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THE HOUSE ALWAYS WINS: DOCTRINE AND ANIMUS IN CALIFORNIA'S COVID-19 PRISON LITIGATION

Hadar Aviram†

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INTRODUCTION

In an important recent work, Brandon Garrett and Lee Kovarsky examined the national landscape of COVID-19 litigation on behalf of incarcerated people. Their abstract summarizes their findings:

> We read hundreds of COVID-19 custody cases, and our analysis defines the decision-making by reference to three attributes: the substantive right asserted, the form of detention at issue, and the remedy sought. Several patterns emerged. Judges avoided constitutional holdings whenever they could, rejected requests for ongoing supervision, and resisted collective discharge—limiting such relief to vulnerable subpopulations. The most successful litigants were detainees in custody pending immigration proceedings, and the least successful were those convicted of crimes.[1]

Garrett and Kovarsky's findings are striking. Universal vulnerability to a dangerous contagion should have produced increased empathy across demographic lines; instead, the pandemic-era poem observing that "we are in the same storm, but not in the same boat"[2] has become widely popular for a reason. It is well known that pandemic suffering worldwide and nationwide has been greater for disenfranchised, disempowered groups along class, race, and gender lines.[3] These deepened inequalities included people in government

1. Brandon Garrett & Lee Kovarsky, *Viral Injustice*, SSRN (Feb. 23, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790859 [https://perma.cc/9AQL-NQ9J] (article forthcoming in the *California Law Review*).

2. *See* Pragadish Kirubakarn, *'We Are Not All in the Same Boat…' Covid Poster & Poem Win the Internet; Here's Their Story*, REPUBLICWORLD, https://www.republicworld.com/world-news/rest-of-the-world-news/we-are-not-all-in-the-same-boat-story-behind-viral-post-and-poem.html [https://perma.cc/B6F5-VK8M] (May 6, 2020, 1:45). Although frequently misattributed to author Damian Barr, he has disclaimed authorship of the poem. *See* Damian Barr (@Damian_Barr), TWITTER (Dec. 6, 2020, 12:33 PM), https://twitter.com/damian_barr/status/1335638579263893505?lang=en [https://perma.cc/M86Y-TDYD] (denying credit for the poem). Its authorship remains unknown.

3. Neeta Kantamnemi, *The Impact of the Covid-19 Pandemic on Marginalized Populations in the United States: A Research Agenda*, J. VOCATIONAL BEHAV. (May 8, 2020), https://reader.elsevier.com/reader/sd/pii/S0001879120300646?token=1EA7C17085F97ED36958B5838382DDC9A87CF370DEAB204E8DFEBFD8316DFD22D885809976649E75E97766

custody. Even against the backdrop of the pandemic in the United States—83 million cases and nearly 1 million deaths as of late May 2022[4]—infection, serious illness, and mortality in prisons have been shocking. In California, more than half of the overall prison population contracted COVID-19 and 304 people, 254 of them incarcerated and fifty staff members, have died.[5] When adjusted for age, the prison-to-U.S. COVID-19 incidence rate ratio was 5.0, while the standardized mortality ratio was 2.7.[6] Anyone familiar with the vast efforts made on behalf of people in other congregate settings—schools,[7] nursing homes,[8] cruise ships[9]—and unfamiliar with U.S. prison law and policy, would expect COVID-19 policies to prioritize public health in the form of population reduction, careful testing and contact tracing, and medical isolation and quarantine protocols. Garrett and Kovarsky's findings reveal the opposite trend: a pathological reluctance to reduce custodial populations and a decision-making pattern that reveals considerations of deservedness, or perceived virtue, rather than public health.

How can we understand such findings? Are they the product of legal doctrine that is not conducive to population reduction

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0D23284CC8&originRegion=us-east-1&originCreation=20220521154437 [https://perma.cc/6JJA-LTFD].

4. *COVID Data Tracker,* CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/25Y8-K2UL] (last visited May 25, 2022).

5. *Three-Judge Court Quarterly Update,* CAL. DEP'T OF CORR. & REHAB. https://www.cdcr.ca.gov/3-judge-court-update/ (Mar. 15, 2022), [https://perma.cc/PTR8-RJK9]; *Population COVID-19 Tracking*, CAL. DEP'T OF CORR. & REHAB. https://www.cdcr.ca.gov/covid19/population-status-tracking/ [https://perma.cc/2PBG-MH73] (Jan. 19, 2022).

6. Neal Marquez, Julie A. Ward, Kalind Parish, Brendan Saloner, & Sharon Dolovich, *COVID-19 Incidence and Mortality in Federal and State Prisons Compared with the US Population, April 5, 2020, to April 3, 2021*, 326 JAMA 1865, 1866–67 (2021).

7. *See Guidance for COVID-19 Prevention in K-12 Schools*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html#:~:text=Physical%20Distancing,-Because%20of%20the&text=Based%20on%20studies%20from%20the,wearing%20to%20reduce%20transmission%20risk [https://perma.cc/7ZJK-T9FW] (Jan. 13, 2022).

8. *See Interim Infection Prevention and Control Recommendations to Prevent SARS-CoV-2 Spread in Nursing Homes*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html [https://perma.cc/M3D9-BKR3] (Feb. 2, 2022).

9. Amy McKeever, *How Cruise Lines are Adapting to COVID-19 in the Age of Omicron*, NAT'L GEOGRAPHIC (Jan. 20, 2022), https://www.nationalgeographic.com/travel/article/heres-how-cruises-are-adapting-to-covid19-in-age-of-omicron [https://perma.cc/PL9Y-9E6A].

mechanisms, or of a deeper, entrenched animus against offering incarcerated people humanitarian support even in an emergency? The answer is not dichotomous. As Margo Schlanger explains,[10] the Prison Litigation Reform Act of 1996 (PLRA),[11] which greatly undermines the ability of incarcerated people to litigate, and prevail, against correctional facilities, came about for precisely that purpose: it was part and parcel of the Newt Gingrich era's "Contract with America," passed for the express purpose of hindering prison litigation. Not all of this alignment with prison authorities against institutional actors comes from statutory constraints, though: As Sharon Dolovich explains,[12] despite presumed checks and balances, "the relevant institutional actors" (including courts) "align themselves with the officials they are supposed to regulate, leaving people in custody unprotected and vulnerable to abuse by the very actors sworn to keep them safe."[13] Dolovich ascribes this to a prevalent animus, deeper than the constitutional or legal provisions: "This pattern is no accident. It reflects a palpable normative hostility and contempt toward the incarcerated, an attitude with deep roots in the virulent race hatred endemic to the American carceral project from its earliest days." [14]

This Article seeks to illustrate the interplay between the legislative barriers to effective humanitarian litigation, as portrayed by Schlanger and others,[15] and the carceral, fear-and-loathing animus permeating the entire system, as portrayed by Dolovich and others.[16] I uncover this interplay in the context of California's COVID-19 prison litigation, focusing on two major cases: *Plata v. Newsom*,[17] a federal class action involving the entire prison system, and *In re Hall*,[18] a cluster of consolidated habeas corpus writs brought in state court by residents of San Quentin State Prison. Both cases resulted in an effective denial of meaningful relief to the prison population, and despite this fact, both cases—astoundingly—are currently under appeal *by the government.*

10. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153–54 (2015).

11. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as 42 U.S.C § 1997e).

12. Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIMINOLOGY 153 (2022).

13. *Id.* at 153.

14. *Id.*

15. *E.g.*, Schlanger, *supra* note 10, at 153–54.

16. *See generally*, Dolovich, supra note 12; Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731 (2010).

17. 445 F. Supp. 3d 557 (N.D. Cal. 2020).

18. *See In re* Hall, Nos. SC212933, SC213244, SC213534, & SC212566 (Super. Ct. Cal., Nov. 16, 2021) (denying petitions for writ of habeas corpus).

While both cases revolve around the question whether prison conditions wrought by COVID-19 mismanagement constitute a constitutional violation (in *Plata*, the U.S. constitutional prohibition against "cruel and unusual punishments";[19] in *In re Hall*, the California constitutional prohibition against "cruel or unusual punishment"[20]), the two cases differ both jurisdictionally and procedurally. *Plata v. Newsom*, a civil-rights class action, was brought and pursued by the legal teams that litigated healthcare conditions in California prisons for the last three decades; as a federal case, it was, and remains, subject to the limitations set in the PLRA. By contrast, *In re Hall et al.* consists of hundreds of individual habeas petitions brought in state court, where the PLRA has no jurisdictional foothold.

Because of these differences, my analysis shows that, doctrinally, the mechanisms for denying relief to the prisoners varied considerably. In *Plata,* the initial hesitation to provide relief in the form of population reduction ostensibly resulted from the PLRA's high threshold for relief, and the eventual, much more modest remedy (currently under appeal) skirted the issue of releases or ongoing danger. In *In re Hall*, the hesitation stemmed from a judicial finding that the advent of the COVID-19 vaccine supposedly rendered relief moot despite the constitutional violations, thereby avoiding releases. The bottom-line comparison I undertake here looks not only at the legal decision—the final product—but also at the process by which the courts arrived at these decisions, and suggests that the fear-and-loathing animus identified by Dolovich has a protean, shape-shifting quality: it contorts itself into the shape of legal limitations and avoidance maneuvers available, respectively, in federal and state litigation. Despite the seeming jurisdictional differences, I show several striking similarities between the two proceedings: a sense that, where occurrences behind bars are at issue, special caution must be exercised with the facts, and deference must be given to prison authorities; a heightened tolerance for dishonesty and bad behavior on the part of government litigants and their legal representatives; overwhelming, and often absurd, preference for, and idealization of, consensus between custodians and incarcerated people in the face of clear evidence of its impossibility; and a misapprehension of urgency and timeliness, resulting in justice denied on account of being delayed. My analysis shows how these factors manifested themselves, respectively, in federal and state courts, and suggests that reforming these respective procedures will not produce real change in prison litigation outcomes.

Part I provides a background to California's COVID-19 correctional catastrophe. I explain the decrepit state of prison healthcare in California and the outcomes of federal litigation to improve it, resulting

19. U.S. CONST. amend. VIII; *see Plata*, 445 F. Supp. 3d at 562.

20. CAL. CONST. art. 1, § 17; *see In re* Hall, slip op. at 1.

in the landmark decision in *Brown v. Plata*.[21] I demonstrate the shortsightedness of the *Plata* remedy and how it rendered California prisons vulnerable to serious contagion. I also highlight the specific vulnerabilities of San Quentin. This part ends with a description of the COVID-19 disaster, with a special focus on the mismanagement at San Quentin.

Part II turns to the federal litigation in *Plata v. Newsom*. Here, I delineate the gradual diminution of the plaintiffs' proposed remedy, from systemwide population reduction, through the vaccination of incarcerated people, to a final, much more modest, request: a vaccination mandate for prison staff. During each step, I demonstrate the court's efforts to make government actors (including legal representatives of the prison guards' union) welcome, the judicial tolerance toward bad-faith arguments and positions, and the judge's perceived inability to issue orders or even find Eighth Amendment violations. This part ends with the Ninth Circuit's reversal of the guards' vaccine mandate, a decision emblematic of all that is pathological in prison healthcare litigation.

Part III describes the state litigation in *In re Hall* and *In re Von Staich*.[22] Here, I show how the bulk of habeas petitions were halted in the Marin Superior Court, while one petitioner's case made it to the Court of Appeal; I explain the struggle surrounding the appropriate jurisdiction for these cases (rife with bad faith behavior on the part of government representatives) as well as the struggle to determine whether an evidentiary hearing is needed under California law; I then follow the case, through the landmark decision at the Court of Appeal, to its reversal by the California Supreme Court, the Attorney General's efforts to unpublish (!!!) the decision, and finally, the evidentiary hearing at the Marin Superior Court. I then describe the final determination, denying the petitioners relief despite a finding of constitutional violations, and end with the government's pending appeal.

Part IV provides the comparison between the two lawsuits. First, I show how, in both cases, judicial caution regarding factual findings of prison conditions works in favor of prison authorities. I then show some of the common litigation tricks employed by the government, including jurisdictional evasive maneuvers, internal finger-pointing and splintering, and wasteful appellate endeavors, demonstrating the judicial tolerance for these behaviors. This is followed by a discussion of judicial fetishization of consensus, which results, in both cases, in the pursuit of goals that are anything but common to all litigants, and in a fear of giving orders to prison authorities.

In the conclusion, I briefly illustrate Sharon Dolovich's point that this capitulation to the interests of correctional institutions is not limited to the judiciary, showing the same trends in the executive prison

21. 563 U.S. 493 (2011).

22. 270 Cal. Rptr. 3d 128 (Cal. Ct. App.), *cause transferred with directions to vacate and reconsider*, Von Staich on H.C., 477 P.3d 537 (Cal. 2020).

release policies of the pandemic era, as manifested by California Governor Newsom's release plan from the summer of 2020. I highlight a particularly tragic aspect of this trend, which I have elsewhere referred to as the "age/violence knot"—the tendency to focus on the historical crimes of elderly, infirm, long-term-incarcerated people and ignore the wide gap between the risk they pose to public safety (very low) and the risk they face within correctional institutions (heightened.) This conclusion highlights the missed opportunity to particularly humanize aging and infirmity, raising grim inferences about the prospect of true and profound paradigm change in correctional policies.

My goals in this article are twofold. I find the bird's-eye analysis provided by Garrett, Kovarsky, Schlanger, and Dolovich, lucid and invaluable. At the same time, it is important to fill in a micro-level portrayal of how the broad trends they identify play out in specific locations, which further supports the idea that the real problem is not the scaffolding of doctrine (the PLRA, state evidence proceedings, mootness doctrines) but rather the draping of punitive animus and deservedness ethos atop the doctrine. It may be that, paraphrasing Tolstoy, each unhappy correctional system is unhappy in its own unique way, but the commonalities between the federal and state procedures suggest that these might be endemic to the system, rather than to particular jurisdictions. But beyond this socio-legal contribution, I want to show how well-intentioned, ethical, and conscientious federal and state judges—all of whom were openly shocked and grieved at the horrors of the COVID-19 correctional crisis—can find themselves swept and manipulated by correctional agencies and their legal representatives, to the point that their natural and human desire to offer emergency aid to people in dire need is completely thwarted. The legal and moral dimensions of this Article are entwined in the sad lessons of COVID-19 litigation and important to internalize.

