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Bottleneck:
The Place of County Jails in California’s COVID-19 Correctional Crisis

HADAR AVIRAM**

Abstract

This Article examines a lesser-known site of the COVID-19 pandemic: county jails. Revisiting assumptions that preceded and followed criminal justice reform in California, particularly Brown v. Plata and the Realignment, the Article situates jails within two competing/complementary perspectives: a mechanistic, jurisdictional perspective, which focuses on county administration and budgeting, and a geographic perspective, which views jails in the context of their neighboring communities. The prevalence of the former perspective over the latter among both correctional administrators and criminal justice reformers has generated unique challenges in fighting the spread of COVID-19 in jails: paucity of, and reliability problems with, data; weak and decentralized healthcare policy featuring a wide variation of approaches; and serious litigation and legislation challenges. The Article concludes with the temptation and pitfalls of relying on the uniqueness of jails to advocate for vaccination and other forms of relief, and instead suggests propagating a geography-based advocacy, which can benefit the correctional landscape as a


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Introduction

Even against the overall abysmal management of the novel coronavirus (COVID-19) in the United States—as of February 14, close to 30 million cases and more than half a million deaths—the catastrophe wrought by the virus in correctional institutions stands out. The COVID-19 case rate for prisoners was 5.5 times higher than the US population case rate; when adjusted for age, mortality rates were 3.0 times higher in prisons than in the national population.¹

Most of the national attention to COVID-19 in correctional settings has been drawn to state prisons; the outbreaks in some California prisons, notably Avenal² and San Quentin,³ are widely regarded as the worst outbreaks nationwide. In some of these prisons, tragically, infection rates were so high that they reached natural herd immunity.⁴ By contrast, the medical disasters playing out in the country’s numerous county jails have received far less coverage, in itself an important observation.

This Article sets out to correct that oversight by illuminating the special problems and challenges faced by county jails handling COVID-19. As I argue, the challenges of managing viral outbreaks in jails stem from a serious policymaking problem: a mechanical understanding of jails as jurisdictional, administrative units belonging to the county and answering to different masters than state prisons, rather than an organic perspective that sees them geographically embedded within counties that also include prisons, immigration detention facilities, and other entities. The mechanical-jurisdictional perception of jails has plagued not only their role in mass

¹ Brendan Saloner, et al., Cases and Deaths in Federal and State Prisons, 324 JAMA 602, 602-03 (2020).
incarceration, but also their inappropriate use as the solution for population overflows and healthcare challenges in state prisons. In that respect, the remedy has been as misguided as the disease. The outcome of this misperception is the essence of the COVID-19 problem in jails: acting as bottlenecks for population destined for prison or for the community, they have sprouted outbreaks of their own, which are underreported, improperly addressed, and managed in a haphazard, decentralized fashion.

It is of historical interest that the linkage between congregate penitentiaries and disease was initially made in the context of jails, which preceded the emergence of modern prisons. While Eighteenth-Century jails varied dramatically in ownership, management, and size, they were generally not used as places of punishment.\(^5\) Jail residents were a heterogenous hodgepodge, held or living there for multiple reasons—mentally ill people, criminal defendants awaiting trial or corporal punishment, and poor youth learning a trade—but what they had in common was poverty, which meant that they were malnourished and suffering from ill health prior to their incarceration.\(^6\)

Conditions within these unregulated facilities were abysmal: overcrowding was rampant, exposure to violence and victimization by the more vulnerable residents was common due to the mixed population, and no uniforms or food were provided, resulting in cold and hunger. The air was stale due to lack of ventilation; the facilities were never or seldom cleaned; and sometimes, raw sewage ran through the facilities.\(^7\)

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As a consequence, disease ran rampant through jails. Eighteenth-century reformer John Howard mentioned the dreadful legacy of the Black Assize of 1577, during which “all those who were present died within forty hours; the Lord Chief Baron, the Sheriff, and three hundred more.” He also referred to several smaller outbreaks, which had occurred between the 1730s and 1750s in various locations, such as Taunton and Devonshire.

In Howard’s time, foul air was thought to be the cause of various diseases, including yellow fever and goal fever; Howard wrote of “guarding [him]self by smelling to vinegar, while I was in those places, and changing my apparel afterwards.” After these visits, his clothes were “so offensive, that in a post-chaise I could not bear the windows drawn up, and was therefore often obliged to travel on horseback. The leaves of my memorandum book were often so tainted that that I could not use it till after spreading it an hour or two before the fire.” Indeed, the jailers themselves, fearing infection, had “made excuses and did not go with me into the felons wards.”

The legacy of filth and disease left its impression on American prison reformers; indeed, the next generation of prisons, such as Walnut Street Penitentiary (opened in 1773) and Eastern State Penitentiary (opened in 1829) were designed with the deliberate aim to prevent the spread of disease. But as Jonathan Simon has noted, the transition to larger, isolated institutions, had adverse implications.
as to the perception of incarceration. One of them was the decreased visibility of the incarcerated population, locked away in sterile and distant facilities, which Simon argues led to seeing confinement “like a state” rather than “like a city.” These new carceral settings removed problems from the public eye and discouraged community-oriented solutions for overcrowding and healthcare problems. By contrast, Simon argued, jails can furnish the necessary link with the wider community that can facilitate a more holistic perspective on reform.

Simon’s perspective, which hailed jails as the hopeful site of criminal justice reform, reflected the sentiment of advocates statewide at a unique moment in California’s correctional history: the landmark Supreme Court decision in Brown v. Plata, which upheld a population reduction order by a federal three-judge panel. Healthcare in California’s state prisons had been abysmal for decades, and the evidence before the Plata court incontrovertibly demonstrated neglect and incompetence at a massive scale. Even before the order, state officials and the legislature were scrambling to alleviate the problem, declared by then-Governor Schwarzenegger a state of emergency. The Schwarzenegger administration attempted to ameliorate the crisis through a jurisdiction-based solution: changing some offense categories from felonies to “wobblers”, which granted prosecutors the discretion to charge them as misdemeanors resulting in county jail sentences in lieu of state prison time. As this effort was joined by judicial pressure to reduce the prison population, the subsequent administration, under Governor Jerry Brown, embarked upon an ambitious legislative project that came to be known as the “Great Experiment”: The Criminal Justice Realignment.

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14 Id. at 297.
19 Joan Petersilia, Realigning Corrections, California Style, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 10 (2016).
in later detail in this Article, were perceived by many of us in the scholarship and advocacy realms as the ideal depressurizing valve for California corrections not only because conditions in state prisons had been so abysmal, but also because the jails’ proximity to, and shared budget with, counties was perceived to provide strong economic incentive to reduce correctional populations by internalizing the costs of incarceration. This would end the accountability problem of sentencing people at the county level to prison stints that would be funded from state budgets, to which Franklin Zimring, Gordon Hawkins, and later W. David Ball, referred to as the “correctional free lunch.”

Nevertheless, even at the time, advocates and scholars expressed concerns that the problems in prisons could duplicate themselves in jails. Malcolm Feeley and Edward Rubin’s analysis of judicial intervention in correctional management is rife with examples of poor jail conditions. Perhaps the most prophetic commentator was Margo Schlanger, who in her seminal paper on *Plata* and Realignment warned against a “hydra’s heads” problem—namely, that rather than one landmark lawsuit against the California Department of Corrections and Rehabilitation (CDCR), advocates would end up litigating dozens of separate lawsuits against county sheriffs about conditions in jails.

This Article essentially sets out to explain why, and how, Schlanger has been proven right. In Part I, I introduce two complementary perspectives on jails: a mechanic-jurisdictional approach, which sees jails as unique because of their jurisdictional position as county institutions, and an organic-geographic approach, which perceives jails through the lens of carceral geography, as carceral locations engaged in constant contact with other carceral

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institutions and with their surrounding communities. I argue that these perspectives should be seen as complementary, rather than competing, and rely on their synthesis to explicate the porousness of the jail membrane and thus its vulnerability to multiple problems, including (but not limited to) viral infections and outbreaks.

