUARE ONE PROJECT, A CALL FOR NEW CRIMINAL JUSTICE VALUES (2019), [https://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/ACallforNewCriminalJusticeValues\\_ArthurRizer\\_Final.pdf](https://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/ACallforNewCriminalJusticeValues_ArthurRizer_Final.pdf); Leah Sakala & Nancy La Vigne, *Community-Driven Models for Safety and Justice*, 16 DU BOIS REV.: SOC. SCI. RES. ON RACE 253 (2019); RUTH DELANEY ET AL., VERA INST. OF JUST., REIMAGINING PRISON (2018), <https://www.vera.org/publications/reimagining-prison-print-report>.

3. *A Growing Trend: Big Cities Shutter Jails and Move to Decarcerate*, VERA INST. OF JUST., <https://www.vera.org/state-of-justice-reform/2019/jails> (last visited May 26, 2021); NAT'L LEAGUE OF CITIES, REDUCING THE USE OF JAILS: EXPLORING ROLES FOR CITY LEADERS (2019), <https://www.nlc.org/resource/reducing-the-use-of-jails/>.

4. JACOB KANG-BROWN ET AL., PEOPLE IN JAIL IN 2019 (2019), <https://www.vera.org/downloads/publications/people-in-jail-in-2019.pdf>.

5. *Id.*

6. JACOB KANG-BROWN ET AL., PEOPLE IN JAIL AND PRISON IN 2020 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>

7. *Id.* We discuss the impact of the COVID-19 pandemic in a later section.

8. *Id.*

9. KANG-BROWN ET AL., *supra* note 6. People from rural counties and small/mid-size metro counties

In contrast to national trends, jail populations in rural counties increased by 27% from 2013 to 2019, reaching per capita incarceration rates at nearly double those in urban areas.<sup>10</sup> Quietly, between 1970 and 2013, rates of pretrial detention in these rural areas grew by 436%.<sup>11</sup> Measured in rates per 100,000 residents, the incarceration rate in rural counties was 398, 2.4 times higher than the incarceration rate of 165 in urban counties.<sup>12</sup>

Despite playing an increasingly prominent role in national trends, rural places have been less prominent in the national criminal justice reform narrative.<sup>13</sup> Rather, there are several common assumptions that circulate as to why people go to jail in rural areas: that the opioid crisis hit rural communities hardest and this inevitably led to more arrests and jail time, that rural areas do not have the resources to offer robust diversion programs or treatment services, and that rural law enforcement and political leaders are ideologically committed to tougher “law and order” tactics. While these narratives contain significant elements of truth for many rural counties and do play a role in shaping crime and justice dynamics more broadly, they do not explain the enormous scale of rural jail growth specifically.<sup>14</sup> This article argues that, instead, the principal drivers of rural jail incarceration are policy choices and

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are 57% of people in jail and prison; rural counties alone form 21% of the population. KANG-BROWN ET AL., *supra* note 6.

10. KANG-BROWN ET AL., *supra* note 4. Vera’s analysis of the urban-rural continuum changes the six categories defined by the National Center for Health Statistics Urban-Rural Classification Scheme for Counties to four. KANG-BROWN ET AL., *supra* note 4, at 5 n.4. A county is labeled “urban” if it is one of the core counties of a metropolitan area with 1 million or more people and is labeled “suburban” if it is within the surrounding metropolitan area. KANG-BROWN ET AL., *supra* note 4, at 5 n.4. Vera turns the remaining four categories into two by combining small and medium metropolitan areas (“small and midsize metro”) and micropolitan and noncore areas (“rural”). See JACOB KANG-BROWN ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN LOCAL JAILS AND STATE PRISONS (2019), <https://www.vera.org/downloads/publications/incarceration-trends-fact-sheets-data-and-methods.pdf>.

11. 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>

12. KANG-BROWN ET AL., *supra* note 4.

13. There has been significant attention to the expansion of prisons in rural areas, including implications for gerrymandering and local economies, but less so on local jails. For example, see the work of CURBED and Critical Resistance, as well as research including: Tracy Huling, *Building a Prison Economy in Rural America*, in FROM INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002), [http://ecws5.webefekts.com/docs/huling\\_chapter.pdf](http://ecws5.webefekts.com/docs/huling_chapter.pdf); Ryan Scott King, Marc Mauer & Tracy Huling, *An Analysis of the Economics of Prison Siting in Rural Communities*, 3 CRIMINOLOGY & PUB. POL’Y 453 (2006); Anne Bonds, *Economic Development, Racialization, and Privilege: “Yes in My Backyard” Prison Politics and the Reinvention of Madras, Oregon*, 103 ANNALS ASS’N OF AM. GEOGRAPHERS 1389 (2013).

14. RALPH A. WEISHEIT, DAVID N. FALCONE & L. EDWARD WELLS, CRIME AND POLICING IN RURAL AND SMALL-TOWN AMERICA (3d ed. 2005). Further, jails are not simply a response to such situations; incarceration can contribute to economic and health crises, such as overdose deaths.

discretionary practices that are largely within the purview of local and state justice system leaders.

Data on jail population trends are now comprehensive and detailed enough to illustrate some diverging trends between rural counties and smaller cities versus major metropolitan areas. Research has started to identify some of the principal drivers of rural jail populations, such as pretrial detention and economic incentives for holding people in jail.<sup>15</sup> But a principal insight from existing research in rural systems is that any analysis of the formal mechanisms of the justice system must be embedded in the local context. Individual criminal justice actors in rural areas have even more influence on reforms than they typically do in larger systems. Local views and attitudes about the causes of crime and the merits of potential reforms can vary greatly even among rural communities in a given region. The rural versus urban divide is not just “tough on crime” versus treatment and prevention. Community advocacy and pressure on jails in rural communities is often driven by organizations whose focus is not usually criminal justice (such as churches or civic organizations); their strategies and messages thus require more contextualization. As demographics and immigration patterns shift, new coalitions are also emerging that may be involved in debates about how counties use detention centers. Further, in places with less data management capacity, understanding the process for generating administrative data is more important. In other words, the common analysis methods for unpacking jail trends in big cities miss meaningful parts of the picture in rural areas.

This article sets out to frame the state of knowledge on drivers of rural jail incarceration and identifies where more research is needed to build pathways toward reversing rural jail growth trends. The goal is not to illustrate or test any given explanation empirically. Rather, this article draws on national data and examples from specific rural areas<sup>16</sup> to consider several contributing factors to rural jail growth: money bail and pretrial detention, financial incentives to holding people in jail, probation enforcement, and unintended consequences of state-level reforms. It will then discuss how common issues facing many rural places, such as scarcity of social service organizations and challenges in accessing lawyers and resources in the criminal legal system affect rural jail population reduction efforts. Finally, it will point to opportunities for policy and practice change that are tailored to rural places. This is a call for further research and policy development on reducing local jail incarceration in rural areas, in ways that are attuned to the variation and complexities of rural communities.

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15. KANG-BROWN & SUBRAMANIAN, *supra* note 11; JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* (2017).

16. The examples are mostly from Washington and Georgia, the two states involved in the Vera Institute’s Rural Jails Research and Policy Network, which partners with universities and rural county leaders: Washington State University in eastern Washington and the University of Georgia in northeast and southwest Georgia.

## II. THE SCALE OF RURAL JAIL GROWTH

Research on rural crime patterns over the last several decades has emphasized that most rural crime reflects the idiosyncrasies of local communities' economies and social networks, as well as some of the resource scarcities rural spaces face in terms of social service organizations, transportation, and other public goods.<sup>17</sup> One could reasonably assume, then, that rural jail populations would reflect these same local dynamics: housing people who generally know one another and who are accused of crimes rooted in the particular economic and social pressures of that place.

This may have been the case in the 1970s, but it no longer tracks today. Rather, the reach of rural jails, especially over the last decade, has expanded and changed, encompassing people and charges that go beyond the boundaries of the local community and that flow from changes in social and political dynamics. As a result, the divergence of trends in jail populations over the past decade – drops in urban areas and increases in rural areas – is striking.<sup>18</sup> While overall jail incarceration rates remain far higher than they were in the 1970s, rural jails are the category of jails where that growth has accelerated over the last ten years, in some places quite sharply.<sup>19</sup>

It is worth noting that the availability and comprehensiveness of data on rural jails have improved over the same period, even though limitations remain. Researchers noted in 2008, that federal data had little detail on rural county jails and called for more thorough administrative datasets.<sup>20</sup> At the time, they were only able to describe broad characteristics, such as rural jails being less overcrowded and with fewer services than urban jails.<sup>21</sup> Since then, the Department of Justice has collected more thorough data and non-governmental organizations have developed tools that synthesize public data that jails post on their individual websites and reports – such as the Vera Institute of Justice *Incarceration Trends* dataset and annual *People in Jails* reports.<sup>22</sup> This has enabled more detailed analysis of national trends, for example on reasons behind jail bookings and releases or on

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17. WEISHEIT, FALCONE & WELLS, *supra* note 14; Lauren Weisner, H. Douglas Otto & Sharyn Adams, *Issues in Policing Rural Areas: A Review of the Literature*, ILL. CRIMINAL JUSTICE INFO. AUTH. (Mar. 18, 2020), <https://icjia.illinois.gov/researchhub/articles/issues-in-policing-rural-areas-a-review-of-the-literature>; SUSAN DEWEY ET AL., *OUTLAW WOMEN: PRISON, RURAL VIOLENCE, AND POVERTY ON THE NEW AMERICAN WEST* (2019). Crime in rural areas is influenced by social and economic dynamics in different ways than many mainstream theories assume. Certain crimes – such as property crime against farms, conservation-related crimes, fraud, and impaired driving are more prevalent in rural areas. JOSEPH F. DONNERMEYER & WALTER DEKESEREDY, *RURAL CRIMINOLOGY* (2014).

18. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

19. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

20. Brandon K. Applegate & Alicia H. Sitren, *The Jail and the Community: Comparing Jails in Rural and Urban Contexts*, 88 PRISON J. 252 (2008).

21. *Id.*

22. See generally KANG-BROWN ET AL., *supra* note 4; KANG-BROWN ET AL., *supra* note 6.

the numbers of people in ICE custody in local jails.<sup>23</sup> As a result, most of the data cited in this article is based on prior research conducted by the Vera Institute of Justice.

#### A. Rural Jail Growth from 1970 Through Early 2020

Trends in overall jail and prison population numbers and rates took a sharp turn upward in the mid-1980s, and continued dramatically through the 1990s as tough-on-crime policies proliferated and governments devoted vast resources to policing and detention.<sup>24</sup> But as new attention to the crisis of mass incarceration and the public safety benefits of supporting alternatives to incarceration took hold in cities, urban jail population rates started to level off and even decrease.<sup>25</sup> Meanwhile, rural counties continued to expand their use of jails.<sup>26</sup>

The result of these countervailing paths is that national jail incarceration numbers remain stubbornly steady, despite some places' significant investments in reforms. Although reactions to the 2020 coronavirus pandemic generated unprecedented decreases in jail populations, this appears to be short-lived, with numbers already rebounding, as we outline below in Section B. The national average jail incarceration rate per 100,000 working-age adults (15-64 years old) decreased by only about 6 percent between 2005 and 2019, from 391 to 368.<sup>27</sup> From 2013 to 2019, the rate per 100,000 residents (of all ages) generally remained almost unchanged, dropping from 231 to 230.<sup>28</sup> This is partly because the national average rate contains both a major reduction in urban and suburban areas (by 22% and 6%, respectively), as well as a 26% increase in rural jail population rates.<sup>29</sup> Put differently, the hike in rural jail populations almost fully counteracts the gains that big cities have made in scaling back jail numbers over eight years. While individual

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23. See [www.trends.vera.org](http://www.trends.vera.org); KANG-BROWN ET AL., *supra* note 4; KANG-BROWN ET AL., *supra* note 6. See also the data collected by the NYU PUBLIC SAFETY LAB, *Jail Data Initiative*, <https://publicsafetylab.org/jail-data-initiative> (last visited May 26, 2021). See DANIEL DOWNS & CHRISTIAN HENRICHSON, APPRISS INSIGHTS, *THE IMPACT OF COVID-19 ON JAIL POPULATIONS: A CLOSER LOOK AT BOOKINGS AND RELEASES* (2020), <https://perma.cc/USG5-G44P>; Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 *LAW & Soc'y REV.* 66 (2020).