I. Background to COVID-19 Litigation in California

A. Triggers and Vulnerabilities (1): Background to California's Correctional Healthcare Crisis

It is no coincidence that Justice Kennedy's Opinion of the Court in the landmark *Brown v. Plata* decision is the first Supreme Court opinion to include photographs; each depiction of the horrific overcrowding throughout the California Department of Corrections and Rehabilitation (CDCR) facilities is truly worth a thousand words.[23] These pictures bring to life a reality resembling John Howard's 18th-century Jeremiad on the state of English prisons:[24] for many decades,

23. *See Plata*, 563 U.S. at 548–49 apps. B, C.

24. *See generally* John Howard, The State of the Prisons in England and Wales (Cambridge Univ. Press 2013) (1777).

the California prison healthcare system had failed to provide minimally adequate service to the prisoners.

Throughout the two decades leading to the federal three-judge-panel decision, California prisons were grossly overcrowded at near 200% of their design capacity. "Bad beds"—triple bunks and makeshift beds in hallways and gyms—were a common sight in the system. These conditions hindered the system's ability to provide basic healthcare for several reasons. Correctional medical personnel were (and still are) difficult to hire and retain, because of California's unattractive correctional geography: large institutions in remote, rural locations.[25] Providing for necessities such as housing, clothing, and feeding on such a scale required considerable compromises in quality, making it difficult to introduce preventative health measures.[26] This problem was compounded by California's increasingly lengthy sentences. As a consequence of repeated "public safety" legislation adding sentencing enhancements, a fourth of the prison population—to this day—is serving a life sentence, producing an aging population in poor health, which requires more chronic and expensive healthcare.[27] Under these circumstances, registration and pharmaceutical services were disorganized and dated. Even when people were finally taken to medical appointments, they would be required to wait for long hours in tiny holding cages without access to bathrooms. Taking prisoners to medical appointments often required lockdowns, which in turn created more delays and administrative hassles. And the prisoners' medical complaints were regularly trivialized and disbelieved—not, usually, out of sadism, but out of fatigue and indifference in the face of so much need.

It was this reality that the *Plata* litigation sought to correct. The story of Marciano Plata, the case's namesake and one of the class action petitioners, was emblematic: after hurting himself in 1997 in the course of working in the prison kitchen, Plata was unable to get adequate medical attention because of insufficient medical staffing. His condition worsened to the point that his knee required surgery, which took years

25. *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 103–06 (2007) (discussing why California prisons were built in rural communities).

26. *Cf.* LITTLE HOOVER COMM'N, SOLVING CALIFORNIA'S CORRECTIONS CRISIS: TIME IS RUNNING OUT 1, 10 (2007) (raising concerns about overcrowding and chronicling cases finding that California were not providing adequate medical care); Aaron Rappaport & Kara Dansky, *State of Emergency: California's Correctional Crisis*, 22 FED. SENT'G REP. 133, 138–39 (2010) ("Overcrowding has also made it impossible for the state to provide constitutionally adequate mental and medical health care for inmates.").

27. *See* CAL. DEP'T OF CORR. & REHAB., 2021-22 STATE BUDGET, at CR2 (2021) (showing an overall increase in adult healthcare costs).

to schedule.[28] This chaos and neglect, when multiplied by 200,000—the number of prisoners in California's state facilities as of 2008—characterized the entire system: Despite eating up more than a fourth of the California correctional budget,[29] the healthcare system was a reign of chaos and neglect. Every six days, a prisoner would die from a preventable (sometimes iatrogenic) condition.[30]

Throughout the litigation, federal courts, feeling constrained by the PLRA's exacting standards for population reduction, introduced various ameliorative measures, culminating in the appointment of special masters to oversee mental healthcare[31] and the transfer of medical care out of the State's hands and into those of a federal receiver.[32] Even these drastic steps failed to considerably improve matters: foreshadowing the COVID-19 crisis, the mid-2000s saw a serious valley fever contagion in prisons located in Kings County which, due to miscommunications between custodial staff and the Receiver's healthcare staff, were not properly addressed.[33]

B. Triggers and Vulnerabilities (2): Brown v. Plata *and its Aftermath*

The 2009 federal three-judge panel decision[34] reviewed in *Plata* was hailed as revolutionary in that it overcame the procedural and substantive hurdles of the PLRA, but might seem less revolutionary when taken in context. The late 2000s were years of transformation not only in California, but nationwide, due to a confluence of events. The advent of the 2008 financial crisis plunged state and local governments into a deep recession, which awakened interest in local budgets, of which correctional expenditures were a considerable share.[35] The realization that incarceration on such a scale was financially unsustainable created the opportunity for bipartisan coalitions at the state and

28. JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 90–91 (2014).

29. CAL. DEP'T OF CORR. & REHAB., *supra* note 27, at CR2 (estimating that adult and juvenile medical, dental, mental-health, and health administration costs will account for roughly 27% of total expenditures in 2021–2022).

30. Brown v. Plata, 563 U.S. 493, 505 n.4 (2011).

31. Coleman v. Wilson, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995).

32. Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253, at *1, *33 (N.D. Cal. 2005).

33. Hines v. Youseff, 914 F.3d 1218, 1223–25 (9th Cir. 2019).

34. Coleman v. Schwarzenegger, 922 F. Supp. 2d 882 (E.D. & N.D. Cal. 2009).

35. HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 53–54 (2015).

federal levels,[36] dovetailing with the Obama Administration's focus on criminal-justice reform and racial justice.[37] Part and parcel of these coalition-building efforts was the need to focus the proposed reforms on low-hanging fruit, in the form of politically palatable populations, such as nonviolent drug offenders, which received the bulk of reformist attention on the right[38] as well as on the left.[39]

Against this backdrop, the 2009 three-judge-panel decision in California was historically important, but not out of step with the limitations of post-recession reforms: Under the Prison Litigation Reform Act (PLRA), the panel ordered a reduction of California's prison population to 137.5% of system-wide design capacity[40]—admittedly, a drastic population cut that the state would continue to fight tooth and nail all the way to the Supreme Court—but shied away from specifying how the population reduction was to be done.[41] Theoretically, the state could have built more prisons to alleviate overcrowding, but recession-era cuts impeded this course of action.[42] In 2011, as *Plata* made its way to the Supreme Court, Governor Brown continued the path charted by his predecessor, Governor

36. *See* TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FALL OF MASS INCARCERATION IN AMERICA 8–11 (2014); DAVID DAGAN & STEVEN TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION 36–39 (2016).

37. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 811–13 (2017).

38. Christopher Seeds, *Bifurcation Nation: American Penal Policy in Late Mass Incarceration*, 19 PUNISHMENT & SOC'Y 590, 590–91, 598, 601–05 (2017).

39. John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 560–61 (2008); *See,* James Forman Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 801–06 (2011) (adding to the criticism of civil-rights leaders "for failing to confront the issue of mass incarceration," as discussed in Michelle Alexander, *The New Jim Crow*, 9 Ohio St. J. Crim. L. 7, 15–18 (2011)).

40. Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 1000–01 (E.D. & N.D. Cal. 2009).

41. *See id.* at 1003–04 (ordering the reduction without specifying means).

42. *See* Associated Press, *Jerry Brown Proposes $315 Million to Lease Private Prison Cells Rather than Release Inmates*, MERCURY NEWS (August 27, 2013, 8:41 AM), https://www.mercurynews.com/2013/08/27/jerry-brown-proposes-315-million-to-lease-private-prison-cells-rather-than-release-inmates/; Hadar Aviram, *The Correctional Hunger Games: Understanding Realignment in the Context of the Great Recession*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 260, 271 (2016) (citing Brown v. Plata, 563 U.S. 493 (2011)).

Schwarzenegger,[43] and signed extensive legislation that many considered "one of the great experiments" in American corrections.[44] Under the Criminal Justice Realignment,[45] people convicted of "non-non-non" offenses—nonviolent, nonsexual, nonserious—would serve their sentence in county jails, rather than in state prisons, eliminating the "correctional free lunch" problem of sentencing at the county level and spending money at the state level.[46] Judges were given more discretion regarding sentencing, to alleviate incarceration and, in most cases, parole supervision functions were transferred to community probation offices.

The implementation of Realignment meant that tens of thousands of people, who were under the auspices (and financial responsibility) of the State, would now be housed, clothed, and fed at the county level. The general sense was that counties would be better positioned to connect people with rehabilitation and reentry services, and that healthcare at the state level was so dire that the counties would surely do better.[47]

Nonetheless, Margo Schlanger raised the prospect of a "hydra problem"[48]: in lieu of one jurisdiction, there would now be sixty—the State and the fifty-nine counties—to contend with, and possibly litigate against. Behind this concern was the fact that jails, originally built to house people only for short terms (pretrial or for less than a year), were ill-equipped to deal with a population in need of both acute and chronic healthcare—as well as the controversial formula for funding the county systems.[49] The extent to which counties proved equal to the task varied greatly: while some counties made efforts to prevent incarceration well ahead of the anticipated legislation and court decisions, others, in panic,

43. *See generally* Joan Petersilia, *A Retrospective View of Corrections Reform in the Schwarzenegger Administration*, 22 FED. SENT'G REP. 148 (2010).

44. *E.g.*, Joan Petersilia, *Realigning Corrections, California Style*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 10–12 (quoting *The Magic Number: California Hasn't Emptied Its Prisons Enough, but It Is Trying*, THE ECONOMIST (May 11, 2013), https://www.economist.com/united-states/2013/05/11/the-magic-number [https://perma.cc/3BE5-7SQ7]).

45. Ch. 15, 2011 Cal. Stat. 271.

46. *See* W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—And Why It Should*, 28 GA. ST. U. L. REV. 987, 993–997 (2012) (citing FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 211–15 (1991)).

47. Magnus Lofstrom & Steven Raphael, *Prison Downsizing and Public Safety: Evidence from California*, 15 CRIMINOLOGY & PUB. POL'Y 349, 350–51 (2016).

48. Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 Harv. C.R.-C.L. L. Rev. 165, 210 (2013).

49. *Id.* at 211; Ball, *supra* note 46, at 991.

started building jails[50] or changing revenue structures to roll expenses onto the inmates themselves.[51] The gaps in implementation were also reflected in divergent reliance on incarceration among judges in different counties.[52]

Related to the "hydra problem" was the fact that the new sentencing and jurisdictional rules applied only to the "non-non-nons," which were considered an easier "sell" from a public-appeal perspective.[53] Realignment was not unique in that respect. Generally, recession-era reforms were characterized by a bifurcation element: they applied to nonviolent offenders and retrenched negative public opinion about so-called violent offenders.

This distinction was based on several empirically unfounded myths, the first of which was that the American correctional predicament was due mostly to the incarceration of non-level offenders. In fact, drug offenders—the recipients of bipartisan sympathies, and justifiably so given the racial disparities in drug enforcement—have constantly been no more than a fourth of the prison population nationwide, whereas people convicted of violent offenses were at least half.[54] A related myth was the perception that violent offenders posed a greater risk to public safety—which, when empirically tested, proved to be untrue.[55]

In California, specifically, the focus on the crime of conviction led the legal system to ignore a fourth of the prison population—the people serving the State's three most extreme sentences: incarceration on death

50. *See* Alex Emslie, Julie Small, & Lisa Pickoff-White, *Realignment 5 Years On: Counties Build Jails for Inmates with Mental Illness*, KQED (Sep. 29, 2016), https://www.kqed.org/news/11107949/realignment-5-years-on-counties-build-jails-for-inmates-with-mental-illness#:~:text=Realignment%20aimed%20to%20satisfy%20a,nonviolent%20or%20non%2Dsex%20offenses.&text=It%E2%80%99s%20been%20about%20a%20%242.5%20billion%20windfall%20for%20jail%20construction%20in%20California [https://perma.cc/SN8R-USWW].

51. HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 144 (2015). *See generally* Robert Weisberg, *Pay-to-Stay in California Jails and the Value of Systemic Self-Embarrassment*, 106 MICH. L. REV. FIRST IMPRESSIONS 55 (2007); Kim Shayo Buchanan, *It Could Happen to "You": Pay-to-Stay Jail Upgrades*, 106 MICH. L. REV. FIRST IMPRESSIONS 60 (2007).

52. *See* Anjuli Verma, *The Law-Before: Legacies and Gaps in Penal Reform*, 49 LAW & SOC'Y REV. 847, 857, 860, 862–64 (2015).

53. Schlanger, *supra* note 48, at 185–86; *accord* Seeds, *supra* note 38, at 598–99.

54. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 14 (2017); Forman, *supra* note 39, at 559 ("Despite large numbers of arrests, relatively few drug offenders are sent to prison").

55. *See* Susan Turner, *Moving California Corrections from an Offense- to Risk-Based System*, 8 U.C. IRVINE L. REV. 97, 117 (2018).

row, life without parole, and life with parole. Because of the rarity of executions in California and the rarity of release on parole, these three punishments merged into a "trifecta of extreme punishment,"[56] consisting of decades behind bars. Greatly overlapping with this category were prisoners aged fifty and above[57] who, as a consequence of serving extremely lengthy sentences, had not only aged out of crime,[58] but also incurred disabilities and chronic health conditions. Well-meaning reforms, therefore, calcified public opinion against the people who were wrongly perceived to pose risks (to public safety) while, at the same time, facing increased risks (because of their age and failing health). California's political culture, which is uniquely polarized and populistic,[59] lends itself to emotional arguments building on heinous (albeit very rare) violent crimes, and public opinion has been remarkably resistant to the idea of distinguishing between, and extending compassion to, people convicted of violent crimes.