Part II demonstrates the pitfalls of relying on the jurisdictional approach and excluding the geographic one by explaining the aftermath of Brown v. Plata and the Realignment. Specifically, I explore the problem of the “correctional free lunch.” Many of us in the advocacy and reform arena saw this as the main problem underpinning incarceration: the lack of financial accountability by county prosecutors and judges sentencing people to prison for felonies and relying on the state to pick up the ever-rising tab. I show how internalizing the costs of incarceration by imposing them at the county level was an essential component of the legislative reform strategy, and how this led to the decentralization of correctional approaches throughout the state: the establishment of the Board of State and Community Corrections (BSCC) as a loose supervisory structure, the squabbles over budget allocations, and the wide variation of correctional strategies among counties, ranging from preemptive decarceration and diversion to the expansion and construction of county jails.

In Part III, the chickens tragically come home to roost. Here, I review how the characteristics of jurisdictional reform—decentralization and variation—have imbued the COVID-19 crisis in county facilities with a unique flavor. First, I explain the paucity and unreliability of data at the jail level as a function of decentralization and the lack of leadership from BSCC, and show how nonprofits, academic institutions, news agencies, and private individuals stepped up to fill the knowledge gap about COVID-19 in jails through exposés and independent data collection efforts. Then, I examine the experience of COVID-19 in California jails, showing that its main features—overcrowding, lack of protective equipment and sanitation, toxic approaches among staff members, and a shortage of medical staffing, were compounded by a protective mechanism exercised by state prisons: shutting down transfers from jails. This, in turn, necessitated a “domino effect” of strategies, including an emergency zero-bail initiative to depopulate the jails. I then show the uphill battle that people incarcerated in jails have faced litigating COVID-19
challenges in jails, focusing on the example of the Orange County jails.

The Article concludes with the prospect of vaccinating the jail population, complicating the picture of advocacy on behalf of people housed in jails. I warn against overreliance on one “jail-specific” argument for vaccination: the presumed innocence of pretrial jail detainees. Instead, I suggest relying on arguments with a geographic appeal: the transience of jail populations and the ease of administering a vaccination program through the counties, and recommend a joint strategy of jails, state prisons, federal prisons, and ICE detention facilities, to vaccinate all incarcerated populations.

Part I: Two Perspectives on County Jails

With an annual national admission of close to 12 million people in more than 3,000 jails—1 million of them in California’s more than 160 facilities—jails are an important component of the criminal justice system. As in the majority of states, California’s jails are administered at the county level; most of the state’s jails are

administered by a single county, and a handful of jails serve multiple counties. Most jails are located in counties in which there are also other types of correctional institutions: state prisons, state and local juvenile facilities, federal prisons, and ICE detention facilities.28 Until the COVID-19 crisis, California jails spent years near or above their total capacity of 79,093 beds. The use of release mechanisms, which will be discussed in this Article, led to a population drop; as of January 2020, California’s jail population is 57,568. The jail population is heterogenous: as of September 2020, 75% of it (43,148 people) consisted of pretrial detainees.29 The remaining people in jail are a mix of locally sentenced people for minor crimes, apprehended probation or parole violators, and state-sentenced people serving time on the county level to alleviate overcrowding in state prisons. Since the passage of Proposition 47, approximately 90% of the people in California jails are either sentenced or awaiting trial for felonies.30

The unique patterns and composition of jail populations can be understood through two complementary frameworks: a mechanical-jurisdictional perspective, which examines their budgeting and administration, and an organic-geographic perspective, which views them in relation to their surrounding communities.

**The Mechanical-Jurisdictional Perspective**

In a recent article, Ashley Rubin and Michelle Phelps problematize the use of the term “carceral state,” which simplistically implies that there is a single, unified, and actor-less state responsible

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30 BSCC DATABASE, supra note 29.
for punishment. By contrast to this fictional entity, real-life carcerality is characterized by fragmentation, variegation, and constant conflict across the actors and institutions that shape penal policy and practice. An obvious example of this is the basic distinction between prisons and jails: generally speaking, the former facilities are run and funded by the state, and the latter operate under the auspices and budget of counties.

This distinction has several important implications. As a Vera Institute report explains, the size of jail populations and the length of time spent cycling through jails are a function of a series of decisions made by largely autonomous system actors: the police who choose to arrest, release, or book people into jail; prosecutors who determine whether to charge or divert arrested persons; pretrial services program providers who make custody and release recommendations; judges, magistrates, or bail commissioners who decide whom to detain or release, and under what conditions; other court actors, from attorneys and judges to administrators, whose action or inaction can accelerate or delay pending cases; and community corrections agencies who choose how and when to respond to persons who violate their conditions of supervision in the community. Release and detention decisions may also depend on the existence of critical community services that can provide the supports needed to keep people charged with crimes out of custody. To these criteria we must add, especially in California, legislative actors who engage in jurisdictional gymnastics, such as creating new offenses or changing offense categories, with particular carceral destinations (jails or prisons) in mind.

The relative independence of these actors, and their diverse (and sometimes contradictory) goals, make it difficult to align their efforts to control the use of jails. Some of these actors may be more aware than others of the share of jails in the county budget and take it into account when managing jail intake and releases. Others yet may believe that jails are inappropriate to house certain residents, such as people serving long stretches of time for serious offenses. These

31 Ashley Rubin & Michelle Phelps, Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change, 21 THEORETICAL CRIMINOLOGY 422, 423 (2017).
32 SUBRAMANIAN ET AL., supra note 23, at 18.
categories of people may be in need of long-term programming that would be difficult to administer in facilities originally conceived as temporary housing for people on trial (or even for people who are booked for just a few days.)

As explained in a National Institute of Corrections report\textsuperscript{33}, the population dynamics of jails are a function of multiple questions: What is the purpose of the jail, who is in the jail, how people enter and exit it, and how long they remain at the jail. The entrance and exit doors are jurisdictional valves: some people enter jail upon arrest, from the community, while some enter after they are sentenced; some people spend a few days in jail, whereas some serve years’ long sentences there; some exit the jail directly into the community, while some shift to other jurisdictions, through a state prison sentence, an ICE hold, or a federal hold. The population’s heterogeneity and the multiplicity of entrance and exit doors make predictive modeling difficult. This is compounded by the fact that individual counties cannot reliably plan intake and exit using aggregate data. Mass incarceration is regarded a national problem and is analyzed at the national or state level, but the structure of jails and their location in the administrative hierarchy means that they are “first responders” in the criminal process—an example of what public policy scholars have referred to as “disjointed federalism.”\textsuperscript{34}

\textit{The Organic-Geographic Perspective}

By contrast to the jurisdictional perspective, an organic-geographical perspective examines the continuity between jails and surrounding communities. Even a superficial glance at the California map reveals that jails are embedded in cities and rural communities, and often not that distant, geographically, from prisons and detention


facilities. Indeed, thinking about jails as part of a carceral continuum should be precisely because of their multiple intersections with various communities and facilities.

Studies in carceral geography\textsuperscript{35} have examined, for example, the complicated political,\textsuperscript{36} economic,\textsuperscript{37} and cultural\textsuperscript{38} reasons for siting correctional facilities at particular locations. Other studies show the carceral aspects of localities and sites beyond ostensible carceral spaces, such as gentrified downtown areas, statewide overnight buses, spatial restrictions on sex offenders, gang members, and electronically monitored homes.\textsuperscript{39} These works illuminate the carceral continuum, of which jails are an essential part, both literally and figuratively. A bus transferring people from jail to prison is, technically, traversing jurisdictions, but at the same time it creates a continuum of carceral power by smoothly

\textsuperscript{35} \textsc{Dominique Moran}, \textit{Carceral Geography: Spaces and Practices of Incarceration} 60 (Routledge 2018).
\textsuperscript{38} \textsc{Joelle Fraser}, \textit{American Seduction: Portrait of a Prison Town}, 39 \textit{Mich. Q. Rev.} 1, 2–3 (2000); \textsc{Prison Town}, USA (Public Broadcasting Services 2007). For an analogy between prison towns and cattle towns, see \textsc{Karen Morin}, \textit{Carceral Space, Prisoners and Animals} (Routledge 2018).
\textsuperscript{39} \textsc{Brett Story}, \textit{Prison Land: Mapping Carceral Power Across Neoliberal America} (Univ. of Minn. Press 2019); \textsc{The Prison in Twelve Landscapes} (Oh Ratface Films 2016).
transitioning people between geographic locations without a break in carcerality. More figuratively, the shift from the outside world into a jail is not as abrupt as the jurisdictional perspective suggests if one considers the carceral elements embedded in practices such as drug testing in workplaces, meting out discipline in schools, and surveillance of homes and neighborhoods—oft referred to through the apt metaphor of a “pipeline.” Even technological tools operating within the private sector, such as the use of software for predictive policing, the racialization of surveillance in employment, buying, and selling, limitations on financial mobility through the creation of credit scores, and the employment of surveillance tactics, offered by loss prevention corporations, to employees in the retail industry, serve as conduits of carceral power, creating a continuous stream