24. NAT'L RESEARCH COUNCIL, *supra* note 2; KANG-BROWN ET AL., *supra* note 6.

25. Olive Lu, *Large Cities Drive Nationwide Jail Population Decline; Jails in Most Rural Counties Still Growing*, VERA INST. OF JUST. (Nov. 10, 2017), <https://www.vera.org/blog/large-cities-drive-nationwide-jail-population-decline-jails-in-most-rural-counties-still-growing>; KANG-BROWN ET AL., *supra* note 4.

26. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

27. KANG-BROWN ET AL., *supra* note 4, at 1.

28. KANG-BROWN ET AL., *supra* note 4, at 1.

29. KANG-BROWN ET AL., *supra* note 4, at 1. Between 2013 and 2019, the jail population rate in urban areas decreased from 212 to 165 per 100,000 residents. KANG-BROWN ET AL., *supra* note 4, at 1. In suburban areas, the rate decreased from 192 to 180. KANG-BROWN ET AL., *supra* note 4, at 1. In rural areas, jail population increased from 314 to 398. KANG-BROWN ET AL., *supra* note 4, at 1. In small and mid-size metro areas, rates rose modestly, from 257 to 265. KANG-BROWN ET AL., *supra* note 4, at 1.

rural jails' small numbers do not make headlines, in combination across nearly 2,000 jails, they are decisive.

Certain groups have seen even sharper increases in rates of jail incarceration in rural areas. For example, the number of women in rural jails increased by 43% from 2004 to 2014, compared to a 29% increase in small and mid-size metro areas and a 6% decline in urban areas.<sup>30</sup> The incarceration of white people also increased disproportionately in rural areas: the rate grew by 19% (2004-2014), with a similar trend in small and mid-size metro areas (15%), compared to a decline of 15% in urban areas.<sup>31</sup> The rate of jail incarceration of Black people in urban areas dropped even more sharply, by 26%, but this rate also grew among rural jails, by 7% over the same period.<sup>32</sup> The detention of people held in jails under Immigration and Customs Enforcement (ICE) custody has also expanded dramatically during this decade: As of 2017, 22,900 people under ICE jurisdiction were detained in local jails – 23% more than in 2013.<sup>33</sup>

At the state level, some of these trends are more dramatic. Georgia and Washington, which have vast rural areas that are demographically and economically different from one another, provide useful examples.<sup>34</sup> In Georgia, for example, the jail population has increased by 1562% since 1970 and 26% since 2000.<sup>35</sup> Moreover, Georgia has 23 times more women in jail today than in 1970.<sup>36</sup> The pretrial detention rate for Georgia's 85 rural counties is 417, above the rate for Fulton County (Atlanta), at 315, or for suburban or small/midsize counties, at 273 and 407, respectively.<sup>37</sup> This means that rural counties saw a 33% increase in pretrial detention in rural areas since the year 2000 – a period during which Fulton County (Atlanta) reduced its pretrial detention rate by 46%.<sup>38</sup>

In Washington State, jail growth overall and in rural areas has also increased, but with divergent patterns across the urban-rural divide. The jail population has

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30. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

31. KANG-BROWN & SUBRAMANIAN, *supra* note 11. A caveat here: smaller jails may be less likely to document Latino ethnicity categories in demographic records for people booked into jail, so some people listed as white may be (also) Latino. While this is an important gap to address, it would not plausibly account for the extent of growth of detention of white people, though.

32. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

33. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

34. As noted above, these two states are where Vera's initial partnerships under the Rural Jails Research and Policy Network project are located. See *Rural Jails Research and Policy Network*, VERA INST. OF JUST., <https://www.vera.org/projects/rural-jails-research-and-policy-network> (last visited May 26, 2021).

35. VERA INST. OF JUST., INCARCERATION TRENDS IN GEORGIA (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-georgia.pdf>. For comparison, the jail populations in Tennessee and Alabama have increased, respectively, 681% and 307% since 1970 and 42% and 7% since 2000. *Id.*

36. *Id.* For comparison, the number of women in jail in Tennessee and Alabama rose 38-fold and 13-fold, respectively. Please see note 6 for the definition of "rural county" employed here. *Id.*

37. *Id.*

38. *Id.*

grown by 362% since 1970 (compared to 182% growth in the prison population), but has dropped by 9% since the year 2000 (not counting 2020 variation).<sup>39</sup> In Washington's eighteen rural counties, the pretrial detention rate is 199 (per 100,000 working-age adults), compared to 184 for small/midsize counties, 140 for suburban counties, and ninety-eight for King County (Seattle).<sup>40</sup> This rate for rural areas has increased by 34% since 2000, compared to a 38% drop in the major city (King County / Seattle).<sup>41</sup>

#### B. Rural Jails Populations and COVID-19

Nationally, more overt pressure for large-scale jail population reduction came to a head in the first half of 2020 with the onset of the Covid-19 pandemic. In response to concerns over widespread infection behind bars and spread to local communities, some criminal justice systems across the country implemented rapid – and short-lived – changes to practices and policies to quickly reduce the numbers of people in their jails.<sup>42</sup> Between April and June 2020, the number of jail bookings dropped by 50%, compared to the same period in 2019.<sup>43</sup> The results of these widespread jail population reduction efforts demonstrate that rural areas could make larger cuts under these quickly imposed changes, because they had not previously tried to reduce the categories of detained people for whom release decisions were easier. In contrast, many urban areas that had already implemented broader reforms saw an important but more modest decrease, of 15% from mid-year 2019 to late 2020, while the suburbs saw a 14% decline.<sup>44</sup> What is striking is that in rural places, that had to date been less engaged in criminal justice reform, the jail population dropped by 33% from mid-year 2019 to mid-year 2020.<sup>45</sup>

The fact that local governments cut their jail populations so sharply and quickly during the pandemic illustrates that they have the power to make these changes more permanent.<sup>46</sup> However, it should be noted that rural jail population

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39. VERA INST. OF JUST., INCARCERATION TRENDS IN WASHINGTON (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-washington.pdf>. For comparison, the jail population in Oregon and California has grown by 316% and 180%, respectively, since 1970, and by 1% for California since 2000, while it dropped by 19% in Oregon since 2000. Please see note 6 for the definition of “rural county” employed here.

40. *Id.*

41. *Id.*

42. See *The Most Significant Criminal Justice Changes From the COVID-19 Pandemic*, PRISON POLICY INITIATIVE (updated May 18, 2021) <https://www.prisonpolicy.org/virus/virusresponse.html>.

43. DOWNS & HENRICHSON, *supra* note 23.

44. KANG BROWN ET AL., *supra* note 6.

45. KANG BROWN ET AL., *supra* note 6.

46. It should also be noted that some state-level actions, such as state Supreme Court orders in places like Washington, were also catalytic in the early pandemic jail population reductions. However, this point should not be taken to mean that local governments do not have the inherent power to make different decisions that can have the same impactful results. See, e.g., Supreme Court of Washington,

declines would have been much more significant had there not been a population uptick in the second half of 2020.<sup>47</sup> Perhaps because some of the perceived urgency of the pandemic began to subside, after the initial sharp decline, rural jail populations increased by nine percent between June and September 2020.<sup>48</sup> Similarly, jails in major cities followed the same pattern of major reductions (23%) in early 2020 followed by a moderate increase (10%) in the second half of the year.<sup>49</sup> This overall fluctuation demonstrates what researchers have called the “fragility” of local jail decarceration efforts – what can be done quickly can also be undone quickly if policy, practice, and culture change is elusive or not sustained.<sup>50</sup>

Data disaggregated by the rurality of the county, over time, are increasingly available, through a combination of federal government data and public jail roster data.<sup>51</sup> This has shed important light on the unique role of rural jails in overall jail trends. However, anecdotal experiences underscore that smaller jails are more likely to have limitations in the extent of data they collect and their ability to analyze and disseminate it.<sup>52</sup> Given the vast differences in policing and prosecutorial decision-making in rural areas, it is important to understand how local practices shape how data are collected and identified, rather than looking only at national or

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Revised and Extended Order Regarding Court Operations in the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, No. 25700-B-615 (April 13, 2020), [www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700B615%20Revised%20and%20Extended%20Order%20Regarding%20Court%20Operations.pdf](http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700B615%20Revised%20and%20Extended%20Order%20Regarding%20Court%20Operations.pdf).

47. KANG-BROWN ET AL., *supra* note 6. Georgia, where jail detention rates are quite high compared to national averages, illustrates the degree of change that has occurred (so far) during the first part of the pandemic, from February to April 2020. VERA INST. OF JUST., *supra* note 35. According to analysis by the University of Georgia, all but six local jails reduced their populations during 2020. *Georgia Jail Trends*, RURAL JAILS RESEARCH HUB (2020), <https://research.franklin.uga.edu/rural-jails-research/gatrends>. Among jails in rural counties, there were significant declines, including six counties that saw decreases of more than 40%. *Id.* Of seven jails with a capacity of less than 150 people, four reduced their population by 50% since February 2020, and the other three reduced by 8 to 31 percent. *Id.* Slightly larger jails in rural counties (up to 500-person capacity) also saw reductions, with only a few exceptions. *Id.* However, as Vera’s late-2020 analysis demonstrates, for most jails across the country, the sharpest changes occurred due to the first actions taken during the pandemic, and populations have rebounded to pre-pandemic levels in many cases since then. KANG-BROWN ET AL., *supra* note 6.

48. KANG-BROWN ET AL., *supra* note 6. Thus, the overall decrease in jail populations from midyear 2019 to late 2020 in rural areas was by 27%. *Id.*

49. *Id.*

50. *Id.*

51. The Incarceration Trends dataset built by the Vera Institute of Justice is one example. See *Incarceration Trends*, VERA INST. OF JUST., [trends.vera.org](https://trends.vera.org) (last visited May 26, 2021).

52. The Rural Jails Research and Policy Network (a Vera Institute of Justice project), working in Washington and Georgia, partners with local rural jails to understand their data. See *Rural Jails Research and Policy Network*, VERA INST. OF JUST., <https://www.vera.org/projects/rural-jails-research-and-policy-network> (last visited May 26, 2021). In some counties, the jail collects only minimal categories and/or does not have the staff capacity to do any analysis. *Id.* In a few places, jails are still using paper records. *Id.*

cross-jurisdiction trends. For example, if jails do not accurately document the race/ethnicity of people admitted – by relying on an officer’s visual guess, for example -- they may over-count white people and under-count Latinx people.<sup>53</sup> In the following sections, we review some of the main drivers of rural jail growth, pointing to current research and questions as to where more in-depth, locally-contextualized study is needed for rural places especially.