Another well-meaning aspect of the *Plata* reforms was that the court order required a population reduction in the system as a whole, rather than per individual institution.[60] Part of the vagueness of the order was due to the already-extreme measure of relying on the PLRA to require an enormous state-wide effort. However, the choice of litigation strategy also mattered. By contrast to European and international standards, which measure humane incarceration standards based on a minimal square area per prisoner,[61] the order in California did not go so far as to ensure that each inmate would have adequate space—only that the average inmate in the entire system would. For years after the *Plata* decision, there was considerable variety in the occupation rates of state prisons, with some prisons still at pre-*Plata* capacity while others were at capacity or even slightly below. The impact of the decision, therefore, was not uniform as to all inmates.

56. HADAR AVIRAM, YESTERDAY'S MONSTERS: THE MANSON FAMILY CASES AND THE ILLUSION OF PAROLE 38–39 (2020).

57. *See* Hadar Aviram, *A Table Before Me in the Presence of My Enemies: Susan Atkins and the Embodiment of Aging and Frailty on Parole*, 22 INT'L CRIM. L. REV. 279, 284–85 (2022).

58. JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70, at 26–28 (2003) (describing several different theories on aging and crime).

59. VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 49, 71–72 (2009).

60. Brown v. Plata, 563 U.S. 493, 502 (2011).

61. HOLLY CARTNER, HUM. RTS. WATCH, PRISON CONDITIONS IN ROMANIA 8 (1992); ERIC GOLDSTEIN, HUM. RTS. WATCH, PRISON CONDITIONS IN ISRAEL AND THE OCCUPIED TERRITORIES 29 (1991).

C. The COVID-19 Crisis in California Prisons

Against the backdrop of these vulnerabilities—fragmented correctional institutions that rose to divergent standards and were accountable to different local governments, a legacy of challenges providing minimal healthcare,[62] uneven occupancy rates, and the perception that public opinion is dead-set against the release of violent prisoners—came the triggers[63]: the pandemic and a few crucial mismanagement steps by CDCR and by county jails.

The prospect that prisons would become incubators of disease was obvious to health and criminal-justice experts months before the March 2020 outbreaks. On March 27, Margo Schlanger and Sonja Starr offered a blueprint for prevention,[64] entreating criminal-justice administrators to delay new sentences, limit the use of pretrial detention, commute sentences about to end, and create a release policy that prioritized aging and infirm individuals. Importantly, anticipating resistance grounded in historical heinous crimes committed by old, long-term incarcerated people, Schlanger and Starr stated, "even if past crimes were significant, nobody deserves the death sentence that COVID-19 could very likely become."[65] Similarly, on April 10, after the first cases of COVID-19 emerged at Avenal State Prison, Sharon Dolovich warned that "[e]very public official with the power to decarcerate must exercise that power

62. *See* Ingrid A. Binswanger, Marc F. Stern, Richard A. Deyo, Patrick J. Heagerty, Allen Cheadle, Joann G. Elmore & Thomas D. Koepsell, *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 165 (2007). Even before the pandemic, people were 12 times more likely to die during the first two weeks after release from prison than people of similar age and gender in the community, because of the health-risk factors they had been exposed to: "drug overdose, cardiovascular disease, homicide, and suicide." *Id.* at 161–62.

63. *Triggers and Vulnerabilities: Why Prisoners Are Uniquely Vulnerable to COVID-19 and What To Do About It*, HADARAVIRAM.COM (Apr. 20, 2020), https://www.hadaraviram.com/2020/04/20/triggers-and-vulnerabilities-why-prisons-are-uniquely-vulnerable-to-covid-19-and-what-to-do-about-it/ [https://perma.cc/JH7H-RQ97]; Ben S. Bernanke, *Some Reflections on the Crisis and the Policy Response*, FED. RSRV., https://www.federalreserve.gov/newsevents/speech/bernanke20090113a.htm [https://perma.cc/B2HJ-R4WU]; Hadar Aviram, *California's COVID-19 Prison Disaster and the Trap of Palatable Reform*, BOOM CAL. (Aug. 10, 2020), https://boomcalifornia.org/2020/08/10/californias-covid-19-prison-disaster-and-the-trap-of-palatable-reform/ [https://perma.cc/D6FC-JJP8].

64. Margo Schlanger & Sonja Starr, *Four Things Every Prison System Must Do Today*, SLATE (Mar. 27, 2020, 12:00 PM), https://slate.com/news-and-politics/2020/03/four-steps-prevent-coronavirus-prison-system-catastrophe.html [https://perma.cc/Z87E-MS8J].

65. *Id.*

now . . . ."[66] Stating that "crisis is opportunity," Dolovich invited criminal justice decisionmakers to consider that "[m]any people in custody right now committed nonviolent crimes. Many, after decades in prison for serious crimes, are fully ready to be law-abiding and productive citizens. Many more are elderly and sick and need medical or hospice care, not bars and handcuffs."[67]

As of May 25, 2022, more than half of California's prison population has been infected with COVID-19. There have been 74,564 cases—many of them reinfections—and 254 deaths of incarcerated people. Fifty staff members have died.[68] Every single prison has had an outbreak, with several such outbreaks consisting of thousands of cases. Ninety-four percent of the population at Avenal prison has tested positive for COVID;[69] more than 75% of the San Quentin population contracted COVID; and, in the winter of 2020–2021, as the Delta variant began spreading, every single prison in the CDCR system had an active outbreak, more than half spanning hundreds of cases.

The virus spread through prisons in two main ways: through careless transfers and through staff. As I explain below, the San Quentin COVID-19 disaster was the consequence of a botched transfer; epidemiologists have found a significant association between weekly transfers (which continued throughout the pandemic)[70] and positive COVID-19 cases. "The number of COVID-19 cases was positively correlated with

66. Sharon Dolovich, *Every Public Official with the Power to Decarcerate Must Exercise That Power Now*, APPEAL (Apr. 10, 2020), https://theappeal.org/every-public-official-with-the-power-to-decarcerate-must-exercise-that-power-now/ [https://perma.cc/Z2PM-85L7].

67. *Id.*

68. All information is available at the CDCR's Population COVID-19 Tracking. *Population Covid-19 Tracking*, CAL. DEP'T OF CORR. & REHAB., https://www.cdcr.ca.gov/covid19/population-status-tracking/ [https://perma.cc/6YDQ-WAMS] (May 25, 2022); *CDCR/CCHCS COVID-19 Employee Status*, CAL. DEP'T OF CORR. & REHAB., https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status/ [https://perma.cc/MC53-F582] (May 20, 2022).

69. Kerry Klein, *Lessons from California Prison Where Covid 'Spread Like Wildfire,'* CAL. HEALTHLINE (Feb. 23, 2021), https://californiahealthline.org/news/article/lessons-from-california-prison-where-covid-spread-like-wildfire/ [https://perma.cc/3B5U-97DY]; Stephen Stock, Michael Bott & Mark Villarreal, *San Quentin Faces New COVID Outbreak, Sparking Fears of 2020 All Over Again*, NBC BAY AREA, https://www.nbcbayarea.com/investigations/san-quentin-prison-faces-new-covid-outbreak-sparking-fears-of-2020-all-over-again/2777726/ [https://perma.cc/BDM6-7ZNY] (Jan. 14, 2022, 11:10 AM).

70. *See* CAL. DEP'T OF CORR. & REHAB., *CDCR Transfer Data*, https://docs.google.com/spreadsheets/d/1DKInH8SBb46vMQLEEbPaCht4_z9quChAEB5CYxJG7Ts/edit#gid=0 [https://perma.cc/MD74-B34G] (last visited Apr. 3, 2022).

the number of transfers three to five weeks [prior to the transfer]."[71] Additionally, despite the inability to argue strong causality (due to the absence of contact tracing), epidemiologists have found that staff members' COVID-19 prevalence—and through them, the larger community—have a direct relationship on the prevalence of COVID-19 among incarcerated individuals, lending strong support to the idea that staff members are an important node of infection transmission in prisons.[72]

Beyond the transfers, prisons contributed to the spread of the contagion in several tragic ways. In the first in a series of reports,[73] California's Office of the Inspector General (OIG) report uncovered lax and careless screening practices at the entrances to several prisons: the vague systemwide mandates were interpreted, in some prisons, as a requirement to funnel every car to a single screening location, where prison staff conducted verbal and temperature screenings of the cars' occupants. Elsewhere, staff members were screened at certain pedestrian entrances to the prisons, an approach which increased the risk that staff or visitors may have walked into or through other workspaces without having been screened. In several prisons, the OIG staff found that the thermometers used for screening were dysfunctional.

Within the prisons, lax discipline and unclear guidance created more risk. The OIG's second report[74] revealed widespread violations of mask mandates by staff, who were observed openly unmasked within the premises. Incarcerated people reported to their families that staff members mocked them for wearing (or asking for) protective equipment and ordered them to stand closer to each other as they waited in line for showers.[75] Staff members spreading rumors about COVID-19—claiming that it was a hoax, or that vaccination would be harmful—were not uncommon. Notably, among the "frequently asked questions"

71. Lauren Brinkley-Rubinstein, Katherine LeMasters, Phuc Nguyen, Kathryn Nowotny, David Cloud & Alexander Volfovsky, *The Association Between Intersystem Prison Transfers and COVID-19 Incidence in a State Prison System*, PLOS ONE (Aug. 12, 2021), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256185 [https://perma.cc/LGC6-SKJG].

72. Danielle Wallace, John M. Eason, Jason Walker, Sherry Towers, Tony H. Grubesic & Jake R. Nelson, *Is There a Temporal Relationship Between COVID-19 Infections Among Prison Staff, Incarcerated Persons and the Larger Community in the United States?*, INT'L J. ENV'T RSCH. & PUB. HEALTH (June 26, 2021), https://www.mdpi.com/1660-4601/18/13/6873/htm [https://perma.cc/3XUA-3YGR].

73. CAL. OFF. OF THE INSPECTOR GEN., COVID-19 REVIEW SERIES: PART ONE, at 15 (2020).

74. CAL. OFF. OF THE INSPECTOR GEN., COVID-19 REVIEW SERIES: PART TWO, at 22–24 (2020).

75. Field Notes from Zoom Meeting with #StopSanQuentinCoalition (Aug. 5, 2020) (on file with author).

document prepared by AMEND SF—a group of UC Berkeley and UCSF physicians monitoring public health behind bars—was the question, "I heard that some of the officers, warden or health care staff are refusing to get the vaccine, why should I?"[76]

The prison system's confusion and discombobulation led to frantic efforts to shift populations between prisons and within each prison in an effort to curb infection, oftentimes achieving the opposite result. The need to quarantine and isolate people in overcrowded facilities with no dedicated physical space led some prisons to use solitary confinement space for medical isolation. This practice, which "rewarded" COVID-19-positive prisoners with a move to a space strongly associated with punishment, dissuaded prisoners from reporting their symptoms and getting tested—in addition to the exacerbation of mental health problems.[77] Even after the medical community learned that COVID-19-positivity was not a binary situation, and people who tested positive could become sicker through continued exposure to other positive people, prisons with no isolation space resorted to housing sick prisoners together.[78] *Plata* litigators informed the court that their clients, who were arbitrarily ordered to change cells for no good reason (often against medical logic and common sense) and refused, received disciplinary write-ups for their obstinance, which were not removed later even though medical staff came to agree with them.[79] These practices, and others, eroded the trust of incarcerated people in the custodial and medical staff to the point that garnering cooperation became extremely challenging and, as I explain later, true concerns arose about the expected vaccine acceptance rates among the incarcerated population.[80]

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76. LEAH RORVIG, DAVID SPEARS, ZOE KOPP, ILANA GARCIA-GROSSMAN & BRIE WILLIAMS, AMEND AT U.C., S.F., FREQUENTLY ASKED QUESTIONS ABOUT THE COVID-19 VACCINE: INFORMATION FOR RESIDENTS OF CORRECTIONAL FACILITIES 3 (2021), https://amend.us/covid/ [https://perma.cc/L8DJ-FEQE].

77. Katja Ridderbusch, *COVID Precautions Put More Prisoners in Isolation. It Can Mean Long-Term Health Woes*, NPR (Oct. 4, 2021 1:29 PM ET), https://www.npr.org/sections/health-shots/2021/10/04/1043058599/rising-amid-covid-solitary-confinement-inflicts-lasting-harm-to-prisoner-health [https://perma.cc/8B7G-WW2Q]; Brian Osgood, *Weeks Without a Shower: Neglect Defines Covid-19 Containment in California Jails*, INTERCEPT (MAY 9, 2021), https://theintercept.com/2021/05/09/covid-california-jails-neglect/ [https://perma.cc/38KS-9EK8].

78. Petitioner's Traverse at 57, In re Von Staich, 270 Cal. Rptr. 3d 128 (Cal. Ct. App.) (No. A160122), *cause transferred with directions to vacate and reconsider*, Von Staich on H.C., 477 P.3d 537 (Cal. 2020).