47 Madison Van Oort, Employing the Carceral Imaginary: An Ethnography of Worker Surveillance in the Retail Industry, in CAPTIVATING TECHNOLOGY, supra note 44, at 213.
between “the outside” and the jail space. Complicating the picture is the variety of uses of the jail itself, including as an inadvertent but increasingly vital component of the healthcare safety net.\(^{48}\)

The importance of supplementing the jurisdictional perspective with the geographic one cannot be overstated. If one considers jails separately, framing the entrances and exits as valves in and out of separate, disjointed jurisdictions that can be open and closed at will, policymaking for one level of government may completely overlook the other. By contrast, thinking of jails as one area in a smooth carceral continuum requires taking them into account when planning policies involving population control and management. As the next part shows, the Achilles heel of the \textit{Plata}/Realignment solution to the prison healthcare crisis was that it focused exclusively on the jurisdictional aspect.

**Part II: Criminal Justice Reform through the Jurisdictional Prism: Jails as the Solution to Prison Problems**

\textit{The Correctional Free Lunch Problem and Its Solutions}

Decades before the Criminal Justice Realignment relied on a jurisdictional shift to achieve population reduction in prisons, scholars pointed to a basic problem contributing to mass incarceration. Elegantly referred to by Franklin Zimring and Gordon Hawkins as the “correctional free lunch,”\(^{49}\) it was essentially an argument about economic externalities: prosecutors charge felonies, and judges sentence people convicted of them, in county courts, whereas the sentence itself takes place in state prisons. This means that the county never “feels” the costs associated with the sentence, and therefore does not take them into account when dishing out lengthy sentences.

Several solutions were proposed for the correctional free lunch problem. Zimring and Hawkins themselves advocated for homogenizing sentencing policies at the state level, through the work


\(^{49}\) \textsc{Franklin E. Zimring \& Gordon Hawkins}, \textit{The Scale of Imprisonment} 211–15 (Univ. of Chi. Press, 1991).
of a sentencing commission.\textsuperscript{50} Other scholars have argued that judges should be informed of the cost of incarceration, and offered empirical proof that, when they are informed, judges tend to sentence more leniently.\textsuperscript{51}

As the healthcare crisis in state prisons raged, another solution emerged: shifting the responsibility of incarceration to the counties who mete out the punishment. The Schwarzenegger Administration’s initiative to reconfigure nonviolent felonies as “wobblers”—offenses that can be prosecuted as felonies or as misdemeanors—were designed to offer prosecutors the option to dictate whether the sentence would be served in a state prison (for a felony) or in a county jail (for a misdemeanor). But prosecutorial discretion would prove insufficient to solve the problem of disease and neglect in prisons; The pressure to solve this problem was augmented by the advent of the 2008 financial crisis, which hurt state and local correctional budgets,\textsuperscript{52} and by the growing sense that federal courts would intervene with a population reduction order. Indeed, a federal three-judge panel heard evidence according to which, every six days, a prisoner in California died of a preventable, and often iatrogenic, condition.

As Margo Schlanger recounts,\textsuperscript{53} the Brown Administration’s response to this multifaceted state prison crisis—the enactment of A.B. 109—was for the most part a jurisdictional shift initiative. Under the Realignment, people convicted of nonserious, nonviolent, and nonsexual crimes (colloquially known as the “non-non-nons”) would serve their sentences in county jails, granting sheriffs the authority to

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\textsuperscript{50} For commentary on this idea, see Kevin R. Reitz, Zimring, Hawkins, and the Macro Problems of Imprisonment, 87 J. CRIM. L. & CRIMINOLOGY 604, 621–22 (1997).
\textsuperscript{52} AVIRAM, supra note 51, at 51.
\textsuperscript{53} Schlanger, supra note 22, at 184.
\end{footnotesize}
release them if necessary. In addition, most post-sentence supervision, which used to be under the auspices of state parole authorities, shifted to county probation offices, and parole revocations also became a county matter.

Lest it appear that the jurisdictional shift was the product of calculated econometrics, Schlanger convincingly explains it as a last resort strategy: jails had 10,000 available beds at the time and, given the population reduction order’s approval by the Supreme Court, using them for state prisons was deemed the only palatable solution because, as the prison’s healthcare Federal Receiver Clark Kelso explained, “politically, nobody could tolerate a straight release of inmates prior to serving their sentence.” County authorities “went along with this approach, albeit reluctantly. As Orange County Sheriff Sandra Hutchens explain(ed to Schlanger), ‘We had no choice. The State had to deal with the three-judge panel and reduce population. The sheriffs were given the option of working with the State on a plan, or the State releasing tens of thousands of prisoners early, with no supervision.’”

However, overall, reformers and advocates hailed the jurisdictional shift as a method of deliverance from the deep failures of the state correctional apparatus. Some of the support for Realignment came from the perception that no healthcare provided by the counties could possibly be worse than the dysfunctional, neglectful healthcare nightmare of the state prison system which, at the time, had already been under federal Receivership for five years.

At the same time, some tried to inject econometric reason into the chaotic funding method of the plan, whose success, after all, would depend on the extent to which the counties would internalize the costs of their own appetites for incarceration. Under Realignment, over $1 billion annually of state sales tax revenue, phased in over several years, was shifted from the state to the counties, and $1.2 billion in jail construction bonds that had been authorized in 2007 was to be accelerated. This, as Schlanger notes, was known to be insufficient to fund the transition even at the time; the “sweetener” of the deal was

54 Id. at 186.
that the counties would have absolute freedom in spending the money, which was to be awarded as a block grant. Counties could use the money as they saw fit: invest in diversion programs and treatment to prevent incarceration or increase jail capacity.

The problem with relying on this allocation technique as an incarceration appetite suppressant was the allocation technique, which relied on a formula using the number of offenders that each county had sent to state prison, the county's adult population, and prior grant funding. Counties that had invested in alternatives to incarceration prior to realignment complained that they were being penalized for their good work, while more punitive counties were rewarded for their punitiveness with a larger share of the pie. In a series of important papers,56 W. David Ball proposed tweaking the formula in a way that would exercise a bit more control over the counties by incorporating a proxy for their need to rely on incarceration: violent crime rates in each county. Under this system, Ball proposed, “[l]ocalities would receive funds based on reported rates of violent crime and would be free to spend these monies on prison, diversion, jail, or anything else. The state would continue to administer prisons but would charge counties for every prisoner they sent.” This plan would “end the correctional free lunch” by making the trade-offs obvious to county officials. Counties that would retain or even increase their incarceration rates would be free to do so, but they would have to fund it on their own; moreover, they would face political accountability for their choices, because “[t]he average person could more easily spot the linkage between increasing numbers of prisoners and, say, a decrease in the frequency of road repairs or a shorter public school year, allowing political checks on criminal justice to operate more effectively.” Whether this strategy would work was still unknown; Joan Petersilia observed that, “if it [did] not work, counties [would] be overwhelmed with diverted inmates, unable to operate needed programs, which ultimately results in continued criminality and jail

(instead of prison) crowding.”

The Establishment of the Board of State and Community Corrections (BSCC) and the Effort to Share County Data

As a consequence of Realignment, the state established the BSCC, a loose resource and regulator for the counties as they were imbued with their new responsibilities that reports directly to the Governor. The BSCC website identifies it as an “independent statutory agency that provides leadership to the adult and juvenile criminal justice systems, expertise on Public Safety Realignment issues, a data and information clearinghouse, and technical assistance on a wide range of community corrections issues” as well as “promulgates regulations for adult and juvenile detention facilities, conducts regular inspections of those facilities, develops standards for the selection and training of local corrections and probation officers, and administers significant public safety-related grant funding.”