### III. REASONS FOR RURAL JAIL GROWTH

Although the staggering growth of rural jail populations has been well documented, identifying a discrete set of drivers behind this trend is much more complex. This is partly because there is enormous cultural, geographic, economic, and social diversity across rural places in the U.S., and it is problematic to draw large generalizations.<sup>54</sup> Lumping all rural communities into one category – in criminal justice policy discussions especially, this often translates as “white,” “tough on crime,” and “conservative” – completely ignores the communities of color, including Native communities, who are estimated to make up 20% of rural populations.<sup>55</sup> This erasure makes it easier for urban progressives to leave rural places out of their movements.<sup>56</sup>

Still, research on culture, economics, and politics in rural places has illustrated some common features of rural communities that may influence how local justice systems operate. Social networks are more often tight-knit and informal – what is sometimes called “acquaintanceship density.”<sup>57</sup> This is relevant to the justice system, as law enforcement, court staff, and community members are more likely to know one another from other settings, as neighbors or former classmates. Such a degree of familiarity shapes how such actors may rely on assumptions about people in their discretionary decisions. Research suggests that individual and family reputation matters more in small communities than factors like race or neighborhood, which can activate bias in larger places.<sup>58</sup> Certain collective values and ideological attitudes in rural places can generate stigma toward individuals or families, such as for lacking perceived independence or receiving public welfare funds.<sup>59</sup> Such social attitudes can also contain undercurrents of both classism and

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53. SARAH EPPLER-EPSTEIN ET AL., URBAN INST., THE ALARMING LACK OF DATA ON LATINOS IN THE CRIMINAL JUSTICE SYSTEM (2016), <http://urbn.is/cjdata>.

54. See generally Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 21 (2020).

55. *Id.*

56. *Id.*

57. William R. Freudenburg, *The Density of Acquaintanceship: An Overlooked Variable in Community Research?*, 92 AM. J. SOC. 27 (1986).

58. See generally JENNIFER SHERMAN, *THOSE WHO WORK, THOSE WHO DON'T: POVERTY, MORALITY, AND FAMILY IN RURAL AMERICA* (2009); DEWEY ET AL., *supra* note 17; Alyssa L. Raggio, Norman G. Hoffmann & Albert M. Kopak, *Results From a Comprehensive Assessment of Behavioral Health Problems Among Rural Jail Inmates*, 56 J. OFFENDER REHABILITATION 217 (2017).

59. SHERMAN, *supra* note 58.

racism.<sup>60</sup> Scarce employment means that the incentives for government officials to stay in a given justice institution position are different, leading to very little turnover in some cases or to new arrivals quickly departing for other places.<sup>61</sup>

Acknowledging both the rich diversity and commonalities across rural areas, some uniting themes have emerged out of rural localities that are worth identifying and further analyzing.

#### A. Money Bail and the Growth of Pretrial Incarceration

One of the more clearly identified forces behind surging numbers of people in rural jails is the growth of populations in jail who are legally innocent and awaiting trial.<sup>62</sup> Since 1970, the number of people incarcerated pretrial nationally has grown by more than five-fold.<sup>63</sup> Until the early 2000s, pretrial populations were growing across the board, in both urban and rural areas.<sup>64</sup> However, gradually, urban and suburban pretrial incarceration rates have leveled off and started to decline (in some urban areas, quite significantly), while rural pretrial incarceration rates have continued to climb.<sup>65</sup>

Well-known progressive criminal justice reforms that have driven successful jail population reduction in urban areas have been directed at reducing pretrial incarceration specifically. For instance, reform-minded prosecutors in largely urban areas such as St. Louis, Chicago, and Philadelphia, and more recently in San Francisco and Los Angeles, have issued policy directives stating that their offices will no longer seek cash bail in certain categories of cases.<sup>66</sup> Judges in some cities have issued standing orders to require release after booking for people with certain categories of charges, not requiring them to see a judge for a determination of

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60. Anne Bonds, *Discipline and Devolution: Constructions of Poverty, Race, and Criminality in the Politics of Rural Prison Development*, 41 *ANTIPODE* 416 (2009); Bonds, *supra* note 13.

61. Lauren M Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 *B.C. L. REV.* 523 (2020); Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part One: Internal Constraints*, 61 *B.C. L. REV. ELECTRONIC SUPPLEMENT I.-32* (2020) [hereinafter *McWithey, Part One*], <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/4/>; Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part Two: External Constraints*, 61 *B.C. L. REV. ELECTRONIC SUPPLEMENT I.-49* (2020) [hereinafter *McWithey, Part Two*], <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/9/>.

62. Kang-Brown & Subramanian, *supra* note 11; LÉON DIGARD & ELIZABETH SWAVOLA, *VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION* 17 (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

63. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

64. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

65. KANG-BROWN & SUBRAMANIAN, *supra* note 10.

66. Rachel Cohen, *Newly Elected Michigan Prosecutor Will Stop Seeking Cash Bail*, *APPEAL* (Jan. 4, 2021), <https://theappeal.org/politicalreport/bail-reform-washtenaw-county/>; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 *UCLA CRIM. JUST. L. REV.* (2019), <https://escholarship.org/uc/item/2rq8t137>.

bail.<sup>67</sup> Courts in some jurisdictions have invested resources into building out pretrial services departments that manage pretrial supervision, issue court reminders, and sometimes make referrals to treatment.<sup>68</sup> Pretrial services departments also often make assessments that a judicial officer will consider in the pretrial release decision.<sup>69</sup>

Many of these reforms do not translate neatly to rural places. Rural places have not seen the same movement towards electing reform-minded prosecutors who are willing to issue bold policy directives against seeking cash bail.<sup>70</sup> Judges in rural places are often faced with enormous political pressure to stick to traditional “law and order” visions of preserving public safety, and may not have advocates knocking on the door to assist them with judicial culture change.<sup>71</sup> Rural places are also less likely to have resources for dedicated pretrial services departments, leaving courts with far fewer clear options for mitigating perceived risks of pretrial release.<sup>72</sup>

State-mandated bail reform laws may also be less straightforward to implement in rural places. In states that have passed laws aimed at reducing the number of people incarcerated because they cannot afford bail, requirements such as providing a hearing to evaluate bail within a certain time period of arrest or providing defense counsel at the initial bail hearing may be harder for rural places to meet. For example, an evaluation of bail reform implementation in Georgia postulated that some rural counties simply may not have the available resources to comply with new state-mandated reforms.<sup>73</sup> Especially when new legal requirements target areas that rely on county funding, such as provision of defense counsel, rural counties may not be in a position to feasibly make required changes without other implementation support. Researchers evaluating the compliance

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67. See, e.g., H.B. 3653, 101st Gen. Assemb. (Ill. 2021), <https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=HB&DocNum=3653&GAID=15&LegID=120371&SpecSess=&Session=> (Illinois bail reform bill restricting the people who may be detained pretrial to only those facing specific charges).

68. ROSS HATTON & JESSICA SMITH, RESEARCH ON THE EFFECTIVENESS OF PRETRIAL SUPPORT AND SUPERVISION SERVICES, UNC SCH. OF GOV'T CRIMINAL JUSTICE INNOVATION LAB (2020), <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2020/05/Research-on-the-Effectiveness-of-Pretrial-Support-Supervision-Services-5.28.2020.pdf>.

69. See John Clark & D. Alan Henry, U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, NCJ 199773, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS (2003), <https://www.ojp.gov/pdffiles1/bja/199773.pdf>.

70. Romero, *supra* note 54.

71. Loka Ashwood, *Rural Conservatism or Anarchism? The Pro-state, Stateless, and Anti-state Positions*, 83 RURAL SOC. 717 (2018); Jennifer Sherman & Jennifer Schwartz, *The Fine Line: Rural Justice, Public Health and Safety, and the Coronavirus Pandemic in Rural Washington*, AM. BEHAV. SCI. (2021).

72. See generally INTISAR SURUR & ANDREA VALDEZ, WASH. PRETRIAL REFORM TASK FORCE, FINAL RECOMMENDATIONS REPORT (2019), <https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf>.

73. Andrea Woods et al., *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 GA. L. REV. 1235 (2020).

with new bail laws across a group of counties in Georgia noted that state officials could do more to support and educate counties on ways to better adopt new policies, including by providing additional resources to public defense and pretrial supports, removing legal barriers to using citations and other post-charging release practices, and providing increased oversight of counties' progress.<sup>74</sup>

Both local and state governments can drive changes in pretrial policy and practice. But regardless of where calls for change originate, meaningful pretrial reform requires a wide range of stakeholders to embrace a culture change within their system that accepts the presumption of pretrial liberty.<sup>75</sup>

Until then, rural counties that are further away from community advocacy groups and criminal justice reform champions will continue to lean heavily on pretrial incarceration.

#### B. Financial Incentives for Holding People in Jail

A central argument of criminal justice reform advocates who pushed for reducing the scope of incarceration in jails and prisons over the past two decades is that incarceration is extremely expensive, and that those enormous costs cannot hold up against the lower costs and increased public safety benefits of community-based alternatives.<sup>76</sup> Indeed, the cost of local jails and other local corrections institutions amounts to \$25 billion (in 2017), a six-fold increase from forty years before.<sup>77</sup> Many state and local governments have chosen to act on addressing high rates of incarceration in part because their budgets were becoming unsustainable.<sup>78</sup> These initiatives were framed in fiscal terms under titles like "smart on crime" or "reinvestment."<sup>79</sup> While these reforms often focused on reducing jail populations for cost reasons, sometimes they also supported

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74. *Id.*

75. *Id.* at 1266–67.

76. JUDAH SCHEPT, *PROGRESSIVE PUNISHMENT: JOB LOSS, JAIL GROWTH, AND THE NEOLIBERAL LOGIC OF CARCERAL EXPANSION* (2015); David L. Altheide & Michael J. Coyle, *Smart on Crime: The New Language for Prisoner Release*, 2 *CRIME, MEDIA, CULT.: AN INT'L J.* 286 (2006); Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 *ANN. REV. CRIMINOLOGY* 235 (2018).

77. JAKE HOROWITZ, PEW CHARITABLE RESEARCH TRUST, *LOCAL SPENDING ON JAILS TOPS \$25 BILLION IN LATEST NATIONWIDE DATA* 20, (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://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data).

78. See TEXAS CRIMINAL JUSTICE COALITION, *SPEND YOUR VALUES CUT YOUR LOSSES: SMART AND SAFE JUSTICE SYSTEM SOLUTIONS THAT PUT COMMUNITIES FIRST* (2020), <https://www.texascjc.org/system/files/publications/Spend%20Your%20Values%20Cut%20Your%20Losses%20Portfolio.pdf>.