79. Field notes (on file with the author).

80. Nationwide, vaccine hesitancy in prison is largely attributable to distrust and suspicion of healthcare in prison. *See* Emily Widra, *The Prison Context Itself Undermines Public Health and Vaccination Efforts*, PRISON

The harms suffered by the incarcerated population exceeded the direct impact of infection.[81] Overwhelmed by COVID-19 cases, medical staff were unable to properly treat people suffering from a variety of related and unrelated conditions, including worsening mental health stemming from the stress, and violence resulting from the frequent shifts between cells.[82] People who were seemingly asymptomatic were ordered to clean cells of symptomatic people who had been taken to hospital, rapidly succumbing to symptoms after completing such tasks.[83] Kitchen staff—professional and incarcerated—became ill, paralyzing kitchen activity and leading to inadequate food distribution. At Pelican Bay, email correspondence between correctional officers revealed that grown men were served, due to kitchen understaffing, "six crackers, two cookies, a small bag of pretzels, block of cheese and a drink mix. They also got 1 peanut butter, banana and a jalapeño. It is hard to believe that two of these lunches and the breakfast meal has the calories that is due to them"—leading one correctional officer to ask his colleagues "is this right because it does not seem right."[84] Ostensibly due to concerns that people could contract COVID-19 through public phones, prisoners were denied access to the phones for weeks, hampering sanity-saving conversations with family members, as well as

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POL'Y INITIATIVE (Mar. 9, 2022), https://www.prisonpolicy.org/blog/2022/03/09/vaccinehesitancy/ [https://perma.cc/M38H-DQL5].

81. For a comprehensive catalog of the many forms of imprisonment pains during COVID, see UC Irvine's Prison Pandemic Project, which includes hundreds of phone-call transcripts in which incarcerated people share their COVID-19 experiences. *See generally Prison Pandemic*, UNIV. CAL. IRVINE, https://prisonpandemic.uci.edu/collections/ [https://perma.cc/SR44-VT4E] (last visited May 7, 2022).

82. Trans people, in particular, reported that the careless COVID-19 era transfers resulted in placing them in cells with transphobic cellmates and exposing them to violence, which went untreated. Jasmine Brown, Transgender Gender-Variant & Intersex Justice Project, Presentation at the Univ. Cal. Hastings College of the Law Symposium: California Correctional Crisis: Mass Incarceration, Healthcare, and the COVID-19 Outbreak (Feb. 12, 2021); Leila Miller, *California Prisons Grapple with Hundreds of Transgender Inmates Requesting New Housing*, L.A. TIMES (Apr. 5, 2021, 6:00 AM), https://www.latimes.com/california/story/2021-04-05/california-prisons-consider-gender-identity-housing-requests [https://perma.cc/3D3K-HJT6] (noting "that COVID-19 precautions have slowed the transfers [to gender-matching prisons] and that officials could not estimate how long a transfer might take under normal circumstances, citing bed availability as a factor").

83. *In re* Hall, Nos. SC212933, SC213244, SC213534, & SC212566, slip op. at 86 (Super. Ct. Cal., Nov. 16, 2021) (denying petitions for writ of habeas corpus).

84. *Pandemic Food Problems*, HADARAVIRAM.COM (Dec. 10, 2020), https://www.hadaraviram.com/2020/12/10/pandemic-food-problems/ [https://perma.cc/47UM-TC4P].

stopping the flow of information to lawyers and advocates on the outside.[85]

Throughout the prison, coughing, crying for help, and the ubiquitous "Man down!" calls were heard.[86] People frequently saw their cellmates and neighbors being taken to hospital, and sometimes dragged out after dying in their cells.[87] The appalling, undignified treatment of those who became seriously ill and were hospitalized also led to extreme anguish among the people left behind. The few wrongful death lawsuits filed on behalf of prisoners who succumbed to COVID-19 revealed that their condition was kept secret from their families until shortly before they died;[88] after death, prisoners' grieving families were handed $900 bills for the cremation of their loved ones.[89]

The anguish, stress, panic, misinformation, and maltreatment severely impacted incarcerated people. Many reported experiencing panic, anxiety, depression, heightened blood pressure, and cardiac symptoms because of living through the pandemic in prison.[90]

D. COVID-19 at San Quentin: The Botched Transfer and Its Effects

Against the backdrop of the general suffering COVID-19 inflicted on incarcerated people, the tragedy at San Quentin stands out. San Quentin harkens back to the Gold Rush era, when it began its history as San Francisco's city prison aboard "the stranded hulk of the brig *Euphemia*."[91] In 1851, former Mexican general Vallejo presented plans for a permanent prison to the California legislature. After some controversy, the hulk was dragged to Point Quentin, where the people incarcerated aboard the Euphemia built the prison on land. San

85. Throughout the litigation, lawyers asked Judge Tigar to ensure that their clients had access to the phones; this was a repeated theme in the #StopSanQuentinOutbreak meetings throughout July.

86. *California Correctional Crisis: Mass Incarceration, Healthcare, and the COVID-19 Outbreak*, U.C. HASTINGS COLL. OF L., at Day 1 at 52:13, http://sites.uchastings.edu/journal-symposium/speakers-video/ [https://perma.cc/2UXN-M9GZ] (last visited May 21, 2022) (presentation of José Armendariz).

87. *In re Hall*, slip op. at 93–94.

88. Sam Stanton, *Family of Sacramento Inmate Who Died of COVID at San Quentin Sues California*, SACRAMENTO BEE (March 16, 2021, 2:33 P.M.), https://www.sacbee.com/news/local/article249984909.html [https://perma.cc/G9RE-727G].

89. Jason Fagone, *'Disgusting Policy': Prisoners' Families Must Pay for Remains After COVID-19 Deaths*, S.F. CHRON., https://www.sfchronicle.com/bayarea/article/It-s-a-disgusting-policy-After-prisoners-15506465.php [https://perma.cc/8ZH8-2RH2] (Aug. 24, 2020, 12:01 PM).

90. *In re Hall*, slip op. at 93; *infra*, Part III(C) (discussing the evidentiary hearing).

91. KENNETH LAMOTT, CHRONICLES OF SAN QUENTIN: THE BIOGRAPHY OF A PRISON 8–9 (1961).

Quentin's plant remains more or less the same as it was in the 1850s; as a consequence, the decrepit cellblocks do not have appropriate ventilation, nor do they have solid doors as in more modern facilities.[92] But against the drawbacks of the dilapidated plant, there are advantages: San Quentin's proximity to the Bay Area's progressive, academic, and affluent enclave has yielded a wealth of volunteer activity and rehabilitative programming unavailable elsewhere in CDCR.[93] Indeed, long before the 2008 financial crisis, the gap between programmatic offerings in San Quentin and in other prisons was palpable to the point that people wanting to make parole—approximately a quarter of the entire California prison population—sought to be incarcerated at San Quentin despite the dire physical conditions.[94]

Another unique feature of San Quentin, of course, is the largest death row in the country, which, until recently,[95] housed more than 700 people.[96] Since the return of California's death penalty in 1978, and up to the eve of the pandemic, thirteen people had been executed[97] while many dozens died of natural causes.[98] The rarity of executions, alongside the size and dilapidated conditions of death row, has created a unique problem of elderly, infirm people who would be difficult to transfer, suboptimal candidates for rehabilitative programming and work, and requiring constitutionally mandated, costly legal representation.[99] In 2019, Governor Newsom declared a moratorium on the

92. Jason Fagone & Megan Cassidy, *UC Health Experts: San Quentin Coronavirus Outbreak Could Pose Threat to Entire Bay Area*, S.F. CHRON., https://www.sfchronicle.com/local-politics/article/UC-health-experts-San-Quentin-coronavirus-15364257.php [https://perma.cc/A58T-ZNCL] (June 25, 2020, 9:33 AM).

93. AVIRAM, *supra* note 56, at 150.

94. *Id.* at 150–52.

95. *California Governor Gavin Newsome Orders Dismantling of State's Death Row*, DEATH PENALTY INFO. CTR. (Feb. 1, 2022), https://deathpenaltyinfo.org/news/california-governor-gavin-newsom-orders-dismantling-of-californias-death-row [https://perma.cc/Y7YD-GQPV].

96. Paige St. John & Maloy Moore, *These Are the 737 Inmates on California's Death Row*, L.A. TIMES (Mar. 13, 2019), https://www.latimes.com/projects/la-me-death-row/ [https://perma.cc/D233-7GDH].

97. *Inmates Executed 1978 to Present: California Executions Since 1978*, CAL. DEP'T OF CORR. & REHAB., https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/ [https://perma.cc/7H7S-ZDE8] (last visited Mar. 28, 2022).

98. *Death Penalty in Limbo*, HADARAVIRAM.COM (June 8, 2013) https://www.hadaraviram.com/2013/06/08/death-penalty-in-limbo/ [https:// perma.cc/5B7K-ET73].

99. Maintaining the death penalty costs California taxpayers $184 million per annum, most of which is litigation costs: the CA constitution awards each death row inmate two free attorneys for postconviction litigation. Carol

death penalty in California and ordered the death chamber dismantled; litigation on behalf of those condemned to death continued, but executions would not go forward.

San Quentin's COVID-19 outbreak during June 2020 was the consequence of a botched transfer. Through a journalistic exposé[100] and a subsequent investigation by the California Inspector General's office,[101] as well as through the evidentiary hearing in *In re Hall*,[102] the public learned the sequence of events. At the eve of the infection, San Quentin, overcrowded to 113% of design capacity,[103] received an influx of 122 people transferred from the California Institute of Men in Chino. The Inspector General inquiry yielded damning details as to the occurrences within the facility. Alarmed by the rapid infection rate at CIM, custodial and medical officials there sought to mitigate the spread by reducing prison population. The transferees—200 people intended for San Quentin and Corcoran prisons—were not tested prior to their transfer. On the morning of the transfer, several transferees told nurses that they were experiencing COVID-19 symptoms (fever and coughing). Email correspondence between health officials shows that those organizing the transfer were aware of this, and nonetheless decided to pursue the transfer. No effort was made to facilitate social distancing within the buses; the transferees heard and felt their neighbors cough throughout the lengthy journey to the destination facilities.

The virus spread quickly throughout the prison, and by the end of June, more than three quarters of the prison population had been infected and twenty-nine had died—twenty-eight prisoners and one worker.[104] The virus ravaged death row in particular, killing more

J. Williams, *Death Penalty Costs California $184 Million a Year, Study Says*, L.A. TIMES (June 20, 2011, 12:00 AM), https://www.latimes.com/archives/la-xpm-2011-jun-20-la-me-adv-death-penalty-costs-20110620-story.html [https://perma.cc/H7SL-HGD4].

100. Mary Harris, *California's Carelessness Spurred a New COVID Outbreak*, SLATE (July 7, 2020, 5:17 PM) https://slate.com/news-and-politics/2020/07/covid-california-san-quentin-outbreak.html [https://perma.cc/3UVV-HB2Z].

101. CAL. OFF. OF THE INSPECTOR GEN., COVID-19 REVIEW SERIES: PART THREE, at i–ii (2021).

102. *See infra*, Part III(C) (discussing the evidentiary hearing).

103. DIV. OF CORR. POL'Y RSCH. & INTERNAL OVERSIGHT, CAL. DEP. OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JUNE 30, 2020, at 2 (2020).

104. Daniel Montes, *Trial Over COVID-19 Outbreak at San Quentin State Prison That Left 29 Dead to Begin Thursday*, BAY CITY NEWS (May 20, 2021), https://localnewsmatters.org/2021/05/20/trial-over-covid-19-outbreak-at-san-quentin-state-prison-that-left-29-dead-to-begin-thursday/ [https://perma.cc/E99Y-XLNE].

people under Governor Newsom's moratorium than were executed prior to the moratorium since the return of the death penalty in 1978.[105]

Facing massive contagion behind bars, San Quentin officials reaped the fruit of having declined multiple offers of help they had received prior to the outbreak. With the advent of COVID-19 cases in California prisons, academic institutions and private entrepreneurs reached out to individual prisons offering to help. The UC Berkeley epidemiology department offered to support San Quentin with fast-tracked COVID-19 testing (which would have solved a serious problem of testing delays that the prison would encounter months later). Silicon Valley technology companies offered to provide protective equipment to the prison. San Quentin officials declined all these offers.[106]

The fast spread of COVID-19 at San Quentin alarmed Marin County's top public-health official, Dr. Matthew Willis. Having worked with the prison during prior health crises, such as the Legionnaire's Disease of 2015,[107] Willis contacted the Warden, expressing concern that the contagion would spread into the surrounding county and imploring him to isolate and test the incoming transferees from CIM. Willis' entreaties fell on deaf ears. After a few futile communications, prison officials did not even dignify him with a personalized response: they forwarded him the letter that Avenal State Prison had sent to the top health official in Kings County which, as explained earlier, tersely claimed that the state facility was not bound or beholden to a county official.

On June 4, 2020, a group of AMEND physicians from UC Berkeley and UCSF visited San Quentin at the invitation of the federal receiver. They were horrified by the reach of the pandemic and by the custodial ineptitude they witnessed. Following their visit, the physicians issued a

105. Patt Morrison, *California Is Closing San Quentin's Death Row. This Is Its Gruesome History*, L.A. TIMES (Feb. 8, 2022, 5:00 AM), https://drive.google.com/drive/folders/11ai4KjKGt3qusGLud42hg3BPeSx8abtp [https://perma.cc/MKQ8-Y7WX].

106. Brooks Jarosz, *Prison Officials Turned Down Free COVID-19 Testing for San Quentin*, KTVU (July 22, 2020) https://www.ktvu.com/news/prison-officials-turned-down-free-covid-19-testing-for-san-quentin [https://perma.cc/PMK2-PX7U]; Amy Maxmen, *San Quentin Prison Turned Down Free Coronavirus Tests and Urgent Advice Before its Massive Outbreak*, 583 NATURE 339, 339 (2020), https://www.nature.com/articles/d41586-020-02042-9 [https://perma.cc/PTY2-QQL5].