The idea of the BSCC as a liaison mechanism between community stakeholders is evident in its composition. As of now, per its website, it consists of a Chair, two CDCR officials (the Secretary and the Director of Adult Parole Operations), two county sheriffs, two county chief probation officers, one retired judge, one chief of police, and three representatives of diversion and rehabilitation programs (one position is vacant.)

The BSCC’s role as information clearinghouse for the counties was especially important given the decentralized nature of county data. In 2016, at the request of the BSCC, the U.S. Justice Department's Office of Justice Programs (OJP) Diagnostic Center evaluated the BSCC’s data collection enterprise, resulting in the development of a self-evaluation checklist for California counties to follow in adhering to sound data and information-sharing principles. The checklist consisted of four principles: using national approaches for interagency information exchange and strategy development; using data to support informed justice and public-safety decisionmaking; developing responsible information-sharing policies, and

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57 Joan Petersilia, Realigning Corrections, California Style, 664 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 7 (2016).
58 Meet the 13 Board Members, BSCC CALIFORNIA, https://www.bsc.ca.gov/s_thebscboard/.
including by connecting existing networks and systems with strong identity, access, and discovery capabilities; and cross-boundary information-sharing and collaboration with input from all involved stakeholders. Despite this initiative, information about jails would continue to be disseminated primarily through the respective sheriff’s departments, with a few notable exceptions, chief among which are the jail profile survey (administered since the 1970s, but now under the auspices of the BSCC), the jail population dashboard, and a few reports on inspection of local detention facilities. By comparison to the detailed population reports and annual population data conducted by CDCR and provided on its website, the BSCC database is underwhelming; specific functions, such as inmate locators, are accessible only at the individual county level, and the respective websites for the different sheriff’s departments vary widely by style, quality, clarity, and amount of available information.


62 BSCC Inspection Reports, BSCC CALIFORNIA, https://drive.google.com/drive/folders/16k0ILN2nGQrEv0TdaKvLqToRyZa_jpZ.


64 See, e.g., Inmate Locator, ALAMEDA CTY. OF CAL., https://www.acgov.org/sheriff_app/.

Admittedly, county jails differ from state prisons in that transfers between counties are much rarer than transfers between state prisons, which at first blush obviates the need for a centralized inmate locator function. The problem is that transfers between jails and prisons are extremely common; as we have seen, most of the jail population consists of pretrial detainees, many of whom will eventually serve state sentences. Not only does BSCC’s data dissemination quality pale by comparison to CDCR’s, but there is virtually no interface between the respective websites of the two agencies, which presents an enormous obstacle to any effort to trace population movements across the state/county jurisdictional divide.

I do not mean to argue that BSCC has been entirely ineffectual. The agency has processed grants for county programs and offered supervision of county facilities. What is important to stress, however, is that this has taken the form of information and advice, rather than centralized control—and, more importantly, that despite the appointment of two top CDCR officials to BSCC, the latter does not offer stakeholders—families of incarcerated people, advocates, lawyers, scholars, the general public—a true understanding of the way people move, in real life, between facilities. This evinces a bias toward the mechanic-jurisdictional understanding of counties and states as separate realms, rather than for the organic-geographic understanding that, for real people in real time and space, these facilities are located on a continuum of movement on both the individual and the aggregate levels.

The only effort to systematically harmonize state- and county-level data in California is the Multi-County Study (MSC), a joint venture between the BSCC and the Public Policy Institute of California (PPIC). Unfortunately, the only participating counties are Alameda, Contra Costa, Fresno, Humboldt, Kern, Los Angeles, Orange, Sacramento, San Bernardino, San Francisco, Shasta, and

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Stanislaus—a problem somewhat mitigated by the fact that the aggregate population of these jails is two-thirds of the state’s jail population.\textsuperscript{67} The next section shows how important this data collection effort has been to understand how counties responded to the jurisdictional population shifts.

\textit{Jail Conditions in the Post-Plata Decade and the Prospect of the Hydra Problem}

When Schlanger wrote about Realignment, shortly after its enactment, she found “deep dissensus among observers about the prospects for nonincarcerative county responses,” with some commentators labeling the incentive structure “a liberal fantasy” and others welcoming the need to implement uncomfortable change. One of Schlanger’s interviewees, sheriff’s lobbyist Nick Warner, was remarkably prophetic: he observed that, in some counties, there were "a lot of good things going on," while in others, he predicted, "we'll have overcrowded local jails, and people will sue the pants off us."\textsuperscript{68} Schlanger referred to the possible result of such variation, and resulting healthcare failures at the county level, as a “potential hydra problem,” after the famous mythological creature who, whenever her head would be cut off, would sprout two heads in its place. The concern was that incarcerated people and their lawyers, rather than filing one lawsuit against the entire state apparatus, would find themselves fighting multiple legal battles against various county jails.

Indeed, as PPIC researchers found through the MSC data in 2015, realignment alone did not result in a concerted decarceration effort at the county level.\textsuperscript{69} The immediate effect of realignment was a simultaneous population decline in state prisons and population increase in county jails. The jail population continued to rise at a steady pace until the November 2014 passage of Proposition 47, which reclassified several drug and property offenses as misdemeanors.

\textsuperscript{67} Grattet et al., supra note 25.
\textsuperscript{68} Schlanger, supra note 22, at 194.
Proposition 47 had a salutary effect on both state and county facilities. At the state level, in combination with building and renting additional prison beds, it helped CDCR finally reach the population reduction target required by *Brown v. Plata*. As shown in Figure 1, at the county level, the passage of Proposition 47 resulted in an almost immediate population reduction, from 82,000 in October to 72,000 in November, bringing the jail population back under the statewide rated capacity of nearly 80,000 beds. This also resulted in 20% fewer releases due to housing constraints.

**Figure 1**: Adult Jail Population and Capacity Releases in California County Jails, 2010-2014

PPIC researchers expressed concerns that the relief for jail populations was temporary; data through March 2015 for Los Angeles County, for example, showed that the jail population dipped below 16,000 in December (down from more than 18,000 in October), but rose above 17,000 in January and stayed above 17,000 through March.
But a retrospective view of the aggregate population changes on the BSCC population dashboard reveals that, generally speaking, Prop 47’s effect was salutary and lasting. Figure 2 depicts jail population and releases due to housing constraints since the passage of Prop. 47, showing consistent bookings close to (but below) the aggregate capacity of county facilities, and a more-or-less consistent rate of releases to ensure an acceptable level of crowding.

**Figure 2**: Average Daily Population, Rated Capacity, and Bookings in California County Jails, 2015-2021

![Average Daily Population, Rated Capacity, and Bookings](image)

**Source**: BSCC Jail Population Dashboard

It is important to point out that the trends reviewed above were observable on the aggregate level. On the individual jail level, counties dramatically differed in terms of their reliance on incarceration versus noncustodial alternatives. A comparative study of twelve counties conducted by RAND researchers in 2015 found considerable variation in policies, practices, jail admissions, and jail release patterns. In San Francisco and Stanislaus counties, jail populations did not rise after Realignment. Fresno, Kern, Los Angeles, Riverside, Sacramento, San

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Bernardino, San Diego, and Stanislaus counties were using early releases, and each had one or more facilities under a court-ordered population cap. Some of these counties had been using early releases and noncustodial alternatives before realignment to manage their populations. In interviews conducted by the researchers, different stakeholders expressed different concerns: while probation officers thought that their counties balanced incarceration and rehabilitation, sheriff’s departments expressed strong concerns about jail crowding and the need to cope with people serving long sentences in county facilities by providing programming that was previously unnecessary. In some of these counties, such as Los Angeles and San Francisco, struggles erupted between county officials and local activists regarding plans to build new facilities or expand old ones to accommodate newcomers.

This new landscape in county jails would confirm Schlanger’s concerns about the hydra problem even prior to the COVID-19 crisis. In addition to the aforementioned court-mandated population caps in several California counties, which preceded Realignment, Schlanger (who wrote her article in 2013) mentioned the filing of the Prison Law Office’s first jail case, in Fresno, and the expansion of the ACLU of Southern California’s work on conditions in Los Angeles county jails. She also observed that some ongoing prison litigation, such as Armstrong and Valdivia, would encompass supervision of proceedings in jails as well.