79. Altheide & Coyle, *supra* note 76; BUREAU OF JUSTICE ASSISTANCE, *WHAT IS JUSTICE REINVESTMENT?*, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jrionepager.pdf>; Ed Chung, *Smart on Crime: An Alternative to the Tough vs. Soft Debate*, *CTR. FOR AM. PROGRESS* (May 12, 2017, 8:53 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2017/05/12/432238/smart-crime-alternative-tough-vs-soft-debate/>.

renovations or expansions of detention facilities in the name of addressing overcrowding and poor conditions or offering more specialized treatments and services (particularly for women and/or people with mental illness).<sup>80</sup>

At the same time, certain stakeholders in government and community sometimes see prisons and jails as economic engines. Indeed, economically disadvantaged places have historically been more likely to seek out and approve new or expanded prisons, pitching their plans as a boon for local jobs.<sup>81</sup> Evidence suggests, though, that the promised number of jobs rarely materialize after the construction of a jail or prison facility.<sup>82</sup> Moreover, even “minor” interaction with jail leads to economic instability for families, through losing key breadwinners and through the time and money that families must sink into visiting relatives in jail.<sup>83</sup> Higher jail detention also reduces local labor force participation.<sup>84</sup>

But, of course, reducing expenses is one of two ways of addressing budget deficits; the other is to increase revenues. From this angle, jails’ potential as revenue-generators can be appealing, despite the reality that even large jails rarely bring in revenues that outweigh their costs.<sup>85</sup> Some local jurisdictions have passed levies or tax increases to finance renovations or expansions to their local jails.<sup>86</sup>

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80. CHRIS MAI ET AL., VERA INST. OF JUST., *BROKEN GROUND: WHY AMERICA KEEPS BUILDING MORE JAILS AND WHAT IT CAN DO INSTEAD* 72 (2019), <https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf>; SCHEPT, *supra* note 76; Justin Piché, Shanisse Kleuskens & Kevin Walby, *The Front and Back Stages of Carceral Expansion Marketing in Canada*, 20 CONTEMP. JUST. REV. 26 (2017).

81. John Eason, *Mapping Prison Proliferation: Region, Rurality, Race and Disadvantage in Prison Placement*, 39 SOC. SCI. RES. 1015 (2010); Rachael Weiss Riley et al., *Exploring the Urban–Rural Incarceration Divide: Drivers of Local Jail Incarceration Rates in the United States*, 36 J. TECH. HUM. SERV. 76 (2018); Michele Hoyman & Micah Weinberg, *The Process of Policy Innovation: Prison Sitings in Rural North Carolina*, 34 POL’Y STUD. J. 95 (2006); Piché, Kleuskens & Walby, *supra* note 80.

82. Bonds, *supra* note 13; Shaun Genter, Gregory Hooks & Clayton Mosher, *Prisons, Jobs and Privatization: The Impact of Prisons on Employment Growth in Rural US Counties, 1997–2004*, 42 SOC. SCI. RES. 596 (2013); Gregory Hooks et al., *Revisiting the Impact of Prison Building on Job Growth: Education, Incarceration, and County-Level Employment, 1976–2004\**, 91 SOC. SCI. Q. 228 (2010); Jack Norton, *Little Siberia, Star of the North: The Political Economy of Prison Dreams in the Adirondacks*, in HISTORICAL GEOGRAPHIES OF PRISONS: UNLOCKING THE USABLE CARCERAL PAST (Karen M. Morin & Dominique Moran eds., 2015).

83. Megan Comfort, *“A Twenty-Hour-a-Day Job”: The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (2016).

84. 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 (2018).

85. See Jacob Kang-Brown & Jack Norton, *More than a Jail: Immigrant Detention and the Smell of Money*, VERA INST. OF JUST. (July 5, 2018), <https://www.vera.org/in-our-backyards-stories/glades-county-more-than-a-jail>. Even jails that are built explicitly with the goal of generating revenues often do not achieve this goal. *Id.* For example, Glades County, Florida, built a large jail in the hopes of bringing in revenues through holding people on immigration detention, but it became mired in debt. *Id.*

86. 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>.

Others have relied on funding from the state government or federal agencies to subsidize their local jail system, sometimes explicitly in the name of economic development rather than public safety.<sup>87</sup> All of these scenarios create additional incentives for localities to incarcerate more people.

Due to their more precarious local tax base, rural counties are especially vulnerable to the idea that expanding jail bed capacity will provide a financial benefit to the local economy.<sup>88</sup> Beyond the argument that new jails will generate jobs, officials also assert that jails can bring in money by renting beds to other entities.<sup>89</sup> These typically include neighboring counties without jail space, state prison agencies seeking to reduce overcrowding, and federal agencies, principally the U.S. Marshals Service and Immigration and Customs Enforcement (ICE).<sup>90</sup> On immigration detention alone, the number of county jail contracts with ICE has increased six-fold, from 128 in 1983 to 727 in 2013.<sup>91</sup> The sharpest increases in people detained by ICE being housed in local jails was for smaller and rural counties (10,000-250,000 people).<sup>92</sup> One sheriff reportedly said, “It’s renting a bed like a motel room.”<sup>93</sup>

The jail bed market has a broad and expanding reach: In 2013, 84% of jails held at least some people for another agency, with about a fifth of people in jail on any given day being in a rented bed.<sup>94</sup> In four states, over 50% of their jail

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build-it; JACK NORTON, *Life and Jail in Southern Colorado*, VERA INST. OF JUST. (Apr. 19, 2018), <https://vera.hyperakt.com/in-our-backyards-stories/life-and-jail-in-southern-colorado>. See Zach Kayser, *County: Could Another Sales Tax Pay for Jail?*, WINONA POST, (Feb. 3, 2021) <https://www.winonapost.com/Article/ArticleID/71525/County-Could-another-sales-tax-pay-for-jail?> (for one example of news reports abound about proposed new taxes, usually sales taxes, to support new jail construction, in rural areas).

87. Jack Norton & Jacob Kang-Brown, *Federal Farm Aid for the Big House*, VERA INST. OF JUST. (Oct. 22, 2018), <https://vera.hyperakt.com/in-our-backyards-stories/federal-farm-aid-for-the-big-house>; Norton and Kang-Brown, *supra* note 86.

88. EASON, *supra* note 15; John M. Eason, Danielle Zucker & Christopher Wildeman, *Mass Imprisonment Across the Rural-Urban Interface*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 202 (2017); MAI ET AL., *supra* note 80.

89. Norton & Kang-Brown, *supra* note 87.

90. See Norton & Kang-Brown, *supra* note 87. Detention of people held in local jails under ICE custody has vastly expanded over the past decade, though it dipped in 2020. KANG-BROWN ET AL., *supra* note 6; Norton & Kang-Brown, *supra* note 86. Overall, about 22,900 people were housed in local jails under ICE custody in 2017, and this fell to 9,600 in 2020; this includes the significant changes in detention practices during the pandemic, as well as changes in immigration inflow and law enforcement tactics. The U.S. Marshals Service detained about 56,400 people in local jails in 2020 (a ten percent decrease from the previous year). Norton & Kang-Brown, *supra* note 86. The federal government allocates budget money for the estimated amount of beds it plans to use in a given year, which creates a predictable, reliable client for the local jails seeking to contract out beds. Norton & Kang-Brown, *supra* note 86.

91. Ryo & Peacock, *supra* note 23, at 84.

92. Ryo & Peacock, *supra* note 23, at 84.

93. Ryo & Peacock, *supra* note 23, at 91.

94. KANG-BROWN & SUBRAMANIAN, *supra* note 11, at 13–14.

population is people from other jurisdictions who are housed in local jails.<sup>95</sup> Further, this market can quickly become competitive: agencies looking to rent beds build larger facilities with the goal of renting space and attempt to out-bid one another, or jails attempting to win bed contracts might try to offer a more appealing deal to an agency. Some call this an “inter-county carceral arms race.”<sup>96</sup>

In recent years, rural counties saw the most growth in the capacity of jails (11% from 2005-2013), compared to a 9% reduction in urban areas.<sup>97</sup> Of course, this aligns roughly with the directions of the jail population trends and some could assume that new beds were needed to house the additional people.<sup>98</sup> Often, the sequence is the reverse: jail populations tick upward as new bed spaces become available.<sup>99</sup> Research suggests that this is due to how local justice system actors adjust their decisions in the face of material constraints: detention is an easier choice when they know that beds are available.<sup>100</sup> In other words, the old adage “if you build it, they will fill it” holds true. Furthermore, if jail populations drop, jail officials tend to try to rent beds to other agencies (like ICE) rather than leave them empty or decommission them.<sup>101</sup> One study found that counties with political leadership and local attitudes that favored “law and order” tactics were more likely to have expanded their local jails’ detention of people on immigration charges through bed rental – regardless of economic impact.<sup>102</sup>

Local jails and courts also generate revenues for the county government through charging fines and fees to the “users” of those systems. These can include fees for each day someone is held in jail, fees for being on community supervision status (pretrial or probation), and fees for using required elements of supervision, such as electronic monitoring.<sup>103</sup> From a budgetary point of view, these fees and fines make up a relatively small proportion of the operating budget for a county or for a jail; one study found the typical proportion to be less than one percent.<sup>104</sup> Still, counties remain committed to these fines and fees on the basis that they provide a

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95. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

96. Norton & Kang-Brown, *supra* note 86.

97. MAI ET AL., *supra* note 80.

98. MAI ET AL., *supra* note 80.

99. *See, e.g.*, MAI ET AL., *supra* note 80, of 216 county jails built from 1999-2005, the median jail population increased 27% following the construction of jail space. *See also* Norton & Kang-Brown, *supra* note 86.

100. MAI ET AL., *supra* note 80.

101. Ryo & Peacock, *supra* note 23.

102. Ryo & Peacock, *supra* note 23.

103. April D. Fernandes et al., *Monetary Sanctions: A Review of Revenue Generation, Legal Challenges, and Reform*, 15 ANNU. REV. L. & SOC. SCI. 397 (2019); Sarah Shannon et al., *The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States*, 4 UCLA CRIM. JUST. L. REV. (2020); SYCAMORE INST., *Fees, Fines, & Criminal Justice in Tennessee* 35 (Dec. 22, 2020), <https://www.sycamoreinstitute.org/wp-content/uploads/2020/12/2020.12.22-FINAL-Fees-Fines-and-Criminal-Justice-in-Tennessee.pdf>.

104. Chris Mai & Maria Katarina E. Rafael, *User Funded? Using Budgets to Examine the Scope and Revenue Impact of Fines and Fees in the Criminal Justice System*, 63 SOCIOL. PERSPECTIVES 1002 (2020).

steady stream of revenue, even though researchers have established that local governments have spent more trying to collect fines and fees and punishing for nonpayment of fines and fees than they ultimately collect.<sup>105</sup> Disentangling the ideological, legal, and budgetary rationales for the complex web of fines and fees in any given jurisdiction is an important step in any effort to identify which ones could reasonably be eliminated or reduced.

### C. Expansion of Probation

Nationally, the number of people on probation increased by 334 percent between 1977 and 2018.<sup>106</sup> Probation terms are often utilized by courts as a sentencing alternative to jail or prison sentences, or as a mechanism for shifting currently incarcerated people to a community supervision status. Some scholars argue that the expansion of such so-called “alternatives” to jail incarceration has actually increased the scope of overall punishment by widening the net of carceral control.<sup>107</sup> This is because expanding the mechanisms of control over people, even under the guise of ordering supervision in lieu of incarceration, ultimately increases the opportunities for those people to be monitored and sanctioned within the criminal justice system.