107. Which was, incidentally, also tied to the decrepit plant. Hamed Aleaziz, *San Quentin Prison Ligionarre's Outbreak Traced to Cooling Towers* SFGATE (Oct. 1, 2015, 5:49 PM) https://www.sfgate.com/bayarea/article/San-Quentin-prison-Legionnaires-outbreak-6544114.php#:~:text=A%20Legionnaires'%20disease%20outbreak%20at,state%20prison%20system's%20medical%20care [https://perma.cc/LFR7-647M].

document titled "Urgent Memo,"[108] the most important recommendation of which was a 50% population reduction for the purpose of enabling social distancing:

> There are currently 3547 people in total incarcerated at San Quentin, approximately ~1400 of whom have at least one COVID-19 risk factor (as do many, unknown, staff members). This means these individuals are at heightened risk of requiring ICU treatment and/or mortality if infected. We detail the units of most immediate concern below. Given the unique architecture and age of San Quentin (built in the mid 1800s and early 1900s), there is exceedingly poor ventilation, extraordinarily close living quarters, and inadequate sanitation. We therefore recommend that the prison population at San Quentin be reduced to 50% of current capacity (even further reduction would be more beneficial) via decarceration; this will allow every cell in North and West blocks to be single-room occupancy and would allow leadership at San Quentin to prioritize which units to depopulate further including the high-risk reception center and gymnasium environments. It is important to note that we spoke to a number of incarcerated people who were over the age of 60 and had a matter of weeks left on their sentences. It is inconceivable that they are still in this dangerous environment.[109]

Among AMEND's other recommendations were the need to appoint a dedicated pandemic response team; dramatic expansion of testing practices; speeding up testing results (which were so slow at the time that they impeded contact tracing); and developing medically appropriate space for isolation and quarantine, because "quarantine strategies relying on the Adjustment Center or cells usually used for punishment may thwart efforts for outbreak containment as people may be reluctant to report their symptoms."[110]

The prison administration ignored AMEND's recommendations.

By October, when the California Court of Appeal decided *In re Von Staich*, the first wave of the pandemic would have run its course through the facility, infecting the vast majority of its residents.

108. SANDRA MCCOY, STEFANO M. BERTOZZI, DAVID SEARS, ADA KWAN, CATHERINE DUARTE, DREW CAMERON & BRIE WILLIAMS, AMEND AT U.C., S.F., URGENT MEMO, COVID-19 OUTBREAK: SAN QUENTIN PRISON, AMEND (2020), https://amend.us/wp-content/uploads/2020/06/COVID19-Outbreak-SQ-Prison-6.15.2020.pdf [https://perma.cc/2NFF-RN83].

109. *Id.* at 3 (emphasis omitted).

110. *Id.* at 6 (emphasis omitted).

II. *PLATA V. NEWSOM*

A. Phase I: Tears and Slideshows—The PLRA and the Failure of Population Reduction Remedies

Plata v. Newsom, a continuation of the original *Plata* litigation, was spearheaded by the same litigation teams: the *Plata* team, addressing medical issues and consisting of attorneys from the Prison Law Office, and the *Coleman* team, addressing mostly mental health issues and consisting of the complex-litigation firm Rosen, Bien, Galvan and Grunfeld. The class certification sought and granted consisted of "all prisoners who are now, or will in the future be, under the custody of the [California Department of Corrections]."[111]

Judge Jon Tigar, a former complex-litigation specialist and public defender and an Obama appointee,[112] presided over the case. Judge Tigar held case management conferences (CMCs) every two to three weeks via Zoom,[113] each of which was preceded by a joint memo from the parties detailing the situation in the prisons. The conferences largely followed the structure of the memos. While the conferences in April and May focused on the entire system, in the summer, the focus became San Quentin, then the epicenter of prison outbreaks. At the July 16 CMC, the lawyers for the plaintiffs bluntly stated, "San Quentin is a disaster, given the number of patients infected, the number who so far have died, the current number hospitalized . . . , the establishment of a large 'Alternate Care Site,' a kind of skilled nursing facility, equipped and staffed by a contractor at presumably enormous cost to the State. . . , and the profound disruption to prison operations including incarcerated people being unable to get outdoors for exercise or even make phone calls."[114] The AMEND memo was mentioned, with plaintiffs observing that the physicians' concerns had "c[o]me to pass: patients with active COVID-19 at San Quentin . . . continue[d] to be housed in the same facilities [and sometimes in the same cell] with others known to be negative."[115]

The Attorney General representatives reported that CDCR had taken a number of steps to address the outbreak at San Quentin and was actively working with the Federal Receiver to implement additional

111. Complaint at 19, Plata v. Davis, 329 F.3d 1101 (9th Cir. 2003).

112. *Tigar, Jon Steven*, FED. JUD. CTR., https://www.fjc.gov/history/judges/tigar-jon-steven [https://perma.cc/FY4T-G2WW] (last visited Mar. 29, 2022).

113. Docket, Plata v. Newsom, 2021 WL 5410413 (N.D. Cal. October 27, 2021) (No. 4:01-cv-01351) (showing frequent case management conferences in 2020).

114. Joint Case Management Conference Statement at 16, Plata v. Newsom, 445 F. Supp. 3d 557 (N.D. Cal. 2020) (No. 4:01-cv-01351), ECF No. 3389.

115. *Id.*

measures; among these measures was an effort to cohort the staff, so that they would not move freely within the prison and cross-contaminate units. As of July 14, the lawyers for the prison noted, all staff was required to wear an N95 masks (this was optional for inmates at that point); dozens of patients were referred to the alternative care site, and the prison was constructing outdoor tents, with room for ten patients each (these tents would become increasingly uninhabitable during the summer fires in California).[116]

By late October, when the virus had already won the day at San Quentin, Judge Tigar was vocally critical of CDCR's handling of this crisis.[117] However, he remained skeptical of making demands of the prison—a strategy that he referred to as a "sledgehammer approach"—and preferred gentle suasion methods. For this purpose, Judge Tigar recounted, he had consulted with Dr. Elizabeth Linos of the Berkeley Goldman School of Public Policy. Judge Tigar encouraged the State's representatives to ask their clients to address the crisis through leadership and role modeling, going as far as expressing doubt that the new CDCR policy to ensure testing compliance—and any measures taken by CCPOA, the prison guards union—went far enough, given the existence of significant "pockets" of noncompliance among the staff. Judge Tigar became visibly emotional as he discussed his visits at the California Medical Facility in Vacaville, which housed aging and infirm people; he told of several people he had met behind bars, including a man in his nineties and a man who had been eligible for parole since 1993. He then portrayed a slideshow on Zoom, which displayed pictures of several people who had died of COVID-19 behind bars. Judge Tigar spoke at length about two of them: Eric Warner, 57, an amputee, reformed Christian, and volunteer, and Sergeant Gilbert Polanco, 55. When speaking of Mr. Warner's passing, Judge Tigar had to stop to wipe his tears.

Judge Tigar then made a lengthy and forceful plea with CDCR Secretary Katheleen Allison to consider releases, stating that the time had come for that remedy and giving Governor Newsom his support in this effort. Notably, Judge Tigar used the term of art "deliberate indifference"—a term indicating a finding of Eighth Amendment violation—several times; he stressed that the threshold had not been technically met, but explicitly said that CDCR's behavior would fuel further lawsuits.

116. *Id.* at 17–18; *see also generally 2020 Incident Archive*, Cal Fire, https://www.fire.ca.gov/incidents/2020/ [https://perma.cc/H5B3-QJV8] ("The 2020 California wildfire season was characterized by a record-setting year of wildfires that burned across the state of California as measured during the modern era of wildfire management and record keeping.") (last visited May 27, 2022).

117. Field notes (on file with author).

The upshot of the hearing was an order requiring the parties to brief Judge Tigar on the physical possibilities to create quarantine and social distancing (including, for example, the existence of solid doors), as well as on the extent to which pandemic-prevention guidelines might have changed during the course of the litigation. The petitioners' plea for releases on a larger scale would remain unanswered even at that stage, at which vaccines and cures were not yet available.

B. Phase II: "Couch Money"—The Efforts to Prioritize Vaccination for the Incarcerated Population

In December 2020 and January 2021, the petitioners' litigation team changed tacks. The reasons were twofold: the advent of COVID-19 vaccines and Judge Tigar's ongoing reluctance to order releases at a satisfactory scale. On the political and social scale, the early days of the pandemic involved heated debates and controversies about the appropriate vaccination priorities. Even as residents of congregate facilities such as nursing home and educational institutions received priority, state administrators dawdled on vaccination for prisoners.[118] Petitioners moved for an order that would prioritize vaccinations, even as there were genuine doubts about vaccine acceptance in the incarcerated population given the serious erosion of trust caused by the pandemic experience. Finally, vaccination became available in prison, and the CMC in January 2021 opened with news on vaccination progress from CCHCS Receiver Clark Kelso.[119] At that point, given the paucity of vaccine doses, the prison opted for vaccinating only people residing in skilled-nursing facilities; the high vaccine acceptance rates (close to 90%) were hailed a pleasant surprise, and yielded close to 80% vaccine coverage in those institutions.

Judge Tigar's next questions were an effort to find out how far CDCR and CCHCS were from vaccinating the entire COVID-naïve population behind bars, assuming that appropriate vaccine dosage would be available. Kelso explained that the next step would be to offer the vaccine to everyone aged sixty-five and older (2,000 people, excluding those who had already been infected.) After that, the next priority would be people under sixty-five who had not been infected with COVID and had risk scores of three and above (based on a CDCR risk assessment scale relying on preexisting conditions). Kelso estimated that this group—approximately 5,200 people—could be vaccinated in about seven days. The next step would be to tackle 42,000 people—the remaining people in CDCR custody who had not been infected—which

118. *See* Hadar Aviram, Opinion, *Prisons Should be a Priority for COVID Vaccine*, S.F. CHRON. (Dec. 4, 2020), https://www.sfchronicle.com/opinion/openforum/article/Prisons-should-be-a-priority-for-COVID-vaccine-15774745.php [https://perma.cc/MR68-FEAU].

119. Further CMC Transcript, Plata v. Newsom, 2021 WL 5410413 (N.D. Cal. October 27, 2021) (No. 4:01-cv-01351), E.C.F. No. 3538.

would realistically take about four weeks, given the severe nursing shortage.

It quickly became clear that, contrary to the bleak predictions, the problem was not buy-in from incarcerated people. Within the skilled-nursing facilities—the only settings in which vaccinations were administered at the time—staff buy-in was also very high (perhaps due to the prevalence of medical staff). Looming on the horizon, however, was a decline in percentage of compliance among the staff, and even though no one at the hearing provided a breakdown, it was widely assumed (probably with good reason) that the problem would be to persuade the custodial staff—who had already been flagged as noncompliant with masking and distancing requirements as well as spreading false rumors about the pandemic—to get vaccinated.

At that point, Judge Tigar talked about the elephant in the room: the institutional unwillingness to take the obvious best step, which would be releases. "I have sometimes become emotional when . . . discuss[ing] this," he said, referencing his slideshow from October.[120] Apparently believing that it was not within his authority, under the PLRA, to order releases, Judge Tigar reported that he had

> cajoled, begged, and pleaded with the Governor . . . to release a very significantly higher number of inmates beyond their current release efforts . . . so we can avoid unnecessary sickness and death . . . .
>
> So far these requests have—again, with all appreciation for the efforts that have been made, . . . fallen on deaf ears.
>
> The consequence of that is now becoming more apparent. COVID has spread more easily than it had to. And we'll never know the number, but I believe there is some unknown number of prison residents who got sick or died that didn't have to.[121]

Judge Tigar highlighted the importance of granting people the good time credits they are unable to earn because of the lockdowns, saying that "we're making over incarceration worse at precisely the time we need it to get better."[122] He also pointed out that he "[could] not emphasize strongly enough the need to release elderly medically-vulnerable inmates. We have started to see a heartbreaking increase in fatalities" (fifty-six since the previous case management conference) "[a]nd releases are a way to make sure . . . [it] does not continue. I take this case personally. So I asked CDCR to send me the records of all the inmates from CMF or CHCF who died from COVID. Most of them died since the last CMC. . . . The vast majority of them were

120. *Id.* at 16.

121. *Id.*

122. *Id.* at 17.

elderly."[123] Judge Tigar was visibly emotional when describing incarcerated people who have to use commode chairs when going to the bathroom—and "when the virus hit, they were defenseless and then they died." [124]

Judge Tigar then pressed CDCR counsel Paul Mello on whether the "primary reason" for the alarming infection rates was the prisoners' refusal to move to safer housing.[125] Mello replied that "in some instances people are not moved quickly enough, but [refusal] appears to be the primary reason."[126] Judge Tigar urged to increase education, so that people "can accept the efforts [being made] to protect them."[127] This, again, led to the discussion of the thorny problem of the staff: refusals to wear masks and get tested. Judge Tigar probed as to what the reasons might be, getting very little input from the parties.[128]

Even in the face of all this, Judge Tigar insisted that he did not yet feel at the point at which the PLRA would enable him to release people pursuant to a finding of "deliberate indifference." "If I could let people out . . . I would do it today," he said, but "[m]y view of the law is that I'm not allowed to do that."[129] The plaintiffs, of course, disagreed, but Tigar insisted that, legally speaking, his hands were tied, which he claimed was a "source of incredible frustration" to him. Judge Tigar stressed that he did not rule out not a future finding of deliberate indifference, but said, "we just haven't gotten there yet." [130]

Even though Judge Tigar explained his reluctance to order releases in formalist terms—the notion that the PLRA tied his hands—it was evident from his management of the CMC that his judicial psychology was a factor. Repeatedly stating that he did not want to give orders, Judge Tigar explained that "litigation is not the way to go with this . . . communication is the [right] way . . . ."[131] At the heart of

123. *Id.*

124. *Id.*; field notes (on file with the author).

125. Further CMC Transcript, *supra* note 119, at 20.

126. *Id.* at 20–21.

127. *Id.* at 19.

128. *Id.* at 32–51. The reasons for staff noncompliance, which were not clarified throughout the litigation, can be difficult to tease out given the complete absence of studies about political and social worldviews of correctional staff. Some possibilities involve the law-and-order advocacy and complete political capture of the prison guards' union, the CCPOA, as well as garden variety COVID-19 denialism and Trumpism among the rank-and-file. For more on the political evolution of the CCPOA, see generally JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA (2011).