I provided this lengthy pre-COVID-19 account of county jails to foreshadow the havoc that the pandemic would wreak on these facilities and, more specifically, the systemic weaknesses and oversights that would be revealed during the pandemic crisis. As we have seen, the remedy for the prison healthcare crisis exhibited the same shortsightedness as the cure: the notion that prisons and jails are separate, distinct entities, disjointed because of their differing jurisdictional statuses, and that jails could therefore be used as a depressurizing valve for problems in prisons without much regard to how these solutions would impact the jails themselves. The decentralization of jails, the paucity of centralized information of high quality, and the absence of systematic interface between the prison and jail data systems, would obscure important interactions between the facilities. Any efforts to help the jail’s heterogenous, transient population, through political advocacy or through legislation, would
struggle in the absence of data, and would face challenges in securing counsel and providing timely relief. Most importantly, the COVID-19 crisis in prisons would exacerbate the crisis in jails, this time using the depressurizing valve to prevent intake, and pushing the jails to fend for themselves.

**Part III: The Chickens Come Home to Roost: COVID-19 and the Failure of the Jurisdictional Approach**

**Agnotology: The Paucity of Jail-Level Data as a Social Fact**

Agnotology, a term coined by Robert Proctor and Iain Boal, is the study of culturally induced ignorance or doubt, particularly the publication of inaccurate or misleading scientific data. In epistemological areas such as climate change and vaccination, attention to agnotology can reveal the political and cultural roots of mistaken opinions or information gaps and develop educational and persuasive countermeasures.

Agnotology plays an important role in understanding the production of knowledge (or lack thereof) about criminal justice and correctional topics. The prevalence of myths about racial crime rates and sex crimes is well documented in the literature. But agnotology also examines glaring information gaps, treating them not as coincidental but as social facts that are important in themselves. For example, in his book *When Police Kill* Franklin Zimring devotes

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76 FRANKLIN E. ZIMRING, WHEN POLICE KILL (Harvard University Press 2017).
considerable attention to the incompleteness of governmental statistics on incidents in which police officers exercised lethal force, comparing them unfavorably to journalistic tallies of such incidents. Similarly, in her book *American Roulette*, Sarah Beth Kaufman discusses the sociological meaning of a lack of any centralized database containing information about capital trials.

Any discussion of the COVID-19 crisis in jails must begin with the epistemological question: what do we know about the crisis? What do we not know? And how do we know what we know? As I explained in Part II, obtaining complete data in a usable format has always been a challenge with county jails, and BSCC’s efforts to centralize data collection resulted in a sparse, user-unfriendly database that did not interface with CDCR’s database. The COVID-19 contagion was no exception.

For almost five months, there was no official, centralized data collection project on COVID-19 in county jails. CDCR began collecting data on the spread of COVID-19 at its institutions—state prisons—on March 10; even though the tool evinced some delays in reporting deaths and some unclarity as to the categories it used, it at least provided information on cumulative and active cases, deaths, and testing rates. No equivalent tool tracked cases in counties. For months, there was great variation in the amount and type of information reported by the counties, as well as the format in which it was offered. Some sheriff’s departments offered a webpage with their COVID-19 readiness protocols (such as the cancelation of visitation.) Others reported only on active cases.

Advocates and public health experts had warned, early in the course of the pandemic spread, that jails posed a bigger infection and transmissivity risk than prisons, due to the transience of their populations. At public meetings in which activists demanded statistics about COVID-19 spread in jails, BSCC leadership waffled about centralized data collection efforts; Linda Penner, the board’s chair, said this was an “unprecedented time” and that teams were being as responsive as possible helping; but that collecting and publishing data about county jail disease outbreaks would not be a priority. The Sacramento Bee quoted Penner as saying, “We don’t want to sound

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like bureaucrats, but we also have to be well aware of the magnitude of this across the state and the various other reporting requirements locals have. We try to balance that conundrum right now.”

In the absence of centralized data collection, the task of informing the public about serious county jail outbreaks—several of which occurred during the spring of 2020—was almost exclusively performed by newspaper exposés. On April 27, the Los Angeles Times reported of the untimely death of 52-year-old Riverside County’s deputy Sheriff Terell Young, who “for two weeks in early March... routinely drove inmates, one at a time... to a hospital for medical appointments” and was exposed, during those trips, “to several people, including inmates and a nurse, who would later test positive for the coronavirus infection.” As of late April, the jail reported 136 cases and two deaths—one of a jail resident and one of another deputy. The article compared the sheriff’s rebuke of jail releases as an essential emergency measure by comparing it to a serious outbreak at the Los Angeles jail complex (whose population numbered 11,866 at the time); by late April, 71 jail resident and 61 staff members had tested positive, and a nurse had died. In June, the Sacramento Bee reported that Fresno County Jail had quarantined 1200 residents, after 13 who had been transferred to a state prison tested positive. In Sacramento County, five jail residents tested positive for COVID-19—information that took the Bee 10 days to obtain from the Sheriff’s office. Officials were also slow to report of an outbreak at the jail in Auburn, Placer County, where 17 residents and a correctional officer tested positive. The newspaper noted that none of those three counties regularly posted information about COVID-19 in their facilities. In the face of county sheriffs’ resistance to release the data, BSCC’s position was, again, astonishingly laissez-faire: BSCC Chair Linda Penner mentioned that she was having conversations about data tracking, but that the board’s hands were largely tied and it was on local health and jail officials to decide how much information to share. She expressed

81 Id.
concerns that “if [the data reporting was to be done] based on self-reporting COVID cases to us jail by jail, I think there’s a concern that there would be issues with accuracy.”

By mid-July, the paucity of data became a serious problem, and Penner finally wrote a memorandum to all county sheriffs, informing them that a centralized data collection effort would be underway, and that their assistance would be necessary. The letter required the sheriffs to report “the number of new positive COVID-19 tests for both residents and staff (reported separately), and deaths at each facility each week. We will also make a one-time request for your facilities’ cumulative COVID-19 case information and deaths to date”. In addition, Penner requested that each sheriff’s department ensure that “your facility health care providers are immediately reporting detailed case-level COVID-19 data to your county public health COVID-19 Data Dashboard Page 2 agency. Every facility administrator should work with their health care providers to ensure that data are being reported timely and completely to your county public health department.”

The resulting database, which went live in late July, was disappointingly sparse and unwieldy. Not only was the data presented per individual facility, with no analysis or aggregate data functions, but it was bound to allow outbreaks to occur undetected; per Penner’s request to the sheriffs, any number of infections below 11 would be reported and displayed as “<11”, with no information as to testing rates. Needless to say, the database did not interface at all with CDCR’s tracking tool, making it impossible to contact-trace across the jurisdictional divide.

But even after the BSCC data collection effort, massive outbreaks continued to occur undetected. On August 27, 2020, KQED journalists reported on a massive outbreak at the Fresno County Jail—at least

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In the absence of useful data through official channels, other actors stepped in to fill the gaps. Launched on March 24 by Sharon Dolovich and Aaron Littman, UCLA’s COVID-19 Behind Bars Data Project began collecting data on a national level, including federal, state, and local facilities. The project has been tracking infection rates, hospitalization, deaths, recoveries, transfers, testing, etc., for all correctional institutions, but found it difficult to obtain data on jails. On its webpage, the Project explains that data collection depends on data quality and availability, as “correctional authorities vary dramatically in what they report publicly” and “[t]here have been instances when the values reported by an agency changed over time in ways that were unexpected based on the description of the variable.” The variation in reporting quality poses special difficulty in the context of testing, which “vary widely by correctional agency. As a result, true case counts are likely higher than reported, and the extent of this underdetection is extremely variable.” Another area of concern is the lack of reliable reporting on staff infections, as “[s]ome jurisdictions leave it to staff members’ discretion whether to report positive test results they receive from community healthcare providers. As a result, the number of staff cases reported may be lower even than the number detected by testing.”