While most existing research on probation focuses on how the probation system interacts with the prison system, the reality at the local level is that if a person who is convicted is given a probation sentence instead of a jail or prison sentence, and then later is accused of violating the conditions of probation, that person will likely spend time in the local jail while they wait for a violation hearing, and can also be sentenced to a period of local incarceration for that violation. Common “technical” violations of probation terms that can result in being detained in a local jail include missing an appointment, failing to attend or pass a drug test,

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105. Shannon et al., *supra* note 103; SYCAMORE INST., *supra* note 103; MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS (2017), <https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf>.

106. See THOMAS P. BONCZAR & LAURA M. MARUSCHAK, DEP'T OF JUST. OFF. OF JUST. PROGRAMS, NCJ 243826, PROBATION AND PAROLE IN THE UNITED STATES, 2012, (Revised 2015), <https://www.ojp.gov/library/abstracts/probation-and-parole-united-states-2012>; LAURA M. MARUSCHAK, LAUREN E. GLAZE & THOMAS P. BONCZAR, DEP'T OF JUST. OFF. OF JUST. PROGRAMS, NCJ 248615, ADULTS ON PROBATION, FEDERAL AND STATE-BY-STATE, 1977-2012 (2013), <https://www.ojp.gov/library/abstracts/adults-probation-federal-and-state-state-1977-2012>; JAKE HOROWITZ ET AL., PEW CHARITABLE RESEARCH TRUSTS, PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 24 (2018); DANIELLE KAEBLE & MARIEL ALPER, DEP'T OF JUST. OFF. OF JUST. PROGRAMS, NCJ 252072, PROBATION AND PAROLE IN THE UNITED STATES, 2017–2018 42 (2020), <https://www.bjs.gov/content/pub/pdf/ppus1718.pdf>.

107. See Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. POL'Y 51 (2013); MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME (forthcoming 2021), <https://thenewpress.com/books/prison-by-any-other-name>.

or not securing employment or housing in a designated timeframe.<sup>108</sup> Thus, relatively simple violations can trigger detention in a county jail pending a probation violation hearing.<sup>109</sup> Moreover, the impact of probation on the local jail is determined in part by local enforcement practices. For instance, even when there are state-level efforts to make probation enforcement less punitive, if there is no buy-in from local and front-line enforcement officers, there is a risk that they will resist or even circumvent new policies.<sup>110</sup> The larger point is, of course, that this is a consequence of using probation as a supposed alternative to prison: depending on enforcement, people are vulnerable to detention anyway, and it is jails that deal with this.<sup>111</sup>

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108. THOMAS P. BONCZAR, DEP'T OF JUST. BUREAU OF JUST. STATS., NCJ 164267, CHARACTERISTICS OF ADULTS ON PROBATION, 1995 10 (1997), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=546>; ANDRES F RENGIFO & CHRISTINE S SCOTT-HAYWARD, VERA INST. OF JUST., ASSESSING THE EFFECTIVENESS OF INTERMEDIATE SANCTIONS IN MULTNOMAH COUNTY, OREGON 25 (2008), [https://vera-web-assets.storage.googleapis.com/downloads/Publications/assessing-the-effectiveness-of-intermediate-sanctions-in-multnomah-county-oregon/legacy\\_downloads/Final\\_Multnomah\\_Report.pdf](https://vera-web-assets.storage.googleapis.com/downloads/Publications/assessing-the-effectiveness-of-intermediate-sanctions-in-multnomah-county-oregon/legacy_downloads/Final_Multnomah_Report.pdf).

109. Further, in cases where the state oversees probation, the question of how to handle probation violations can lead to quite direct conflicts between local and state governments. This is partly because the decisions of state-run probation agencies can inadvertently lead to increases in admissions and costs for local county jails. *See, e.g.*, STATE OF WASH. DEP'T OF CORR., DOC 320.145, VIOLATOR CONFINEMENT POLICY (Revised 2020), <https://www.doc.wa.gov/information/policies/files/320145.pdf> (establishing that people who violate terms of state-run community supervision be held in local jails). For instance, if the state pays for bed spaces in local jails for people serving time for violations at an advantageous rate, local jails may welcome this. Otherwise, they may object or even refuse. *See, e.g.*, Letter from Julie Marzin, Deputy Secretary, & Robert Herzog, Assistant Secretary, State of Wash. Dep't of Corrections, to Donald Holbrook, Washington State Penitentiary Superintendent et al. (Mar. 24, 2020), <https://www.doc.wa.gov/corrections/covid-19/docs/2020-0324-wsp-facility-violator-booking-and-housing-protocol.pdf>.

110. Jill Viglione, Danielle S. Rudes & Faye S. Taxman, *The Myriad of Challenges with Correctional Change: From Goals to Culture*, 7 EUR. J. PROBAT. 103 (2015).

111. Violations while someone is on parole can also fuel rural jail incarceration, via similar mechanisms as probation violations. One study of parole releases in rural Pennsylvania noted that the conditions of parole do not adequately adjust for the realities of life in rural areas, thus setting people up for violating their conditions and returning to incarceration – often, in a county jail. Edward L. Bowman & Katherine Ely, *Examining the Predictors of Parole Release in a Rural Jail Population*, 97 PRISON J. 543 (2017). The scholars note that discretionary release on parole is influential on local jail populations, as this is a common type of release for people serving short sentences and it is in the hands of local jail and court authorities: 55,000 people were released from local jails by this mechanism in the state, compared to 16,000 people released from prison. *Id.* at 558. This analysis finds that the most important predictors of people being denied discretionary parole release from jail was having a prior record of detention or conviction. *Id.* at 556. A more comprehensive assessment of a person's track record and prospects for successful reintegration might expand discretionary release for people with prior jail time. *Id.* at 558. More broadly, the authors flag the problems of poverty, lack of housing, and lack of drug treatment services in rural counties as major barriers to successful compliance with parole conditions. *Id.* at 558.

Research on the impact of probation on rural jail populations specifically is extremely limited. However, several relevant (albeit older) studies have identified differences in the use of probation across rural and urban localities.<sup>112</sup> For instance, a 1997 study of people placed on probation in both metropolitan and nonmetropolitan counties indicated that probation admissions were 50% higher in nonmetropolitan counties, and that nonmetropolitan probation admissions were more likely to be for misdemeanors than in metropolitan admissions.<sup>113</sup> A 2001 study of probation sentences and outcomes across urban and rural counties in Illinois found that people serving sentences of probation in rural counties were more likely to have been convicted of a misdemeanor than people on probation in urban counties.<sup>114</sup> The authors of this study postulate that this may suggest greater use of probation overall in rural counties, but acknowledge the need for additional research.<sup>115</sup> Further, the study found that people on probation who had been convicted of felonies in rural counties received slightly longer probation sentences than people on felony probation in urban counties.<sup>116</sup> Conversely, misdemeanor sentences for people on probation in rural areas were slightly shorter overall.<sup>117</sup>

There is some research suggesting that people on probation in rural areas face some heightened challenges compared to people on probation in urban areas. One straightforward example is transportation: in places without public transit options, and where license suspension is a common penalty for minor charges, people inevitably miss court and other appointments.<sup>118</sup> For example, a recent study of probation officers' perceptions of supervising people with mental illnesses in both rural and urban settings found that people with mental illness who were on probation in rural areas reported facing certain challenges more frequently than people with mental illness who were on probation in urban areas.<sup>119</sup> These challenges included possessing outstanding court costs and probation fees, experiencing barriers to obtaining employment, and lacking access to community resources.<sup>120</sup>

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Another way of looking at this would be to have judges and community supervision agencies establish different conditions that would represent satisfactory behavior during parole, thus removing common causes of technical violations.

112. See WEISHEIT, FALCONE & WELLS, *supra* note 14, at 161; see also David E. Olson, Ralph A. Weisheit & Thomas Ellsworth, *Getting Down to Business: A Comparison of Rural and Urban Probationers, Probation Sentences, and Probation Outcomes*, 17 J. CONTEMP. CRIM. JUST. 4 (2001).

113. WEISHEIT, FALCONE & WELLS, *supra* note 14, at 161.

114. Olson, Weisheit & Ellsworth, *supra* note 112.

115. Olson, Weisheit & Ellsworth, *supra* note 112.

116. Olson, Weisheit & Ellsworth, *supra* note 112.

117. Olson, Weisheit & Ellsworth, *supra* note 112.

118. Tonya B. Van Deirse et al., *Probation Officers' Perceptions of Supervising Probationers with Mental Illness in Rural and Urban Settings*, 43 AM. J. CRIM. JUST. 267 (2018).

119. *Id.*

120. *Id.*

Moreover, in several states, the widespread use of private probation has contributed to rising jail populations.<sup>121</sup> Private probation companies typically require people under their supervision to pay daily fees that can quickly add up, creating economic incentives for companies to keep people under supervision for longer periods.<sup>122</sup> In turn, longer periods of supervision create additional opportunities for people to miss payments or appointments and be sent to jail. In Georgia, the private probation industry is worth about \$40 million per year.<sup>123</sup> Some lawsuits have challenged private probation companies in Georgia for charging excessive fees, but it is still unclear whether these will lead to changes in the laws and policies governing probation generally.<sup>124</sup> Fines and fees are also commonly imposed for other elements of “alternatives to incarceration” such as for ankle monitors or mandatory drug testing. In some places, these fines may not require a judicial order, even though non-payment can result in jail incarceration.<sup>125</sup>

More research is required to fully understand the impact of probation on rural jail populations. Probation scholars suggest that the nuances of implementation make the difference in terms of whether probation actually reduces jail and prison populations or instead ends up supervising people who would not have otherwise ended up in detention – and rural settings are one angle worth further analysis.<sup>126</sup> Lessons drawn from existing research suggest the possibility that probation may be used by courts at higher rates in rural areas than in more urban places, and especially in states that utilize private probation companies to manage supervision. It follows that, in places where access to defense lawyers, employment, housing, and community resources and social service safety nets are more limited, people on probation in rural areas might face additional obstacles in avoiding violations

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121. CHRIS ALBIN-LACKEY, PROFITING FROM PROBATION: AMERICA’S OFFENDER-FUNDED PROBATION INDUSTRY (2014); SHARON BRETT, NEDA KHOSHKHOO & MITALI NAGRECHA, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, PAYING ON PROBATION: HOW FINANCIAL SANCTIONS INTERSECT WITH PROBATION TO TARGET, TRAP, AND PUNISH PEOPLE WHO CANNOT PAY 92 (2020), [https://mcusercontent.com/f65678cd73457d0cbde864d05/files/f05e951e-60a9-404e-b5cc-13c065b2a630/Paying\\_on\\_Probation\\_report\\_FINAL.pdf](https://mcusercontent.com/f65678cd73457d0cbde864d05/files/f05e951e-60a9-404e-b5cc-13c065b2a630/Paying_on_Probation_report_FINAL.pdf); ALLISON FRANKEL ET AL., REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES (2020), [https://www.hrw.org/sites/default/files/media\\_2020/07/us\\_supervision0720\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/media_2020/07/us_supervision0720_web_1.pdf).

122. Simone Chérie, *Understanding the Probation Trap in Georgia*, MEDIUM (Nov. 14, 2019), <https://medium.com/antiparty/gaprobation-c17ee60479d3>. See also Sarah Shannon, *Probation and Monetary Sanctions in Georgia: Evidence from a Multi-Method Study*, 54 GA. L. REV. 1213 (2020). Chérie notes that these include a \$50 one-time fee plus \$23 per month, on top of victim restitution and court fines. Shannon finds that median fees in the rural southwest of Georgia were higher.