129. Further CMC Transcript, *supra* note 119, at 25.

130. *Id.*

131. *Id.* at 67.

this effort to create consensus was his continuous outreach to the CCPOA representatives, which evinced earnest efforts to get everyone on board: "Nobody . . . like[s] low staff testing rates," he said. "We need to get [them] as high as possible. . . . [W]hy [are] they . . . where they are to begin with[?]"[132]

At this point, he turned to the CCPOA representatives, the union lawyer David Sanders and labor attorney Gregg Adam, in an effort to get the union's collaboration at "[a] moment when CCPOA could become an invaluable partner, if they want to, in keeping their own brothers and sisters safe . . . ."[133] Judge Tigar hammered home the need to get complete buy-in from the leadership: "If the captains say, you have to wear a mask, . . . [then] you have to wear a mask. . . . There are no exceptions. . . . [I]f they make that the policy, . . . that is how this is going to work."[134] The back-and-forth between the judge and union counsel offered another insight into Judge Tigar's cooperative psychology: he told them that the benefit would be that compliance orders from above

> create[d] an environment where you can publicly take the position that you . . . don't masks, but I wear one because I have to because I don't have a choice.
>
> If leadership is uniform, it creates an environment where it's much easier for staff . . . to be uniform.
>
> . . . .
>
> . . . It has to happen off the job, too. . . . I have been hoping that CDCR or CCHCS . . . would create videos for staff . . . using staff.
>
> I asked and I asked and I asked. More than you will ever know . . . . And then I gave up. And then they did it and they are great. I just saw them yesterday. Your staff will see them. . . . And they make this point:
>
> You can't be in the car with your friends driving to work or going to someone's backyard and think, oh, I know these guys. . . . COVID doesn't care who your friends are.
>
> The need to wear the mask is the same . . . on the job, off the job. [I]t has to be at that level. [High command] order[s custodial

132. *Id.* at 29.

133. *Id.* at 31.

134. *Id.* at 34.

> staff] to do this on the job, [and] expect[s compliance] off the job.[135]

One of Judge Tigar's ideas was to solicit a volunteer in each prison who would be "down with the goal" to report to a member of Kelso's staff who "comes from custody [and] speaks the language."[136] He also continued to consult with suasion experts, this time Prof. Amy Lerman of the Goldman School, regarding correctional culture and fostering compliance. Happily, Adam, one of the CCPOA representatives, also seemed to have respect for Lerman and also mentioned that they were planning to speak to Professor Linos (whom Tigar referred to as the "persuasion guru" about compliance strategy.[137] At that point, CCPOA counsel Sanders offered a highly revisionist history of CCPOA's involvement in prison conditions litigation, presenting CCPOA as the great champions of the original *Plata* release order, both because of the safety of their own employees and because they apparently thought that it was "morally and professionally wrong what was happening in our prisons . . . warehousing human beings, and literally seeing them die because of the medical conditions." [138] Ironically, a few months before the CMC, while their members were ailing and dying from COVID-19, the CCPOA invested 4 million dollars in support of punitive voter initiatives that failed at the ballot,[139] and planned an in-person jaunt to Las Vegas for a board meeting[140]—issues that went unmentioned by Judge Tigar. CCPOA representatives also balked at the idea of modeling good conduct through prison staff hierarchy, explaining that "we don't actually represent captains" and that "sergeants and lieutenants don not have collective bargaining rights . . . ." [141]

At this point, the hearing turned to the petitioners' change of strategy—from asking for releases and decarceration to a petition for vaccinations. The latter request, from an organizational standpoint, was

135. *Id.* at 35–36.

136. *Id.* at 37.

137. *Id.* at 41.

138. *Id.* at 43.

139. Wes Venteicher, *California Prison Guards' Union Spent Big and Lost with Tough-On-Crime Message*, SACRAMENTO BEE, https://www.sacbee.com/news/politics-government/the-state-worker/article247149034.html [https://perma.cc/UE9B-Z6DP] (Nov. 13, 2020, 10:08 AM).

140. Wes Venteicher, *Update: California Prison Union Headed to Las Vegas for Board Meeting Amid COVID-19 Surge*, SACRAMENTO BEE, https://www.sacbee.com/news/politics-government/the-state-worker/article248318735.html [https://perma.cc/HB5N-SXR6] (Jan. 7, 2021, 3:12 PM).

141. *Id.* at 44.

of course far more modest, but the prison authorities found it objectionable. In his argument against procuring vaccines for all incarcerated people, Mello resorted to legalese: not only did the respondents receive the request too late, he said, "we believe an order would be unnecessary . . . and it would constitute . . . undue intrusion on executive authority."[142] There would also be practical hurdles, he explained, and CDCR was not out of line by addressing this within the confines of current CDC health directives. Finally, Mello opined that the plaintiffs faced an uphill battle showing deliberate indifference with expert testimony, which would stand in the way of even the modest request for vaccinations.

While Judge Tigar remained calm—and seemingly agreed with Mello about the legal point—he clearly found the resort to legalese somewhat tasteless. "I think about [this] in such a simple way, simplistic even" he said,

> I heard Mr. Kelso say he needs 40,000 doses . . . to get the job done. . . . [T]wo and a half million doses . . . have already rolled into the State. . . . 40,000 doses is like couch cushion-money.
>
> . . . .
>
> . . . Do we think that the governor can shake 40,000 doses loose? . . . [I]f the issue gets litigated . . . by the time [the litigation] resolves, it will be a dead issue. . . . [T]here are things I can do to expedite it.
>
> [But] I have a much simpler question: Do we think the Governor could shake loose whatever the number is, . . . 40,000 doses, to protect a population that he has already recognized is defenseless, deeply in need, and whose vaccination, because of the roles prisons play [in the larger infection story] will greatly affect public health in a positive way? Do you think he would shake loose those doses if I asked him to?[143]

Sara Norman of the Prison Law Office responded with a moral call to action. "[T]his is not litigation about vaccination," she explained, "[it's] about quarantine. . . . [H]undreds or thousands of people are being . . . quarantine[d] . . . with shared air, . . . [which] has resulted in significant illness and death."[144] The solution, she said, "has been within Defendant's grasp from the beginning"; releasing people "is their choice and they have continued to place our clients, their patients[,] at significant[,] serious[, and] profound risk of harm . . . . We are now

142. *Id.* at 60.

143. *Id.* at 64–65.

144. *Id.* at 68.

saying there's another solution."[145] Vaccination of incarcerated people—mandated by virtue of their classification as 1.B.2. in the priority list—is "within [CDCR's] reach . . . . They can do it."[146] Norman ended by quoting Yoda: "Do or do not; there is no try. It is up to them to do it."[147]

C. Phase III: Persuasion—The Efforts to Require Staff Vaccination

In January 2021, California had merely 2 million doses of COVID-19 vaccines, and had vaccinated only 500,000 people. Working through prioritization, the State was still vaccinating people in Phase 1A, which included people in long-term care facilities and some frontline medical workers. As explained above, in CDCR, where vaccines were in short supply, this meant limiting vaccinations to skilled-nursing facilities housing aging and infirm people.[148] In late January, the State posted the Phase 1A, Tier Two vaccine eligibility list, which, thanks to relentless civil-rights advocacy, included all incarcerated people.[149] CDCR's plan was to prioritize people according to a complicated COVID-19 risk algorithm, prioritizing people who had not contracted COVID-19 in the last ninety days. Among those people, the first to be offered the vaccine were those facing higher risk due to age, preexisting conditions, or both.

Eventually, the high vaccine acceptance rate in all correctional facilities—almost 70% as of July 2021[150]—was not a CDCR accomplishment, nor did it happen as a salutary outcome of *Plata*. The credit for the success of the vaccination effort goes primarily to the incarcerated

145. *Id.* at 68–69.

146. *Id.* at 69.

147. *Id.* (quoting STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (20th Century Fox 1980)).

148. *Guidelines to Californias Health Departments Allocation of COVID-19 Vaccine During Phase 1A*, CAL. DEP'T OF PUB. HEALTH (Dec. 14, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Allocation-Guidelines-COVID-19-Vaccine-Phase-1A.aspx [https://perma.cc/D4P3-DGU3]; Ann Hinga Klein, *25 California Prisons Have Logged More than 1,000 Infections. None Are in the First Wave of Vaccinations.*, N.Y. TIMES https://www.nytimes.com/live/2021/01/02/world/covid-19-coronavirus [https://perma.cc/FAS3-JAEF] (Jan. 25, 2021).

149. Colleen Shalby, Howard Blume, Melody Gutierrez, Luke Money & Sara Cardine, *What the Changes in the California COVID-19 Vaccine Priority List Mean for You*, L.A. TIMES (Jan. 26, 2021, 10:50 AM), https://www.latimes.com/california/story/2021-01-26/new-california-covid-vaccine-priority-list-what-to-know [https://perma.cc/2E2T-8CHJ].

150. Elizabeth T. Chin, David Leidner, Theresa Ryckman, Yiran E. Liu, Lea Prince, Fernando Alarid-Escudero, Jason R Andrews, Joshua A Salomon, Jeremy D. Goldhaber-Fiebert, & David M. Studdert, *Covid-19 Vaccine Acceptance in California State Prisons*, 385 NEW ENG. J. MED. 374, 374 (2021).

people themselves, who conducted their own research (often on smuggled cell phones) and overcame their bitterness and mistrust. They were helped by several formerly incarcerated people and advocacy organizations, which provided useful materials, and by the physician group AMEND, who issued useful vaccination information, tailored to residents of correctional facilities.

Given these salutary developments—for which neither the court nor the State deserved the credit—petitioners' attorneys further downscaled their demands: a vaccine mandate for all prison staff, medical, custodial, and otherwise. UCLA's COVID-19 Behind Bars Data Project found significant gaps between vaccine acceptance of incarcerated people and staff; as of August 2021, 79% of incarcerated people accepted the vaccine, but only 57% of staff did the same.[151] In response to a CDCR survey discussed at the CMC, about 40–50% of staff reportedly expressed reluctance about vaccination, citing reasons such as "I wanna wait and see what happens."[152] Beyond a video made by AMEND especially for custodial staff, advocates for the prisoners were unclear whether CDCR or CCPOA had engaged in any educational campaign targeted at the staff, nor did anyone seem to know whether CDCR, as employer, would condition employment upon vaccination.

After months of no progress on the staff vaccination front, a development occurred: the federal Receiver, Clark Kelso, broke lines with respondents, imploring Judge Tigar to issue a vaccine mandate. On September 27, 2021, Judge Tigar issued an order requiring a mandate.[153] The order relied heavily on Kelso's position:

> Facing these facts, the Receiver has recommended, based on his review of the medical and public health science, that a mandatory COVID-19 vaccination policy be implemented for workers entering CDCR institutions and incarcerated persons who choose to work outside of an institution or accept in-person visitation. Now before the Court is an order to show cause as to why the Receiver's recommendations should not be adopted.[154]

Indeed, the advent and availability of the vaccine, as well as the fact that incarcerated people, on their own initiative, accepted it in high rates, played an explicit role in bringing about Judge Tigar's order. That the extent of the dispute (including the requested remedy) was

151. Erika Tyagi & Joshua Manson, *Prison Staff Are Refusing Vaccines. Incarcerated People Are Paying the Price.*, UCLA LAW COVID BEHIND BARS DATA PROJECT (Aug. 12, 2021), https://uclacovidbehindbars.org/prison-staff-vaccine-refusals [https://perma.cc/5FGW-LBB9].

152. Field notes (on file with the author).

153. Plata v. Newsom, No. 01-cv-01351-JST, 2021 WL 4448953, at *13 (N.D. Cal. Sept. 27, 2021), *vacated*, Nos. 21-16696, 21-16816, 2022 WL 1210694 (9th Cir. Apr. 25, 2022).

154. Field notes (on file with the author).

now narrowed to the modest and clearly delineated question of staff vaccination—something, he reasoned, that even the defendants could easily understand and support—was a factor in his decision:

> [N]o one disputes that the risks to the incarcerated population extend to the vaccinated as well as the unvaccinated. All agree that a mandatory staff vaccination policy would lower the risk of preventable death and serious medical consequences among incarcerated persons. And no one has identified any remedy that will produce anything close to the same benefit.[155]

Judge Tigar was also explicit in explaining how the advent of the vaccine facilitated his finding of deliberate indifference:

> A finding that Defendants were not deliberately indifferent based on a toolbox without a vaccine has little relevance when the same toolbox now includes a vaccine that everyone agrees is one of the most important tools, if not the most important one, in the fight against COVID-19.[156]

The order was immediately met with derision from the CCPOA. In response to a query from CalMatters, CCPOA president Glen Stailey texted, "We've undertaken an aggressive, voluntary vaccination program and we still believe the voluntary approach is the best way forward . . . . We are looking into our legal options to address this order."[157]

D. Phase IV: The Appeal

And address it they did. On the heels of Judge Tigar's order, CDCR published a three-page plan for implementation,[158] which excluded many people from the vaccine requirement, while at the same time filing a notice of appeal the mandate.[159] The Attorney General representatives immediately moved to stay the vaccination order, a motion Judge Tigar denied. The State immediately appealed to the Ninth Circuit, which stayed the decision, citing "irreparable harm" to

155. *Id.*

156. *Id.* at *7.

157. Byrhonda Lyons, *Judge Requires COVID Vaccines for California Prison Guards*, CALMATTERS https://calmatters.org/justice/criminal-justice/2021/09/covid-vaccine-mandate-prison-guards-california/ [https://perma.cc/BZW2-KKBJ] (Mar. 16, 2022).

158. Notice of CDCR and the Receiver's Submission of a COVID-19 Vaccination Plan for Certain CDCR Workers and Incarcerated People in Compliance with the September 27, 2021 Order at 4, *Plata*, 2021 WL 4448953 (No. 01-cv-01351-JST), ECF No. 3694.