A glance at the Project’s California page reveals that, even as of

February 28, 2021, they do not have reliable data for several California jails. The Project does not rely on the BSCC database for its numbers; instead, it scrubs data from the more informative databases for the individual sheriff’s departments, and relies on external, reliable sources for the rest.\(^{89}\)

One such resource is a regional collection effort by the Davis Vanguard, which includes an accessible database covering several counties.\(^{90}\) The Davis Vanguard relies on the websites maintained by the Sheriff’s departments in Alameda, San Francisco, Solano, Yolo, Los Angeles, Orange, Santa Clara, and Sacramento counties; the Vanguard also reports BSCC numbers, but state that the BSCC database “remains incomplete as many facilities have refused to comply. Further, it does not contain historical data prior to July 20.”\(^{91}\)

Importantly, the Vanguard’s reporting includes information about quarantines of specific units in some of the jails, as well as about testing rates where available.

Notably, these academic and journalistic efforts are supplemented by efforts by private individuals who pore over data from specific jails. For example, UC Berkeley law student Darby Aono maintains her own database of the Santa Rita jail which, in addition to population, case numbers, and testing rates, includes information on quarantines by housing unit.\(^{92}\)

That a serious, rigorous actor such as the UCLA COVID-19 Data Project prefers to avail itself of these alternative sources, rather than of the incomplete BSCC data, is an important social fact. It brings to mind Franklin Zimring’s aforementioned effort\(^{93}\) to quantify lethal force exercised by law enforcement. Zimring compared the FBI database to those maintained by the Washington Post and the Guardian, finding that the official statistics left out about half of the

\(^{89}\) Email from Aaron Littman, Binder Clinical Teaching Fellow, UCLA Law, to Hadar Aviram, Professor of Law, UC Hastings (Feb. 28, 2021) (on file with author).


\(^{91}\) Id.

\(^{92}\) Darby Aono, *Santa Rita Jail COVID-19 Data*, https://docs.google.com/spreadsheets/d/1Ufb0C8-cRfl0glzfnN-mi-hrE1jdvDYg4Kk1uc-VB8/edit#gid=1601012795.

\(^{93}\) ZIMRING, *supra* note 76, at 25.
lethal incidents, and relying for his analysis and recommendations on the journalistic databases. Such data collection gaps by governmental agencies are not unimportant: handling complicated, tragic phenomena requires careful study of its extent and distribution, and neglect in this area can cast doubt on the seriousness that is ascribed to these tragedies and the efficacy of the efforts to prevent and address them—as we see in the next section.

The COVID-19 Experience in County Jails

Even before the pandemic, multiple experts and officials urged correctional authorities at all levels to reduce their populations and adopt measures to prevent the spread of disease. In early March, when San Francisco saw only 13 cases, San Francisco Public Defender Mano Raju sent a letter to San Francisco Sheriff Paul Miyamoto, expressing his “serious concern” that the more than 1,100 inmates living together in San Francisco’s jails could be susceptible to the contagious disease. Raju warned Miyamoto about the specific risks to the pretrial detainee population, writing: “The constant flow of both staff and detainees in and out of the jails — where large numbers of people are housed in close proximity — means that a powerful virus like COVID-19 can take over quickly and easily.”

Jails differed greatly in the precautionary steps they took. In early March, the Sacramento Bee reported that the Merced County Sheriff’s Office announced that it would halt visitation at two county facilities as a temporary, “precautionary measure”, and started conducting visitor screenings; by contrast, a Fresno County Sheriff’s Office spokesman said the agency had no plans to halt visitation and was “constantly educating inmates, staff and visitors about the importance of good hygiene.” Sacramento County reported it had not changed anything about its daily operations, intake screening, jail visitation or communicable disease practices because they were already “sufficient.” Placer County, where a cruise ship passenger had died on March 4, said it would not answer basic questions regarding its jail

policies without a formal request under California’s Public Records Act. Remarkably, in late March, the San Francisco Chronicle reported that Solano County sheriff’s deputies were driving to other county jails and picking up recently freed people on minor traffic offenses, then transporting them to their own jail.

This variation, as well as the difficulties of coordinating a response to the closure of prisons to jail transfers, were at the root of the COVID-19 problem in jails. On March 24, in an effort to curb the contagion in state prisons, Governor Newsom issued an executive order directing the CDCR Secretary to temporarily halt the intake and/or transfer of inmates and youth into the state’s 35 prisons and four youth correctional facilities. The stoppage of jail intakes did not completely eliminate the risk to state prison residents; indeed, transfers between facilities continued, resulting in several cases—notably, the infamous outbreak at San Quentin prison—from botched transfers from other state prisons.

The closure of prisons created a bottleneck in jails, jamming the flow of residents in and out of county facilities. This resulted in serious overcrowding, which was documented in several lawsuits brought on behalf of jail population. In late April, the American Civil Liberties

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Union filed lawsuits against Gov. Newsom and Attorney General Xavier Becerra, demanding that jail populations be reduced: “Outbreaks at local jails and juvenile facilities threaten to tax the broader community’s health care system beyond capacity. This impending viral explosion — imminently likely to occur in most, if not all, of California’s 58 counties — will directly impact all California residents, including correctional staff, their families, and their respective communities.”

The situation in Orange County, described by Justice Sonia Sotomayor in her dissent in *Barnes v. Ahlman* — a class action suit on behalf of the Orange County jail population — was emblematic of these problems. Relying on “dozens of inmate declarations,” Justice Sotomayor summarized the situation as follows:

Although the Jail had been warned that “social distancing is the cornerstone of reducing transmission of COVID–19,” inmates described being transported back and forth to the jail in crammed buses, socializing in dayrooms with no space to distance physically, lining up next to each other to wait for the phone, sleeping in bunk beds two to three feet apart, and even being ordered to stand closer than six feet apart when inmates tried to socially distance. Moreover, although the Jail told its inmates that they could “best protect” themselves by washing their hands with “soap and water throughout the day,” numerous inmates reported receiving just one small, hotel-sized bar of soap per week. And after symptomatic inmates were removed from their units, other inmates were ordered to dispose of their belongings without gloves or other protective equipment. Finally, despite the Jail’s stated policy to test and isolate individuals who reported or exhibited symptoms consistent with COVID–19, multiple symptomatic detainees described being denied tests, and others recounted sharing common spaces with infected or symptomatic inmates.

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100 *Barnes v. Ahlman*, 591 U. S. ____ (2020)
Two jail residents, José Armendariz and Lonnie Kocontes, described the conditions in an interview with CalMatters.\textsuperscript{101} The two said that they had witnessed jail staff fail to follow cleaning protocols, particularly when distributing jail staff fail to follow cleaning protocols, particularly when distributing pills to residents from plastic pill bags or handling inhalers. They reported that the staff frequently did not wear masks, and that the masks for residents were made from torn-up bedsheets that they were required to wrap around their faces. They also reported that inmate workers use soiled rags to clean communal spaces after mealtimes; according to Armendariz, residents are required to buy their own rags to clean with from the jail’s commissary, and that cleaning supplies are so diluted that they are almost useless. Armendariz and Kocontes also described the residents’ response to the conditions: creating their own quarantine system:

New arrivals are told not to touch anything — newspapers, communal surfaces, the phones attached to the wall — for 12 days after they arrive in the medical unit. There is one phone designated for new inmates.

“We don’t touch that one even if it’s open. You just line up and wait for a different one,” Armendariz said.\textsuperscript{102}

Similar problems were reported in a class action lawsuit on behalf of the Tulare County jail population, filed in July 2020. The plaintiffs accused the sheriff of failing to implement state-mandated health protocols to protect their health; one of the attorneys, ACLU attorney Kathleen Guneratne, reported that jail residents “described ‘alarming,’ ‘cramped,’ and ‘restrictive’ conditions, including prolonged hours of confinement, where inmates are stuck in their cells for more than 23 hours per day.” Jail residents reported that those who were sick were being “neglected, denied medical attention, and ignored when they


\textsuperscript{102} Id.; See also José Armendariz and Daisy Ramirez, Presentations at the University of California Hastings Race and Poverty Law Journal California Correctional Crisis: Mass Incarceration, Healthcare, and the COVID-19 Outbreak (Feb. 5, 2021), http://sites.uchastings.edu/journal-symposium/speakers-video/.
asked to be tested. Many were shuffled in and out of cells and around the facility, potentially exposing others to infection.”