123. Chérie, *supra* note 122.

124. Sandy Hodson, *Judge Approves Settlement in Sentinel Probation Suit*, AUGUSTA CHRONICLE (updated May 24, 2019, 2:21 PM) <https://www.augustachronicle.com/news/20190524/judge-approves-settlement-in-sentinel-probation-suit>.

125. Andrea Young, *How Georgia’s Probation System Squeezes the Poor and Feeds Mass Incarceration*, ACLU (Nov. 13, 2018, 5:30 PM), <https://www.aclu.org/blog/criminal-law-reform/how-georgias-probation-system-squeezes-poor-and-feeds-mass-incarceration>.

126. Phelps, *supra* note 107.

and future periods of incarceration. However, it is also highly likely that the degree to which probation impacts jail population varies widely depending on the local dynamics of enforcement and the incentives that shape the decisions of probation officers, jail administrators, and judicial actors.

Future research should examine the impact of probation on local rural jail populations in significantly greater detail, including by examining the impact of technical violations versus violations arising out of new offenses, rationale for violation decisions, attitudes and culture of probation agents, and efforts to make probation terms and conditions less punitive.

#### D. Unintended Consequences of State-Level Reforms

Rural-focused researchers over the years have documented a common sentiment held by many people in rural communities: That their needs are regularly overlooked or deprioritized by state-level lawmakers in more urban centers.<sup>127</sup> Indeed, there are many instances of state-level criminal justice reforms having unintended consequences for small and rural counties, especially where policymakers immersed in an urban context may not have direct knowledge of the implementation mechanics of their proposed reforms for places with limited resources and infrastructure.<sup>128</sup>

For example, in an analysis of New York State, where state officials have pushed for decreasing the number of people held in prisons and jails, the drop in jail numbers was far sharper in New York City than in upstate, particularly rural parts of upstate New York.<sup>129</sup> Some analysts argue that this is because some of the key reforms were based on assumptions that fit a big city.<sup>130</sup> For example, shifting people charged with drug use or possession into community corrections only keeps people out of jail if people successfully comply with the conditions of probation. In rural New York counties, two factors converge: fewer support services for people on probation to seek treatment or social services, and harsher policing of drug use in the first place.<sup>131</sup>

In California, state officials responded to a 2011 U.S. Supreme Court prison population reduction order by implementing Public Safety Realignment, a set of policies that would require people convicted of certain state-level offenses to serve

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127. SHERMAN, *supra* note 58; SCHEPT, *supra* note 76; EASON, *supra* note 15.

128. KANG-BROWN & SUBRAMANIAN, *supra* note 11. RYKEN GRATTET ET AL., PUBLIC POLICY INST. OF CAL., CALIFORNIA'S COUNTY JAILS IN THE ERA OF REFORM 12 (2016), [https://www.ppic.org/wp-content/uploads/R\\_916RGR.pdf](https://www.ppic.org/wp-content/uploads/R_916RGR.pdf).

129. *Empire State of Incarceration: Correcting the Overuse of Jail*, VERA INST. OF JUST. (Feb. 18, 2021), <https://www.vera.org/state-of-incarceration>.

130. Andrew J. Pragacz, *Is This What Decarceration Looks Like? Rising Jail Incarceration in Upstate New York*, in AFTER PRISONS?: FREEDOM, DECARCERATION, AND JUSTICE DISINVESTMENT (William G. Martin & Joshua M. Price eds., 2016).

131. *Id.*

their sentences in county jails as opposed to state prisons.<sup>132</sup> These changes shifted responsibility for the majority of people convicted of lower-level felonies, as well as all people paroling from state prisons, to California's 58 counties.<sup>133</sup> The policies also give counties discretion to spend over \$1 billion annually on their local justice systems in order to support the influx of people.<sup>134</sup> In studying the impact of Realignment, researchers have observed that some larger, more urban counties have put this funding towards investing in community resources outside of incarceration, while some more rural counties have invested in expansion of new or existing carceral infrastructure.<sup>135</sup> Moreover, a 2020 analysis of California's Board of State and Community Corrections' data on jails by researchers at the Vera Institute of Justice found that counties who had recently invested in jail expansion released far fewer people on average during the COVID-19 pandemic than counties who had not, suggesting that state-funded investment in jails correlates with a "political reluctance to decarcerate" at a county level.<sup>136</sup> Importantly, these examples should not be understood as arguments against state-mandated criminal justice reform. Instead, they should serve as reminders that rural counties may require different resources or implementation support to fully and meaningfully accomplish required changes and avoid unintended consequences. Otherwise, problems can simply be kicked down the road from the state to the county.

#### IV. FACTORS COMPLICATING RURAL REFORM EFFORTS

Compared to cities, rural areas suffer disproportionately from a variety of social problems: poverty, poor health, educational deficits, low employment prospects, the opioid epidemic.<sup>137</sup> Scholars have connected these problems to deep-seated socioeconomic issues such as "persistent inequitable allocations" of resources to certain communities, especially Native communities, and resulting "distributive injustice" that leads to steep drops in rural tax bases funding many rural local governments.<sup>138</sup> The widespread barriers to accessing justice system and community resources that have resulted from these inequitable practices continue to affect all rural communities.

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132. *Brown v. Plata*, 563 U.S. 493 (2011); *see also* Assemb. B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011).

133. JOAN PETERSILIA ET AL., STANFORD CRIM. JUST. CTR., VOICES FROM THE FIELD: HOW CALIFORNIA STAKEHOLDERS VIEW PUBLIC SAFETY REALIGNMENT (2014) <http://www.ssrn.com/abstract=2395498>.

134. *Id.* at 45.

135. 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>.

136. *Id.*

137. Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018); Michele Statz & Paula Termuhlen, *Rural Legal Deserts Are a Critical Health Determinant*, 110 AM. J. PUB. HEALTH 1519 (2020).

138. Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189 (2020).

However, it would be too simplistic to include resource shortages and problems of access to justice as primary drivers of the recent rural jail population boom, as these issues have, sadly, been around for decades. Significant jail population reductions should be able to occur in rural places now, so long as the local context, including the issues of accessing resources and justice, are meaningfully considered in rural reform efforts.

#### A. Availability of Community Resources

The consequences of resource shortages in rural communities arise at nearly every stage of the local criminal justice process. This issue comes up especially frequently in discussions of alternatives to incarceration. In bigger cities, judges often have the option of ordering someone to participate in programming or services in lieu of pretrial incarceration, or to opt for a therapeutic or specialty court that offers treatment for substance use or mental health conditions under court supervision. However, rural areas tend to have fewer social services than urban areas, and often face shortages of behavioral health treatment, mental health services, drug and alcohol treatment opportunities, and counseling.<sup>139</sup> This raises the risk that judges and prosecutors will see jail incarceration as the only answer to community safety concerns. Beyond its effect on jail admissions this can inadvertently lead to health-related services being under the purview of local law enforcement agencies. Further, less widespread access to technology can make it difficult to access online information about scheduled court hearings or to participate in workarounds such as remote proceedings that are designed to make it easier for people to reliably appear for court.<sup>140</sup>

For people reentering the community after criminal justice system involvement, resource shortages can create additional obstacles for complying with probation terms or avoiding recidivism. For instance, it is more difficult to secure stable, affordable housing in rural areas than it is in urban or suburban areas. There are more owner-occupied homes, and as a result, fewer rental opportunities that are less likely to be affordable than in urban areas. Homeless shelters are very rare in rural areas, and those that do exist often can be further away or at full capacity. Limited transportation resources can also make it more difficult to comply with both pretrial and post-release conditions of supervision, as public transportation is often unavailable or extremely limited in rural areas.<sup>141</sup>

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139. Deirdre Caputo-Levine, *A Case Study in Rural Reentry*, in PRISONER REENTRY IN THE 21ST CENTURY: CRITICAL PERSPECTIVES OF RETURNING HOME (Keesha M. Middlemass & CalvinJohn Smiley eds., 2019); Brett Garland, Eric J. Wodahl & Julie Mayfield, *Prisoner Reentry in a Small Metropolitan Community: Obstacles and Policy Recommendations*, 22 CRIM. JUST. POL'Y REV. 90 (2011); Eric J. Wodahl, *The Challenges of Prisoner Reentry from a Rural Perspective*, 7 WESTERN CRIMINOLOGY REV. 32 (2006).

140. INCARCERATION NATIONS NETWORK, IS VIRTUAL JUSTICE REALLY JUSTICE? (2020), [https://www.incarcerationnationsnetwork.com/wp-content/uploads/2020/09/Virtual-Justice-Toolkit\\_Draft-FINAL-with-Hyperlinked-SC.pdf](https://www.incarcerationnationsnetwork.com/wp-content/uploads/2020/09/Virtual-Justice-Toolkit_Draft-FINAL-with-Hyperlinked-SC.pdf).

141. Caputo-Levine, *supra* note 139.

Local criminal justice reforms in rural places must therefore be developed with these unique challenges in mind and should be focused on justice system decision points that can make a meaningful difference in spite of longstanding roadblocks. Still, rural residents sometimes argue that one of their key strengths is the presence of close-knit social networks that offer robust informal social support, both informally and through organizations such as churches, as opposed to government or nonprofit services.<sup>142</sup> Research on community services – whether for reentry or as alternatives to incarceration – should ask different questions, to depart from solely using the deficit framing of “lack of services,” particularly when referring to services linked to the criminal legal system. Rather, research could ask about how people support one another (or not) in these communities in practice, and about the dynamics and outcomes of these social networks.<sup>143</sup> Another important angle would be on how supportive services – such as for housing, mental health, or for healing from violence – could be accessible without having to go through a police or court referral. Further, policy research could assess the potential and impacts of shifting conditions of diversion programs to fit the reality of a rural setting rather than an imagined array of social service organizations.

#### B. Access to Justice

Questions about access to justice in rural places typically center around the shortage of lawyers, limited availability of judges, and geographic dispersion of courthouses and other justice system infrastructure in remote areas.<sup>144</sup> These are well-documented problems. First, the number of lawyers practicing in rural areas is painfully low. While 20% of people in the United States live in rural areas, only 2% of small law practices are located there.<sup>145</sup> In the local criminal legal system, a shortage of lawyers might mean that counties must assume additional costs to obtain constitutionally required counsel from nearby communities when there are no public defense offices at all and no local lawyers available to represent people charged with crimes, increasing the time that someone waits in jail for representation.<sup>146</sup> It also might mean that conflicts of interest create additional complications or lag times, when a limited pool of local attorneys are all legally barred from taking on a case that involves people with whom they have close

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142. Sherman & Schwartz, *supra* note 71; DEWEY ET AL., *supra* note 17; DONNERMEYER & DEKESEREDY, *supra* note 17.

143. Research in rural communities finds that informal social networks can provide protection and support to certain community members – those who uphold, or appear to uphold, community values. SHERMAN, *supra* note 58. Conversely, people perceived as transient, involved in crime, and/or reliant on public welfare resources often talk about facing extreme isolation from such social networks. For more, see SHERMAN, *supra* note 58.

144. Pruitt et al., *supra* note 137; Lisa R. Pruitt & Bradley Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466 (2014).