159. *Id.*

the guards should the remedy be implemented before the appeal is heard.[160]

Far from an inconsequential interim decision, the "irreparable harm" would, arguably, all be borne by the other side to the litigation: shortly after the order, the Omicron variant swept through California prisons, infecting thousands of incarcerated people as well as thousands of staff members.

The Ninth Circuit reasoned that anti-vaccination sentiments run rampant among prison guards and assumed that, in the face of vaccine mandates, many might quit their well-paying jobs, leaving California's vast prison system understaffed. This scenario was feared, but did not come to pass in many other employment sectors with mandates, where vocal protestations and threats of resignation gave way to vaccine compliance. But even if the threat of correctional officers' resignations were real, the underlying question avoided by judicial decisionmakers was whether incarceration at this scale is even possible given the inability to hire and retain staff who will undertake the care of their wards seriously and with common sense.

The Ninth Circuit's evasion of this question, and protectionism of the prison's internal logics, was in full display again in the final decision on the appeal.[161] Reversing Judge Tigar's mandate, the appellate judges considered CDCR's efforts in

> making vaccines and booster doses available to prisoners and correctional staff, enacting policies to encourage and facilitate staff and prisoner vaccination, requiring staff to wear personal protective equipment, and ensuring unvaccinated staff members regularly test for COVID-19. Defendants also employed . . . symptom screening for all individuals entering the prisons; enhanced cleaning in the facilities; adopting an outbreak action plan; upgrading ventilation; establishing quarantine protocols for medically vulnerable patients; and testing, masking, and physical distancing among inmates.[162]

These steps, in the court's view, were sufficiently ameliorative to reduce their misdeeds below the threshold for an Eighth Amendment

160. Emergency Motion to Stay Under Circuit Rule 27-3; Motion for Expedited Briefing at 2, Plata v. Newsom, No. 21-16696, 2022 WL 1210694 (9th Cir. 2021); Order, *Plata*, 2021 WL 4448953 (No. 21-16696), *discussed in* The Associated Press, *Court Blocks COVID-19 Vaccine Mandate for California Prisons*, NBC NEWS (Nov. 27, 2021, 7:10 AM) https://www.nbcnews.com/news/us-news/court-blocks-covid-19-vaccine-mandate-california-prisons-n1284800 [https://perma.cc/XX2M-3XGA].

161. Plata v. Newsom, Nos. 21-16696 & 21-16816, 2022 WL 1210694 (9th Cir. Apr. 25, 2022).

162. *Id.*

violation.[163] Were these steps the best plan under the circumstances? This, said the Court, did not matter, because "[a] decision to adopt an approach that is not the most medically efficacious does not itself establish deliberate indifference."[164]

The Ninth Circuit's decision is a textbook example of the inherent inadequacy of prison litigation as a solution for dynamic healthcare situations. It reflects familiar attributes of the deferent standard in prison law: a perverse overfocus on the uniqueness of the prison setting,[165] contortion of the Eighth Amendment to defend prison administration,[166] and an underlying assumption that lives lived behind bars are "second rate" to the point that efficiency and competence expectations from the free world become irrelevant.[167] The decision also reflects the pathology of the interagency "game of chicken" that stalemates efforts to provide relief in real time: optimally, during such a crisis, intervention and relief should emanate from the governor's mansion and the prison administration itself, but since neither has an incentive to step in, courts apply a clunky, time-consuming process to address changing situations.

III. *IN RE HALL*

A. Phase I: Stuck in Superior Court

By contrast to the litigation in *Plata*, the San Quentin litigation began as a grassroots effort by incarcerated men supported by community organizations. This effort took the form of individual habeas corpus writs. Originally crafted in Medieval times to bring people into court, the writ evolved in England during the 16th and 17th centuries into a procedural way to challenge unlawful detention.[168] In the United States, the first half of the 20th century saw an enormous expansion in federal habeas filings: the Supreme Court expanded the writ's scope

163. *Id.* at *1.

164. *Id.* at *2.

165. *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 542–66 (2021).

166. *See generally* Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133 (Meghan J. Ryan & William W. Berry III eds., 2020) (discussing how courts apply the Eighth Amendment differently to correctional officers than other government actors).

167. *See generally* Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385 (2022) (discussing how society's failure to enforce regulatory laws within prions subjects incarcerated individuals to a lower standard of living).

168. Alan Clarke, *Habeas Corpus: The Historical Debate*, 24 N.Y. L. SCH. J. HUM. RTS. 375, 377–90 (1998) (discussing the development of habeas corpus in English Common Law).

beyond narrow claims of jurisdictional overreach[169] to postconviction challenges by criminal defendants,[170] allowing federal courts to reexamine constitutional issues previously tried and fully reviewed in state courts[171] (while complying with the Congressional requirement that state remedies be exhausted before federal relief is sought[172]). Habeas corpus thus rapidly became, in the 1960s and 1970s, a vehicle for enforcing federal rights of detainees and incarcerated people that states did not view with sympathy.[173] The Warren Court era heralded an expansion of the federal habeas scope into an additional layer of postconviction review beyond the reach of inhospitable state courts, heralded by some and viewed by others as excessive.[174]

With the political and judicial changes of the Nixon Era and the post-Warren Court came a contraction in the reach of federal habeas corpus. The Supreme Court excluded Fourth Amendment challenges from habeas when state courts had provided a full and fair litigation of these issues,[175] increased gatekeeping through the doctrine of procedural default,[176] and held that no new rules could be applied or announced on collateral review, effectively relegating habeas proceedings to the enforcement of yesteryear's law.[177] These limitations were bolstered by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[178] which enacted a one-year deadline to file a petition following a final judgment, and further limited federal intervention to only those situations in which the state-court decision clearly contradicted Supreme Court precedent regarding federal law.

It is no coincidence that much of the post-1960s effort to curb federal habeas review came hand in hand with increased deference to state institutions, a well-known *leitmotif* of the Nixon presidency and

169. *See* Waley v. Johnston, 316 U.S. 101, 104 (1942).

170. William H. Speck, *Statistics on Federal Habeas Corpus*, 10 Ohio St. L. J. 337, 340 (1949).

171. Brown v. Allen, 344 U.S. 443, 458 (1953).

172. *See* 28 U.S.C. § 2254 (1948).

173. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. Rev. 991, 1031 (1985); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. Crim. L. & Criminology 63, 64–65 (1996).

174. Ronald K. Badger, *A Judicial Cul-de-Sac: Federal Habeas Corpus for State Prisoners*, 50 A.B.A. J. 629, 634 (1964); Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 384 n.33 (1964).

175. Stone v. Powell, 428 U.S. 465, 481–82 (1976).

176. Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977); Coleman v. Thompson, 501 U.S. 722, 757 (1991).

177. Teague v. Lane, 489 U.S. 288, 316 (1989).

178. Pub. L. No. 104-132, 110 Stat. 1214.

the post-Warren Court in other areas.[179] This reversal of fortune would have important effects not only on the more well-known habeas petitioners—convicted defendants seeking post-conviction review by relying on constitutional errors and defects during their trial—but also on incarcerated people seeking relief from prison conditions that violated the Eighth Amendment prohibition on cruel and unusual punishment. As Malcolm Feeley and Edward Rubin explain,[180] after decades of a laissez-faire approach to conditions in state and county custodial facilities, it was through the federal courts that incarcerated people finally managed to challenge unconstitutional prison conditions—albeit usually through class-action lawsuits, rather than state habeas proceedings.

This history is not without importance, because the decision to seek relief at the Superior Court of Marin County, rather than through the federal judicial channels, would later play an interesting role in this case. The first COVID-19 petitions for relief were composed by the incarcerated men themselves; later petitions relied on a template offered by Legal Services for Prisoners with Children. By June 2020, hundreds of men had submitted petitions; many continued to join the litigation well into August and September, to the point that Judge Howard had to sort the petitioners into groups based on the timing of their petitions. Other categorization would prove difficult, because the petitioners varied greatly by age, length of sentence, health conditions and crime of commitment.

One such petitioner was Ivan Von Staich, at the time a sixty-four-year-old man incarcerated at San Quentin for several charges, including second-degree murder. Since his incarceration in 1986, Von Staich has served time at California State Prison, Corcoran; California State Prison, Sacramento; California Institution for Men; Pleasant Valley State Prison, Soledad State Prison; and California Men's Colony.[181] Suffering from multiple health conditions, including chronic obstructive pulmonary disease (COPD)—a risk factor for COVID-19—and bronchitis, Von Staich was confined to a cell in West Block that he shared with his cellmate for twenty-four hours a day. At the time that Von Staich filed his appeal in the California Court of Appeal, he possessed only one cloth mask, which had been issued to him two months earlier, and which he washed regularly. In mid-July, Von Staich and his cellmate, Donald Jagiolka, tested positive for COVID-19;

179. Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 Tulsa L. J. 1, 3–4 (1995).

180. *See* Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State 97–102, 114–15 (1998) (describing judge-initiated class action lawsuits in Colorado and California).

181. Kevin Sawyer, *"They Want to Do Me in": The Prisoner Who Fought COVID Overcrowding*, Filter (Feb. 8, 2021), https://filtermag.org/prisoner-covid-overcrowding-california/ [https://perma.cc/S79G-7NQ3].

Jagiolka became symptomatic and both were kept in their cells. Von Staich's attorneys, Richard Braucher and Brad O'Connell of the First District Appellate Project, described what they termed his "daily nightmare" in their brief:

> Petitioner reports that staff try to talk inmates with COVID-19 symptoms out of medical treatment. They are told that hospitals in the area are overwhelmed and that they have to "kick it" on their own. Petitioner believes that prison authorities believe that everyone in West Block is going to somehow build up immunity to the coronavirus. He observed that when the virus first broke out in West Block and a prisoner came down with symptoms, a prisoner's cellmate would alert staff, yelling "man down," and prison staff would come and render aid. Now, petitioner says, prison staff leave the inmate in the cell.
>
> Petitioner reports that many inmates who are sick from COVID-19 avoid seeking medical treatment anyway, if it means being taken out of their cell. They have no confidence that the prison can do anything for them. Also, if inmates request treatment, they will be sent to a tent without access to any of their property. At least in their cells, inmates might have a radio or a TV.
>
> Petitioner reports that he and his fellow inmates are very frightened. Those who have not been tested or have tested negative for the virus, are afraid of contracting it. Those who have tested positive—whether or not experiencing symptoms—are afraid of serious harm or dying from COVID-19. Having received a positive test result and having experienced no symptoms, petitioner lives with the fear that it was a false positive or, if not a false positive, that, given the infectious environment he lives in, he could contract COVID-19 again and die.[182]

It was happenstance that Von Staich's case was pulled out of the stack of habeas petitions. He submitted his original petition early and was denied by the Marin Superior Court. The FDAP took over his representation and appealed.[183] When the case was scheduled to be heard before a panel that would include Justice Anthony Kline, a veteran judge with an established reputation as a champion of civil rights and a compassionate supporter of the constitutional rights of

182. Petitioner's Supplemental Petition for Writ of Habeas Corpus at 34, In re Von Staich, 270 Cal. Rptr. 3d 128 (Cal. Ct. App.) (No. A160122) (citations omitted).

183. Bob Egelko, *Court Considers Releasing Inmates Vulnerable to COVID-19 from San Quentin*, S.F. CHRON. (Aug. 17, 2020) https://www.sfchronicle.com/bayarea/article/Court-considers-releasing-inmates-vulnerable-to-15490355.php [https://perma.cc/ZR25-8RNP].

suspects and defendants,[184] petitioners' spirits were buoyed. Judge Howard paused the proceedings in the hundreds of cases still pending in Marin Superior Court until the Court of Appeal's resolution of Von Staich's case.

B. Phase II: "We Must Act Hastily"—In re Von Staich *at the Court of Appeal*

On September 8, 2020 the First District Court of Appeal heard oral argument in *In re Von Staich*.[185] The hearing opened with a debate on evidence-law doctrine in California—namely, whether the respondents, who in their response brief disputed all the declarations and reports made by AMEND physicians about the conditions at San Quentin, should have provided actual evidence to refute these reports. CDCR representative Kathleen Walton argued that the habeas rules did not require her to provide these facts and pressed the court for an evidentiary hearing; Brad O'Connell, for the petitioner, argued that CDCR made no attempt to plead the facts or meet them at all. Justice Kline characterized the prison's response as "conclusionary statements, not facts," and rejected CDCR's argument that the issues they briefed (whether CDCR provided adequate cleaning, sanitizing, masks, continuation of holding petitioner Von Staich with other inmates, whether COVID is still spreading at the prison, etc.), were the focus of the case. "What we believe this case is about," said Justice Kline, "is whether there is persuasive evidence that the court must do what the *Plata* court cannot do, which is to reduce population of San Quentin to a level that can permit the administration of social distancing within that prison."

After confirming that CDCR can, indeed, release people serving life with parole, and discussing the legal mechanisms to do so (including the Governor's emergency authority to release), much of the discussion consisted of CDCR peddling various falsehoods and the Justices not having it. Ms. Walton intimated that some of the prison's vigorous efforts to contain COVID-19 spread at San Quentin were hindered by "inmates refusing to cooperate," including testing and reporting symptoms. Justice Kline countered with the possibility that people were disincentivized from cooperating because the prison relied on spaces with a punitive connotation (solitary confinement cells) for the purpose of medical isolation (a problem pointed out in the AMEND report and in our Amicus brief).

184. *See* Bob Egelko, *California's Top Appellate Judge Retires After 42 Years on Bench, but His Important Rulings Will Live on*, S.F. CHRON. (Nov. 12, 2021) https://www.sfchronicle.com/bayarea/article/After-42-years-on-bench-California-s-top-16613822.php [https://perma.cc/RD3P-B9PV] (describing Judge Kline's decisions that supported civil rights and the strides he took to change the bail system).