Some of the neglect stemmed from staff shortages, a chronic problem plaguing both state prisons and county jails—particularly in distant, rural locations. Other problems involved misallocation of funds intended for COVID-19 care relief; the Orange County Sheriff’s Department, which received $90 million in federal coronavirus response money, spent the vast majority of the funds to pay for salaries and benefits of existing jail staff. Yet more problems resulted from the architecture of different jails. According to a class-action lawsuit on behalf of the Los Angeles County Jails’ population, the prisoners in the Los Angeles County jails are crowded into open dormitories and two-person cells the size of parking spaces. They are sleeping inches from one another and cannot practice social distancing. Officers don’t always wear masks, and prisoners’ masks aren’t replaced regularly. The plight of one of the plaintiffs, Tereza Gomez, was told in an op-ed in the Los Angeles Times: Gomez learned she was pregnant shortly after her arrest in August. After testing positive for COVID-19 in October, she was moved to a small, windowless, dirty solitary confinement cell and locked in for 23 hours a day — punitive conditions the Centers for Disease Control and Prevention has warned will deter prisoners from reporting symptoms. A scheduled obstetric wellness exam was canceled because of her COVID-19 status. And her criminal case has come to a standstill; the courts have repeatedly

canceled hearings due to COVID risks.\textsuperscript{107}

\textit{Zero Bail as a Depressurizing Valve}

Handling COVID-19 in cramped, inappropriate facilities, without transfers to prisons, required another depressurizing valve—and the answer came from the courts. On April 6th, the Judicial Council of California moved to set a statewide emergency bail schedule that reduced bail to $0 for most misdemeanor and some low-level felony offenses, for 90 days, starting April 15.\textsuperscript{108} Because approximately 75\% of the jail population consists of pretrial detainees, the emergency measure resulted in considerable population reduction. As reported by the Prison Policy Initiative\textsuperscript{109} and elsewhere, by the end of May, jail populations in Los Angeles\textsuperscript{110} and Sacramento Counties\textsuperscript{111} had decreased by over 30\%. Orange County’s jail population dropped by almost 45\% in the same period,\textsuperscript{112} while other

\textsuperscript{107} Id.


\textsuperscript{112} Id.
counties—including San Diego, San Mateo, and Stanislaus—also released hundreds of people held pretrial.

The results of the measure were mixed. Sheriff’s departments in Alameda and Ventura counties reported that the reduced number of residents was amenable to cohorting, which slowed the spread of the pandemic; nevertheless, outbreaks occurred at both locations, including the death of six residents in total in Ventura and a serious outbreak in Alameda County’s Santa Rita Jail. The Santa Rita outbreak prompted the Alameda County Public Defender, Brendon Woods, to call for the immediate release of more than 100 inmates who have less than six months left to serve as an emergency measure; District Attorney Nancy O’Malley declined, arguing that she could not “jeopardize the safety of victims or the community.”

In June, during the phased reopening of the state, the Judicial Council voted to end the emergency zero bail measure, leaving it up to the individual county courts “to continue to use the emergency COVID-19 bail schedule where necessary to protect the health of the

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117 Ventura County Deputy Tests Positive For COVID-19, Total Number of Cases Increases To 243 (CBS-Los Angeles broadcast Apr. 7, 2020).


119 Id.
community, the courts, and the incarcerated.\textsuperscript{120} Thirty-one counties (collectively housing about 80% of California residents) elected to keep the emergency bail schedule in place.\textsuperscript{121} The outcome, again, reflected the atomized, jurisdictional nature of jail policies. A population tracking tool created by the Vera Institute of Justice shows wide variation in the population trends of various California counties.\textsuperscript{122} The highest decreases are reported in Yuba (-48%), Orange (-39%), Marin (-31%), Santa Clara (-29%) and San Francisco (-26%) counties. Tehama County increased its jail population by 28%, followed by Monterey (+7%) and Placer (+1%) counties. Notably—again—the data evinces an agnotology problem: the tracking tool reports populations for only 16 counties.

\textit{The Hydra Rears Its Ugly Heads: Litigation}

As explained in the previous sections, Prof. Schlanger’s prediction that healthcare litigation in the post-Plata era would take the shape of the mythical hydra has come true. In California, and nationwide, numerous lawsuits were filed on behalf of both prison and jail populations—some as consolidated habeas corpus petitions, some as class action lawsuits, and some, tragically, as wrongful death grievances.

In a forthcoming article, Brandon Garrett and Lee Kovarski analyzed hundreds of COVID-19 in correctional settings. They found that judges tended to avoid constitutional holdings as much as possible, rejected requests for ongoing supervision, and resisted mass releases as a remedy, opting instead to limit such relief to vulnerable subpopulations. They also found that moral worth and deservedness played a role in litigant success: the most successful litigants were detainees in custody pending immigration proceedings, and the least


\textsuperscript{121} Id.

successful were those convicted of crimes.\textsuperscript{123}

In Garrett and Kovarski’s typology, jail residents occupy an interesting place. On one hand, they consist mostly of pretrial detainees who, of course, are presumed innocent; on the other, they sometimes require courts to pore into conditions in small facilities in remote locations, which can be labor intensive if supervision is necessary. In addition, the remedies sought in jail lawsuits run the gamut between improved healthcare protocols (PPE supplies, social distancing, mask mandates for staff) and population reduction orders.

Of particular interest was the federal litigation involving COVID-19 protocols in the Orange County jail system. In late May, District Court Judge Jesus G. Bernal ordered the sheriff to enforce social distancing, administer regular testing, and distribute cleaning supplies and hand sanitizers.\textsuperscript{124} The sheriff appealed the order all the way to the Supreme Court which, in a 5-4, stayed the lower court’s preliminary injunction.

The decision was brief, with only Justice Sotomayor writing in dissent that the decision to stay the injunction was “extraordinary.” Ordinarily, the conditions for granting a stay require (1) a “reasonable probability” that SCOTUS will actually grant certiorari to hear the case, (2) a “fair prospect” that SCOTUS will subsequently reverse the decision on the merits, and (3) “a likelihood that irreparable harm [will] result from the denial of a stay”. None of these applied in the Orange County litigation: the Ninth Circuit ruled on clearly established law—it found ample proof of “deliberate indifference” because the jails were forewarned about this months ago and knew the risks—and, even if the Eighth Amendment constituted insufficient grounds for relief, there would be an alternative claim under the Americans with Disabilities Act. The odds that the Supreme Court would grant certiorari and hear the case, therefore, were slim—and, worst of all, the “likelihood of irreparable harm” was obvious from the


\textsuperscript{124} Order (1) Granting-in-Part and Denying-in-Part Plaintiff’s Application for Temporary Restraining Order or Preliminary Injunction (Dkt. No. 41); and (2) Granting Plaintiff’s Motion for Provisional Class Certification (Dkt. No. 42), Melissa Ahlman, et al. v. Don Barnes, et al., No. SACV 20-835 JGB (SHKx) (D. Cal. C.D. May 26, 2020).
facts, which are quoted in a previous subsection.

The extent (and expense) to which the sheriff, who according to the claims in *Ahlman*, did not provide PPE to jail residents, went in challenging the decision were remarkable, especially in light of the fact that the remedy granted was not a mass release but merely a mandate regarding health protocol. But the Orange County mess would eventually result in a more dramatic remedy. Some jail residents filed habeas corpus writs with the Orange County Superior Court—which, on December 11, 2020, ordered the jail to reduce its population by 50%.125

In his decision, Judge Peter Wilson recounted the facts, which painted—as in *Ahlman v. Barnes*—a horrifying picture of the COVID experience at the jail. Not only was it impossible, given the conditions in the facility, for residents to socially distance, staff behavior was not monitored when they were away from the facility. Amazingly, staff were not tested unless they requested to be, even if they displayed symptoms. The staff was provided PPE but were not required to wear it. Housing decisions did not take medical vulnerability into account. None of these facts, which were backed by statements from medical experts and staff members, were contradicted by respondents with any evidence.

The decision was a pretty straightforward application of an earlier Court of Appeal decision in *In re Von Staich*, regarding the San Quentin outbreak.126 In *Von Staich*, the court applied the procedural standard from *People v. Duvall127*, according to which, on habeas corpus, the respondent (in this case, the correctional facility) must state facts in its return brief—and if it does not do so (for example, if it merely denies the petitioner’s allegations) no evidentiary hearing is granted. Accordingly, the Court of Appeal agreed with the expert opinions and memos by medical experts, which estimated that proper social distancing could only be achieved through a population reduction, and found nothing in respondent’s briefs to contradict these findings.