145. Pruitt et al., *supra* note 137; Pruitt & Showman, *supra* note 144.

146. Pruitt et al., *supra* note 137.

ties.<sup>147</sup> Perhaps most concerning for people charged with crimes, the rural lawyer shortage may also result in the appointment of counsel with little or no expertise in criminal law, simply because they are the only lawyers available who are willing to accept a meager appointment fee from the local courts.<sup>148</sup>

The frequency of court proceedings in some rural areas also poses complications. In many rural areas judges split their time between a number of different county courthouses, and as a result, criminal court dockets might happen only once or twice per month.<sup>149</sup> A 2018 report on felony representation in Mississippi found that in some rural counties the district attorney makes grand jury presentations only twice a year.<sup>150</sup> As a result, people must sometimes wait up to 12 months after arrest to be assigned an attorney.<sup>151</sup> Relatedly, people living in rural areas who are ordered to appear in court also might have to travel long distances to the courthouse – trips on the highway that require a car and to places that are not easily accessible via public transportation.

Again, rural criminal justice reforms must acknowledge these issues, or they will not be successful. While policymakers and researchers focused on access to justice issues more broadly are pushing for crucial movements towards change (government programs to provide student loan forgiveness or tax credits for lawyers who practice in rural areas, law school programs that invest in rural legal issues specifically, and other incentives for legal professionals to remain or relocate to the rural communities that so many call home<sup>152</sup>), local and state decisionmakers can implement legal, policy and practice changes that can still make a difference in the shorter-term. There is a need for research that works in partnership with policymakers to track the implementation and consequences – planned and unintended – of initiatives to improve access to justice in rural areas.

#### V. PATHWAYS TOWARDS REVERSING RURAL JAIL GROWTH

The challenges for reversing rural jail population growth will first be in examining what local and state-level changes will have the most impact on jail population reduction, and in figuring out how to move towards enacting these changes across the 1,986 rural counties that are contributing to so much of the national jail population. This will first require more research focused on drivers of rural jail populations specifically, and on integrating analysis of administrative data from various agencies with qualitative insights about the local context and culture.

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147. Pamela Metzger, *What This Law Prof Has Learned About Rural Justice*, ABA J. (2020), <https://www.abajournal.com/voice/article/what-ive-learned-about-rural-justice>.

148. Pruitt et al., *supra* note 137; Metzger, *supra* note 147. Often, prosecutors far outnumber the lawyers eligible to do defense counsel work.

149. KANG-BROWN & SUBRAMANIAN, *supra* note 11.

150. SIXTH AMENDMENT CTR., *THE RIGHT TO COUNSEL IN MISSISSIPPI: EVALUATION OF ADULT FELONY TRIAL LEVEL INDIGENT DEFENSE SERVICES* (2018), [https://sixthamendment.org/6AC/6AC\\_mississippi\\_report\\_2018.pdf](https://sixthamendment.org/6AC/6AC_mississippi_report_2018.pdf).

151. *Id.*

152. Pruitt et al., *supra* note 137.

The rural jail population drivers discussed in this article have been identified based on limited study, and more analysis must happen at the local level. The recommendations below are based on what we know now, and they include suggestions for further clarifying the way forward.

#### A. Local-Level Opportunities for Change

Local criminal justice system actors are granted an enormous amount of discretion in making decisions about who to punish and incarcerate.<sup>153</sup> At the county level, law enforcement officials have discretion over which laws to enforce, who to stop and search, when to issue a citation in lieu of making an arrest, and when to ultimately book someone into jail. Prosecutors have broad discretion over who to charge, charges to impose, when to seek pretrial detention, and how vigorously to advocate for a certain punishment. Judges have authority to decide who must wait in jail pretrial, whether people must serve jail or prison sentences after conviction, how long those sentences must be, and under what terms they are supervised in the community. Chief judges can also issue broad directives against setting bail for certain charges and can often determine whether to promulgate a bail schedule. County boards determine local spending, and sheriffs decide whether to enter into jail bed rental contracts with other authorities.

The collective decisions of these actors determine how many people in a community are incarcerated. This was made clear by local responses to the COVID-19 pandemic, when public health directives and public outrage over the dangers of jail came to a head.<sup>154</sup> During the months immediately following the onset of the pandemic, police, sheriffs, and other law enforcement officers across the country used their discretion to make fewer “unnecessary” arrests, prosecutors used their power to stop “low-risk” people from being held in jail pending trial, and judges ordered people who they deemed “safe” to be released from jail altogether.<sup>155</sup> In some rural counties sheriffs hesitated to take these steps, concerned about public opinion favoring “law and order” style policing and detention.<sup>156</sup> For sheriffs who run local jails, some felt caught between the public health directives to release as many detained people as possible and the backlash from local community members.<sup>157</sup> Although not every county made these types of decisions, the ones that did saw some significant and immediate reductions in their jail populations. Out of 1,278 counties with available data, 527 made jail population reductions that

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153. JASMINE HEISS ET AL., VERA INST. OF JUST., *THE SCALE OF THE COVID-19-RELATED JAIL POPULATION DECLINE* 5 (2020), <https://www.vera.org/downloads/publications/the-scale-of-covid-19-jail-population-decline.pdf>.

154. See, e.g., Chris Gelardi, Daniel Nicheanian & Jay Willis, *The Coronavirus Response: Spotlight on State and Local Government*, APPEAL, <https://theappeal.org/political-report/coronavirus-response-state-local/> (last visited May 31, 2021).

155. See, e.g., *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POLICY INITIATIVE (updated May 18, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html>.

156. Sherman & Schwartz, *supra* note 71.

157. Sherman & Schwartz, *supra* note 71.

remained stable in the weeks following the pandemic onset, while 270 counties made immediate changes resulting in population reduction but quickly returned to previous levels.<sup>158</sup>

Overall, the immediate reduction of the jail population in response to COVID-19 happened to a greater degree in rural counties than in urban counties.<sup>159</sup> Some of this may be because some opportunities to reduce admissions and expand releases had already been implemented in cities, but not yet in rural areas. Still, this suggests that a group of targeted decisions by local actors can make a difference in rural places too, despite systemic issues of resource shortages and access to justice. At the local level decisionmakers should focus on the choices that relate to the main drivers of rural jail populations. In order to immediately drive down pretrial incarceration rates, for instance, law enforcement should use their discretion to expand the use of citation in lieu of arrest, and judges should issue directives against setting bail for misdemeanors and non-violent felonies, as well as barring the use of incarceration as a penalty for technical violations of probation terms. Courts should adopt systems of sending text message reminders for court, even in places without dedicated pretrial services departments. All actors should cooperate to ensure that people who are facing charges receive defense counsel at first appearance hearings.<sup>160</sup> But all of these options require thoughtful and tailored implementation to a given rural place in order to avoid unforeseen consequences, as well as sufficient public education. Researchers should track not just how a given intervention affected local incarceration rates, but also the local dynamics of the process: When and why leaders did or did not decide to take on a new approach? Which interventions fell apart quickly or lasted beyond the initial adjustment period? What were the impacts of reforms on the structure and culture of the relevant local agencies?

There will of course be unique challenges to implementing these types of reforms in rural places. For rural prosecutors, researchers have noted that factors such as limited opportunities for trial experience in rural areas may contribute to a reluctance to decline pursuing certain cases to trial, or to avoid decisions to decline charging in the first place.<sup>161</sup> Rural prosecutor offices are also more likely to attract “career prosecutors,” who remain in office for many years.<sup>162</sup> Prosecutors who are committed to remaining in the same office for the foreseeable future may be more likely to have “fixed sentiments towards certain crimes or types of defendants that may make them unwilling to bend to new policy change.”<sup>163</sup> Moreover, the smaller rural environment may make it more likely that prosecutors will have close, personal relationships with local law enforcement, making cooperation in reform

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158. HEISS ET AL., *supra* note 153.

159. KANG-BROWN ET AL., *supra* note 6.

160. Alissa Pollitz Worden et al., *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIM. JUST. POL'Y REV. 710 (2018).

161. McWithey, *Part One*, *supra* note 61, at l.-41.

162. McWithey, *Part One*, *supra* note 61, at l.-41; Ouziel, *supra* note 61.

163. McWithey, *Part One*, *supra* note 61, at l.-47.

efforts even more important.<sup>164</sup> However, smaller prosecutor offices in rural places may make it easier for lead prosecutors to make changes and enact culture change, and to provide the necessary oversight to ensure that line prosecutors are complying with new office policies.<sup>165</sup> For prosecutors who are motivated to enact meaningful changes, the rural environment may overall provide more substantial advantages than disadvantages.<sup>166</sup>

Judges in rural areas may also encounter specific challenges to implementing changes that are seen as counter to a “tough on crime” approach. Rural judges may feel more directly accountable to their communities than judges in urban areas, as research has shown that rural voters are, on the whole, much more knowledgeable about their local judges than urban voters.<sup>167</sup> As a result, rural judges may be less likely to make decisions that could have political backlash.<sup>168</sup> Additionally, judges in some rural areas may not receive the same levels of support and resources towards making what may seem like bold changes as do judges in urban areas, both because there often are no state-coordinated judicial culture change efforts, and because limited access to local-level data may make it more difficult for rural advocates to support their arguments for change.<sup>169</sup>

Law enforcement (including probation officers and jail staff) in rural places may also have an increased feeling of direct accountability to their communities, as they are more likely to interact with members of their own jurisdictions than urban police.<sup>170</sup> Further, rural law enforcement face a general lack of specialized training as compared to law enforcement in more urban areas, as well as chronic understaffing.<sup>171</sup> As a result, local reform efforts should emphasize their potential to provide relief to officers who are stretched thin, as opposed to stacking on additional duties.<sup>172</sup>

Because of the decentralized nature of local criminal justice systems, along with the competing interests and motivations held by each stakeholder group, change implementation may initially seem daunting.<sup>173</sup> Indeed, seemingly political

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164. See McWithey, *Part One*, *supra* note 61, at I.-46 n.82.

165. McWithey, *Part One*, *supra* note 61, at I.-45–I.-46 (“[T]o keep up with the demanding caseload, Mark Gonzalez personally runs double grand juries every week in Nueces County, a small rural district. . . . In Salem County, New Jersey, chief prosecutor John Lenahan oversees just eleven attorneys. Greg McCaffrey, the District Attorney of Livingston County, New York, has a staff of only six attorneys. DA Scott Colom of Circuit Court Sixteen in rural Mississippi has a staff of only five lawyers and remains involved in the courtroom. He has prioritized reviewing cases prior to the grand jury stage to ensure that any cases lacking sufficient evidence are kept out earlier in the process.”).

166. *Id.* at I.-45–I.-48.

167. Mark Jonathan McKenzie et al., *Americans’ Knowledge of Their Local Judges*, 39 POLITICAL BEHAV. 259, 260 (2017).

168. Woods et al., *supra* note 73, at 1265.

169. *Id.*

170. WEISNER, OTTO & ADAMS, *supra* note 17; Sherman & Schwartz, *supra* note 71.

171. WEISNER, OTTO & ADAMS, *supra* note 17.

172. WEISNER, OTTO & ADAMS, *supra* note 17.

173. Ouziel, *supra* note 61.

calls for sweeping change from elected leaders often do not effectively make it down to the “career enforcers,” or the people who stay in justice system enforcement jobs regardless of who is at the political helm.<sup>174</sup> There is no easy answer to this, but researchers have identified some key areas for managing these systemic barriers to change. In her recent article, “Democracy, Bureaucracy, and Criminal Justice Reform,” Professor Lauren Ouziel notes the importance of hearing and responding to public preferences for criminal justice system reform, hearing and responding to concerns and day-to-day challenges faced by career enforcers, and focusing future dialogue on aligning both of those interests.<sup>175</sup> She offers the following:

The hard work of convincing enforcement professionals of the value of change necessarily requires greater public engagement outside the electoral process. Giving greater voice and participation to career enforcers in setting enforcement policy invites them to examine more critically the choices they make, and to see those choices as products of earlier political movements.