In *Campbell*, Judge Wilson found that the Orange County Sheriff

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took a page from the San Quentin Warden’s litigation strategy and limited his response to denying the jail residents’ allegations. As a consequence, Judge Wilson relied on the facts argued by the petitioners to establish that an Eighth Amendment violation had occurred—in other words, that the sheriff exhibited “deliberate indifference” to the health and safety of the jail population. Consequently, the court granted the specific petitioners in Campbell immediate relief, in the form of release or transfer. For everyone else in the Orange County Jail, the court modeled its order after the Von Staich order, with some more specificity: it ordered population reductions of at least 50% in all dormitories—and, if this were to be insufficient to achieve proper distancing, even further reductions.

The District Attorney criticized the decision, arguing that the population reduction order “will release dangerous and violent criminals back into our neighborhoods to commit more crimes and victimize more people.” The sheriff—only days after declaring that his deputies would not enforce Gov. Newsom’s stay-at-home order—issued a statement: “We are evaluating the order, its impacts and our options for appeal. . . If the order stands, it will result in the release of more than 1,800 inmates.”

It will be interesting to see how the case fares at the appellate level. Importantly, since the decision in Campbell, Von Staich was reversed by the California Supreme Court and is now on its way back to the Marin Superior Court for an evidentiary hearing on whether the San Quentin authorities engaged in remedial measures

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131 *In re Von Staich*, 477 P. 3d 537 (2020).
sufficient to counter the court’s finding of deliberate indifference.\footnote{Disposition In re Ivan Von Staich on Habeas Corpus, App. Cts. Case Info., https://appealcases.courtinfo.ca.gov/search/case/disposition.cfm?dist=1&doc_id=2318126&div=2&doc_no=A160122&request_token=NlfwLSEmTkew%2BW1ApSCJdWEtQEQ6UVxfJSJeQzhTUCAgCg%3D%3D.} This could provide the District Attorney and Sheriff Barnes legal ammunition to force an evidentiary hearing, at which they could present evidence of mitigation to try and counter the “deliberate indifference” finding.

What can we learn from the Orange County litigation and other jail cases? Encouragingly, the transience of jail populations has not stood in the way of obtaining class certification for class action lawsuits, or of obtaining excellent legal representation. In that respect, civil rights litigators have adapted well to the post-\textit{Plata} world. In addition, the hesitance to grant population reduction orders, which is part of the federal legal landscape after the enactment of the \textit{Prison Litigation Reform Act},\footnote{Schlanger, supra note 22.} seems not to have spilled over to state courts. The extent to which litigants will eventually prevail in affirming these orders remains to be seen. Another lesson from the similarities of \textit{Von Staich} and \textit{Campbell} is that, despite the jurisdictional differences, some judges are able to see that similar humanitarian problems plague both state and county facilities.

**Conclusion: Vaccines and Beyond**

The narrative so far demonstrates, I hope, the folly of approaching county jails from a mechanistic, jurisdictional perspective. The tendency to ignore and discount counties except when used to depressurize state prisons has resulted in a “hydra problem” of infections, human rights violations, haphazard release countermeasures, and a flurry of litigation with varying degrees of success.

The same problems are evident not only in the disease, but in the distribution of the prophylactic. The advent of the Pfizer and Moderna vaccines opened a new avenue of advocacy on behalf of incarcerated...
Given the prioritization of vaccinating people in congregate housing settings, such as nursery homes, similar arguments were made in the context of prisons. The same arguments can, and should, be made on behalf of residents of county jails. In California, the concerted effort of advocates and experts led to the classification of people in prison as vaccine priorities, in Tier 1B; despite a disappointing January retraction of this policy, as of February 23, 2021, 40 percent of the prison population has been vaccinated.

Despite understandable concerns that incarcerated people might harbor mistrust and suspicion of prison authorities, which would stand in the way of administering the vaccine, the acceptance rate among incarcerated people has been high; refusal rates have only been problematic among the staff.

It is here where, once again, the jurisdictional-mechanistic approach to county jails works to the detriment not only of their residents, but of all residents of the surrounding and neighboring counties: Even before it was rescinded, the California state mandate

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137 Email from Sara Norman, Prison Law Office (Jan. 8, 2021) (on file with author).
extends only to state prisons. Counties were left to decide for themselves whether to prioritize their jail populations and, as in other matters, there has been considerable variation. Bay Area counties are ramping up vaccination for their jail populations, while Kings and Tulare counties are vaccinating aging and infirm jail residents, while Merced and Fresno Counties have no set date yet to begin vaccination in their jails.

While these variations in vaccine policies could be simply manifestations of supply shortages, they might also represent political pushback in the counties of the sort seen in other states regarding prisons. In Colorado, for example, Governor Jared Polis responded to public pressure by ignoring expert opinions on the urgency of vaccinating incarcerated people for public health and downgraded this population in his plan. The Director of the Center for Bioethics and Humanities at the University of Colorado criticized this decision as guided by “moralistic argument,” explaining that “[i]t’s a very stigmatized population, and there are people who say, ‘They’re in prison, they must have done something terrible, and they don’t deserve a place in line.’”

The prevalence of such “moralistic arguments,” which compound public health priorities with hierarchies of perceived deservedness, might play into the struggle for vaccination in jails. As explained above, 75% of the California jail population consists of pretrial detainees who, of course, are presumed innocent; it is not difficult to imagine an appeal to public policy that distinguishes between these people and the presumably “less deserving” people in state prisons.

Despite its superficial rhetorical appeal, I strongly advise against relying on such an argument. Adopting the organic-geographical perspective that this article proposes implies seeing all incarcerated

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people in California as part of one porous carceral network, along a continuum that reaches to the outside community. The bottleneck effects of the jurisdictional approach have led to outbreaks; the way out of this quagmire requires accepting the need for population equilibrium and population reductions throughout the entire correctional system, regardless of administration and budgeting levels. Part and parcel of this essential population reduction is opening the jail floodgates, not only through releases to the population, but also as a two-way flow to and from the prisons. Under such circumstances, it is unacceptable to continue mixing vaccinated and unvaccinated populations. Moreover, 25% of the jail population consists of sentenced individuals, many of them for felonies; taking the deservedness argument to its conclusion would lead to the absurd policy of vaccinating only some jail residents and leaving others exposed. Such a policy would be impossible to justify and would have unbearable equity and public health implications.

Instead, I propose advocating the vaccination of the jail population by relying on two arguments with organic-geographical appeal. First, it must be clear that the transient jail population poses at least as much risk to the surrounding community as the staff working among the less transient prison population. The reasoning for vaccination in both cases should be the same. In addition, there is a practical consideration that should appeal to counties and municipalities: running a vaccination enterprise at a congregate housing location with permanent medical staff would ease vaccine distribution, help with the dissemination of medical information, protect county court personnel, and possibly have the ripple effect of generating more vaccine acceptance among family members and friends of people who are vaccinated during the course of their jail residency.

While the project of vaccinating incarcerated populations is worthwhile, it raises the concern that the vaccine would come to be seen as the panacea for all correctional problems. This article’s review of the spillover of healthcare problems from prisons into jails should be a cautionary tale.

My recommendations for remedying the broken healthcare structure in county jails require a paradigm change, which would view jails not through the jurisdictional-mechanistic perspective, but as organic parts of their surroundings and communities. Unifying the
administration of prisons and jails in California might be a pipe dream; however, at bare minimum, health care policies should be far better coordinated. Informational databases—not only involving healthcare, but also population shifts—should have seamless interfaces between state and county facilities (an inexcusable oversight in a state with such high technological literacy.) Aggressive efforts at hiring and retaining medical staff should target not only individual facilities, but also local county hospitals with an eye toward serving incarcerated populations as well. Most importantly, health care policies, ranging from preventative healthcare, nutrition and wellness, to emergency care, should start with families and schools, extending into jails and prisons as a continuum. These are crucial not only to curb the current pandemic, but also to prevent the pandemics of the future.