Elected and appointed leaders should imagine mechanisms for greater engagement by both career enforcers and the public in setting criminal enforcement priorities and practices. Such mechanisms should be designed to encourage stakeholders—community leaders and representatives, those affected by crime and its enforcement, career enforcers, and enforcement leaders—to participate in and deliberate on the exercise of enforcement discretion, and to ensure that agreed-upon reforms are implemented and executed. With thought, engagement, deliberation, and care, changing public preferences can be refined and translated into changed enforcement on the ground.<sup>176</sup>

Reform efforts aimed at reducing jail populations in rural places should heed Ouziel’s advice. Coupled with a concerted effort at increasing the availability and quality of local-level data, rural localities will be better-positioned to increase stakeholder confidence levels in the necessity of reforms, as well as allow for community advocates to better hold their local systems accountable.

#### B. State-Level Opportunities for Change

State-level actors can also make a big impact on jail population reduction efforts at a local level, even though the grand majority of granular decision-making is in the hands of local actors. First, state legislatures should prioritize efforts to mandate and provide funding for regular reporting of data from local jails and law enforcement, as well as mechanisms for the public to easily access that data.

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174. Ouziel, *supra* note 61.

175. Ouziel, *supra* note 61.

176. Ouziel, *supra* note 61, at 589.

Successful state policies on local criminal justice data collection should be comprehensive and far-reaching, including clear requirements for regular reporting of jail admissions and length of stay, including details as to how many people are in jail for various reasons: pretrial, probation detainers, probation violations, etc.

State policymakers can also be more thoughtful about setting rural places up for successful implementation of statewide criminal justice reform policies, both to avoid problems with compliance and to protect against unintended consequences. This might include providing funding for implementation of policies that require additional county expenditure, making concrete plans for oversight of policy adoption across the state, or consulting with rural representatives on feasibility concerns held by local officials.<sup>177</sup> State policymakers should also make an effort to eliminate potential barriers to reform implementation that may be codified in state law, such as limitations on local authority to use citation in lieu of arrest.<sup>178</sup>

As previously discussed, one of the principal barriers to sustainable reform in rural areas is the difficult task of achieving culture change. State-level actors can take on a share of this task by providing oversight and support to local decisionmakers. For instance, Justices on State Supreme Courts can stress the importance of adhering to new policies and support local judges against political backlash,<sup>179</sup> state policymakers can attend meetings of state Sheriff Associations and listen to concerns held by rural members, and community advocacy organizations in urban centers can partner with rural organizers to help push for needed changes – even if this means tailoring some policies differently for rural places than for cities. When urban policymakers, advocates, and stakeholders understand that rural areas are key to the widespread success of jail population reduction and broader criminal justice reform, at least part of the battle will be over.

### C. Where Do We Go from Here?

Beyond all of these policy ideas, the significant question of how to drive necessary change across all 1,986 rural counties remains. It is neither feasible nor fair that each locality, no matter how small, should be left to figure out how to do all of this on their own, over and over again. Although rural counties are of course operating within very different local contexts, they face some similar significant

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177. Woods et al., *supra* note 73 at 1265–66.

178. See Woods et al, *supra* note 73, at 1266: “Additionally, state legislators and the Attorney General likely need to eliminate barriers to the local use of citation and/or summons practices. For example, O.C.G.A. § 17-4-23(a)(2) requires fingerprinting pursuant to arrest at the specification of the Attorney General. Other local law enforcement agencies may be required to conduct a more expansive collection of identifying information in order to receive state or federal grants. If local law enforcement officials believe they are required to arrest and book all individuals charged with misdemeanors in order to comply with other data collection requirements, it will seriously impede their ability to undertake citations practices that would enable many individuals to avoid jail altogether.”

179. Woods et al., *supra* note 73, at 1265–66.

challenges. The following recommendations offer some broad suggestions for charting the way forward.

i. Elevate and Invest in Rural Champions for Change

In some public discussions, the determination and strategies of organizers and criminal justice reformers in rural places are not acknowledged. The common trope of “rural = white” and the assumption that all rural voters are conservative ignores both the people of color and Native communities living in rural areas who suffer disproportionately from harsh criminal justice policies. This also ignores the complex positions of white people and other groups sometimes pigeonholed as conservative, such as churches and local business associations. This can make it ‘acceptable’ to abandon rural places in their efforts towards justice reform. Even some law enforcement leaders are vocal about the need to reduce the scope of jails. For example, sheriffs who support tough-on-crime approaches on drug use might still endorse reforms that divert people with mental health conditions away from jail detention. Given the political and social gulf between rural places and cities, rural leaders are likely more receptive to considering the experiences of their rural peers.

Thus, national and state reform advocates should elevate and invest resources in supporting rural champions for change, both rural community advocates who are serving as a crucial check on local systems, and reform-minded government stakeholders who are attempting to implement positive changes. For example, prosecutor Scott Colom in Eastern Mississippi conducts a personal review of all cases with an eye towards preventing any cases that lack sufficient evidence from proceeding to the grand jury stage.<sup>180</sup> Due to the relatively small size of his office, he is able to ensure that his vision for culture change trickles down to every case prosecuted by his office.<sup>181</sup> We Are Down Home in Alamance County, North Carolina, has successfully created community bail funds in several rural counties and is leading community efforts to push back on proposals for jail expansion.<sup>182</sup> All of their work can and should help change false and problematic public perceptions of rural places.

ii. Create Regional Networks of Researchers, Stakeholders, and Community Advocacy Groups

There has been periodic discussion of the merits of “regionalization” of criminal justice system functions in rural jurisdictions, and we see this playing out in many rural places that share judges, jails, and law enforcement with other nearby

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180. McWithey, *Part One*, *supra* note 61, at l.-46.

181. McWithey, *Part One*, *supra* note 61, at l.-46–l.-47.

182. See DOWN HOME NORTH CAROLINA, [www.downhomenc.org](http://www.downhomenc.org) (last visited May 31, 2021); see also Jasmine Heiss, *In Our Backyards: Community Grants*, VERA INST. OF JUST., <https://www.vera.org/projects/in-our-backyards/community-grants> (last visited May 31, 2021).

counties.<sup>183</sup> There are clear benefits to sharing resources and knowledge between similarly-situated localities, and it makes sense to use this approach to create opportunities for data collection and analysis, dialogue, and the ultimate culture change that is necessary for jail population reductions to be sustainably achieved.

This approach is currently being tested as part of the Rural Jails Research and Policy Network project, funded by Arnold Ventures and piloted by the Vera Institute of Justice.<sup>184</sup> Under this model, a university serves as the hub of a network of rural counties, all of which have committed to providing their administrative jail data for analysis. Since the university is a credible and permanent fixture of society with a clear commitment to being grounded in research, they are a good candidate for convening rural criminal justice system actors and community advocates to engage in dialogue and facilitate work towards alignment of interests. Washington State University and the University of Georgia are the first pilot sites for this approach, and each is working with groups of rural counties within their states to analyze drivers of local jail populations and assist decisionmakers in identifying where making changes will have the most impact.<sup>185</sup>

### iii. Acknowledge the Local Context

Finally, as has been previously discussed, there is great diversity across rural communities in the United States. While researchers have identified many significant commonalities across rural places, implementing reforms that are responsive to the local culture and context will have the best chance at success. Building the capacity to analyze standard local government data is crucial. But qualitative research is essential, too, so that the motivations, fears, relationships, and assumptions of key system actors, people in conflict with the law, and support services inform interpretation of the numbers and the potential impacts of new policies. Future research and reform must aim to acknowledge the local context in which the work is happening, both by remaining rooted in local data and by not assuming that a reform that worked in one rural place will automatically work in another. There is a particular need for research attention to how racial and economic inequality dynamics manifest in different rural settings and how the justice system shapes these. Once there is rigorous study of local criminal justice issues across a variety of rural places, it will become more possible to track implementation and outcome data comparatively and over time.

## VI. CONCLUSION

A close look at the circumstances of rural jails in the United States tempers optimistic interpretations of the drop in jail populations overall or the reductions

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183. Rick Ruddell & G. Larry Mays, *Trouble in the Heartland: Challenges Confronting Rural Jails*, 1 INT'L J. RURAL CRIMINOL. 105 (2011).

184. See *Rural Jails Research and Policy Network*, VERA INST. OF JUST., <https://www.vera.org/projects/rural-jails-research-and-policy-network> (last visited May 31, 2021).

185. *Id.*

that occurred during the 2020 pandemic. Existing research on rural jails growth is now comprehensive at a national level, but there is a need for more detailed place-specific analysis aimed at deeper understanding of the nuances of policy and practice in rural settings.<sup>186</sup> This article has highlighted several factors that contribute to excessive numbers of people in rural jails. The conditions imposed on people during pretrial and probation periods make it very difficult to avoid jail detention, the consequence for non-compliance. Economic decisions also play an important role. As counties face budgetary pressures, many decide to expand their jail bed capacity in search of a new stream of revenue. Jails usually fail to meet the promise of being an economic engine for small towns or rural areas, but once more beds exist, justice systems tend to keep them full.

Beyond deeper exploration of specific drivers of rural jail populations, this article calls for a reframing of common narratives that cast rural places as uniformly supportive of harsh law enforcement practices and unable to implement positive change due to resource constraints. Despite the real challenges that drive these narratives, reversing jail population growth in rural places can begin to happen through thoughtful culture change within the justice system and by leaning into the strengths of rural communities: social support networks, versatile community advocacy groups, and a skepticism toward unnecessary interference in or surveillance of people's private lives. Moreover, rural places offer an important setting in which to explore alternatives to incarceration that do not rely on resources such as 'specialized' services or treatment that entail ongoing mandatory interaction with criminal justice institutions. These too often become a new form of system supervision over vulnerable people in the name of helping them.<sup>187</sup>

The current pace of reducing incarceration is slow: at today's rates of change, cutting the prison population by half will take 60 years.<sup>188</sup> Population reduction in jails can occur more quickly, as the pandemic reductions demonstrate, but rely on political will by key actors being sustained beyond one moment of crisis. The number of people in jail nationwide will not meaningfully decrease unless rural places become part of the national reform conversation. Currently, rural jails' expansion is canceling out reductions in big cities—and the analysis of why and what to do about it requires a specialized rural framework.

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186. This research has been conducted primarily by researchers within the In Our Backyards project at the Vera Institute of Justice. See Jasmine Heiss, *In Our Backyards: Community Grants*, VERA INST. OF JUST., <https://www.vera.org/projects/in-our-backyards> (last visited May 31, 2021).

187. SCHEPT, *supra* note 76; SCHENWAR & LAW, *supra* note 107.

188. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, CAN WE WAIT 60 YEARS TO CUT THE PRISON POPULATION IN HALF? (2021), <https://www.sentencingproject.org/publications/can-we-wait-60-years-to-cut-the-prison-population-in-half/>.