185. Field notes (on file with the author).

Discussion then turned to release policies, with Justice Kline paying special attention to the most obvious demographic for successful releases: aging people doing long stints for violent crime. The Attorney General representative responded that the petitioner in this particular case—a sixty-four-year-old man with chronic health conditions, who committed his crimes of commitment in the mid-1980s—was judged to be "moderate risk."

The next topic on the table was an argument made in the prison administration's brief—that the state appellate court was an inappropriate forum in that it was "duplicative" of the systemwide litigation in *Plata*. Justice Kline explained: "You keep making arguments that assume we have the same interests as the federal court. We are not being asked to evaluate the quality of care and attention to COVID they are providing. [The federal courts] are looking into that." Walton then presented Judge Tigar's *Plata* stance as "he didn't find an Eighth Amendment violation." Justice Kline immediately retorted that, as a matter of public knowledge, Judge Tigar had urged state courts to do something because he believed that, as a federal judge, his hands were tied by the PLRA. In short, said Justice Kline, the COVID crisis at San Quentin was a state problem, happening at a state department of corrections, which made it the business of state courts. Justice Stewart proceeded to chide Walton for arguing "inappropriate forum" in each of the courts in which the State was battling prison conditions claims; Walton, in response, presented the Attorney General's position as a hierarchy of litigation: the appellate court would have to defer to the superior court, which was handling hundreds of similar habeas petitions; both state courts would have to defer to the *Plata* court, which was handling the systemwide claims; and all courts would have to defer to the wisdom of prison administrators, as the answer to complicated healthcare and prison-management policy issues lay with prison bureaucrats rather than with courts.

While the oral argument boded well for Von Staich, the court did press the petitioner's representatives on the appropriate remedy. Issuing an order to release 50% of the prisoners per the AMEND "Urgent Memo," said Justice Kline, is "something I'm not sure I'm willing to do . . . not confident that my court has the ability." Indeed, the role of the appellate court, he reasoned, might be limited to assessing whether the current conditions at San Quentin allow the social distancing necessary to stop the spread in that facility, and to put in some guidelines about particular issues that would apply across the board. Justice Kline also commented that the lawsuit had already resulted in a benefit to Von Staich himself; as a consequence, he had been isolated and no longer as exposed to COVID as he previously had been. In light of these issues, the question to petitioner's attorneys was, "What would you have us say?" The response from Richard Braucher (for the petitioner) was that, in the absence of a vaccine or a cure, the

only ways to effectively address COVID-19 at San Quentin were releases or transfers.

The Court, however, expressed the need to restrain the extent of its interference with prison business via a direct release order. To show that the State was doing its best, the Court cited a July 10 plan issued by Governor Newsom, which would result in the release of less than 8,000 people systemwide. The plan was dated at inception, woefully narrow, and targeted the wrong people, prioritizing people who were to be released within a short time anyway over aging and infirm people. In response to the question how petitioner's counsel would craft the order of releases, Braucher replied that the two lynchpins of the policy should be age and medical condition (both present in Von Staich's case).

The discussion of Newsom's order opened the door to Walton's argument that there was "no need to act hastily." Walton explained that AMEND's "Urgent Memo," which called for a 50% population reduction, was composed before the prison implemented a variety of ameliorative measures, including a new program for sanitation and distribution of protective equipment. At this, Justice Kline exploded: "Yes there is. Yes there is. There is a need to act hastily." People have gotten sick and died, he said, and we must ensure that no more of this happens.

In October, the Court of Appeal issued its decision: Von Staich had won.[186] The Court wrote: "We agree that respondents—the Warden and CDCR—have acted with deliberate indifference and relief is warranted."[187]

The decision began by stating the magnitude of the San Quentin catastrophe. Even against the horrific history of disease and contagion in prisons–including three separate spikes of the Spanish Flu in 1918—the San Quentin COVID-19 outbreak is "the worst epidemiological disaster in California correctional history."[188] The Court then highlighted the physicians' urgent memo (published after they visited San Quentin, at the Receiver's invitation) recommending a 50% reduction of the prison population.[189] CDCR's response fell far short of this: between March and August 2020 they achieved a mere 23% reduction, "accomplished, in part, by suspending intake at San Quentin from county jails, which has increased the presence of COVID-19 in those local facilities, and is not likely sustainable."[190]

186. *In re* Von Staich, 270 Cal. Rptr. 3d 128 (Cal. Ct. App.), *cause transferred with directions to vacate and reconsider*, Von Staich on H.C., 477 P.3d 537 (Cal. 2020).

187. *Id.* at 132.

188. *Id.* at 134.

189. *Id.* at 135.

190. *Id.* at 137–38.

The Court then rejected the evasive maneuvers employed by the Attorney General's office, who had urged deference to the *Plata* litigation. First, the court wrote, San Quentin is a particular, antiquated prison with specific problems, which are not the focus of the federal litigation.[191] Second, these habeas cases are designed to ask for temporary relief, rather than the more systematic remedies sought in *Plata*.[192] Third, state courts are not limited and bound by the PLRA, as federal courts are.[193] And fourth—remarkable considering the general perception of federal courts as the only resort in prison conditions cases—state courts "have the duty and competence to vindicate rights" under the U.S. and California Constitutions[194] (which, just like the U.S. Constitution, forbids cruel and unusual punishment—albeit worded slightly differently[195]).

The court also rejected the Attorney General's petition for an evidentiary hearing at the Superior court. The State's contentions that the AMEND physicians exaggerated the necessity of population reduction, the Court reasoned, were "conclusions the Attorney General has failed to support with any factual allegations contradicting petitioner's allegations"—even with testimony from the State's own prison physicians.[196] Under these circumstances, "the issue before us is simply whether respondents' disregard of the experts' conclusion that a 50 percent population reduction is essential constitutes the 'deliberate indifference' necessary to sustain petitioner's constitutional claim. The issue is one of law, not fact."[197]

On the merits, the Court found that the prison authorities' reluctance to significantly reduce this behavior by prison authorities satisfies the "deliberate indifference" standard; prison authorities conceded they knew the risk, and they were recklessly failing to take the necessary steps physicians recommended, while not providing any factual justification.[198] The continued use of spaces in which people sleep in close proximity "is not merely negligent, it is reckless"—and "the recklessness is aggravated by respondents' refusal to consider the

191. *Id.* at 138.

192. *Id.* at 139.

193. *Id.*

194. *Id.* at 139, 140–41 (quoting Williams v. Taylor, 529 U.S. 420, 436–37 (2000)).

195. CAL. CONST. art. 1, § 17. The California constitution forbids "cruel *or* unusual punishment"—a difference that the California Supreme Court relied on in *People v. Anderson* (1972), 493 P.2d 880, 883, 899 (Cal. 1972), when abolishing the death penalty, but which has since been regarded as largely semantic.

196. *In re Von Staich*, 270 Cal. Rptr. 3d at 140.

197. *Id.*

198. *Id.* at 140–50.

expedited release, or transfer, of prisoners who are serving time for violent offenses but have aged out of a propensity for violence . . . ."[199]

The Court addressed CDCR's response to the pandemic—the establishment of a central command, the tent structure, the repurposing of non-unitive spaces for isolation, the provision of protective equipment to the population and staff, and the release of 922 people as part of Governor Newsom's plan—and found it inadequate.[200] The decision quoted Dr. Beyrer, one of the petitioners' experts: "[h]ad San Quentin done nothing, the rates of infection there would have been roughly the same."[201] The prison's ameliorative steps, while commendable, were insufficient without resorting to population reduction.[202]

The *In re Von Staich* court did, indeed, order a population reduction, but evinced a complicated approach toward this remedy. On one hand, the Court felt comfortable criticizing CDCR's release policies, particularly the prison's boast that it had, in fact, reduced San Quentin's population to slightly more than 100% of design capacity.[203] In a facility such as San Quentin, the Court wrote, full occupancy cannot allow for the social distancing needed to fight the pandemic.[204] The decision quotes extensively from AMEND's urgent memo, which detailed conditions in specific areas of the prison, notably North Block and West Block, showing that the combination of crowding and high-risk people was unsustainable.[205]

The court also criticized the prison's reluctance to release anyone serving time for "a violent crime as defined by law" when such people are approximately 30% of the prison population.[206] From a medical standpoint, the decision read, "[e]xclusion of lifers and other older prisoners who have committed violent offenses and served lengthy prison terms is also difficult to defend, given their low risk for future violence and high risk of infection and serious illness from the virus."[207] The decision cited robust legal, sociological, and medical materials to show the folly of excluding lifers and strikers from release programs—including literature on life-course criminology, which consistently finds age a significant factor in desistance.[208] The Court also opined that the

199. *Id.* at 149.

200. *Id.* at 147–50.

201. *Id.* at 142 (alteration in original).

202. *Id.*

203. *Id.* at 143–44.

204. *Id.*

205. *Id.* at 135–36.

206. *Id.* at 143–44.

207. *Id.* at 146.

208. *Id.* at 147.

decision to exclude aging people who committed violent crimes "render[s] it doubtful whether a 50 percent reduction in San Quentin's population could soon take place . . . ."[209]

While finding that the habeas corpus process allowed the Court to extend relief to people situated similarly to Von Staich (whom the court ordered to be immediately released or transferred from San Quentin[210]), the decision held that "it would be inappropriate and unwise to order the release of prisoners we considered vulnerable even if we thought we had the power to do so in this proceeding."[211] The court raised three concerns in this respect: one, that medical vulnerability is a question of "scientific facts, not law"; two, that it was unsure whether it could extend relief to people who did not file a habeas petition; and three, that the appropriate social distancing via releases or transfers could be created not only by transferring vulnerable prisoners out of San Quentin, but also by releasing other people in sufficient numbers to allow for social distancing for the remaining prisoners.[212]

"Nevertheless," held the decision, "we are not without means to expedite the release or transfer from San Quentin of more inmates than are now deemed eligible for release."[213] These means were provided by § 1484 of the California Penal Code, which allowed the Court to take such a course of action.[214] The Court cited numerous California cases that involved injunctive relief through habeas.[215] By this authority, the Court orders CDCR to bring the CDCR population down to 50%–"no more than 1,775 inmates."[216] The Court left the manner of doing so to CDCR's discretion, though the decision provided some clues as to the proper approach: "expanding eligibility for the two expedited release programs currently limited to inmates not serving sentences for violent offenses to inmates like petitioner, who are over age 60 and completed minimum terms of at least 25 years."[217]

The *In re Von Staich* order wreaked panic amidst prison authorities and the advocates. The Attorney General immediately appealed the order to the California Supreme Court, arguing that an evidentiary hearing should have been held, in which the prison would have the opportunity to refute the facts presented by the petitioners. Relying on

209. *Id.* at 148.

210. *Id.* at 153.

211. *Id.* at 151.

212. *Id.* at 151–52.

213. *Id.* at 152.

214. *Id.* at 152–53.

215. *Id.* at 153 (collecting cases).

216. *Id.* at 154.

217. *Id.* at 153.

People v. Duvall,[218] the California Supreme Court held that "it appears that there are significant disputes about the efficacy of the measures officials have already taken to abate the risk of serious harm to petitioner and other prisoners, as well as the appropriate health and safety measures they should take in light of present conditions. For this reason, we return the case to the Court of Appeal with instructions to consider whether to order an evidentiary hearing to investigate these matters before judgment is pronounced."[219] This reversal did not satisfy the Attorney General, who went as far as to petition that the Court of Appeal's decision in *In re Von Staich* be depublished (!!!),[220] as if to obliterate any trace that constitutional violations were found. The California Supreme Court, to its credit, denied the request for depublication without dignifying it with an explanation.[221]

Von Staich himself was not particularly fortunate in the aftermath of the landmark decision in his case. In late October and early November, shortly before his transfer to Corcoran, Von Staich told a reporter that, following the decision, he was the target of threats by staff. He reported that a captain told him: "I don't give a fuck about a court order . . . . We can do what we want to you. You're destroying our whole prison . . . . You think you're going to get money out of this . . . . You got to live to get paid."[222] In early December, Von Staich was released from California custody only to find himself in federal custody due to a parole hold that predates the trial that led to his incarceration in 1986. His attorneys are working to get the hold lifted.

C. Phase III: "Packed Like Sardines"—the Evidentiary Hearing at the Superior Court

The remand of the habeas cases to the Marin Superior Court for an evidentiary hearing spurred Judge Howard into action. By the time *In re Hall* was due to be heard, the factual landscape had been transformed beyond recognition. When *In re Von Staich* was filed, San Quentin was the epicenter of contagion, with thousands of cases and dozens of deaths; even as late as September, in oral argument, Justice Kline bristled at the suggestion that there was "no need to act hastily." But at the opening of the evidentiary hearing, San Quentin only had four active cases—not because prison administrators won their battle against the virus, but because the virus had won, and ran out of people

218. People v. Duvall, 886 P.2d 1252, 1264–65 (Cal. 1995).

219. Von Staich on H.C., 477 P.3d 537, 538 (Cal. 2020).

220. Req. for Depublication, Von Staich on H.C., 477 P.3d 537 (Cal. 2020) (No. S265173).

221. *Von Staich on H.C.*, 477 P.3d at 538.

222. Sawyer, *supra* note 181.

to infect. In the winter of 2021, some prisons that had been free of COVID-19 cases for months, which would have arguably served as viable transfer destinations, were seriously afflicted.

The dynamic shift in the landscape of contagion raised the question of whether the vagueness of the *In re Von Staich* remedy—which strongly urged CDCR to release aging and infirm people, but explicitly stated that transfers are a viable path to compliance too—coupled with the moral paralysis at the governor's office and at CDCR, led to a situation in which the "relief" that CDCR was willing to provide (i.e., transfers from San Quentin to other prisons) would now be worse than no relief at all. Between the *In re Von Staich* decision and the evidentiary hearing, many petitioners contacted their attorneys, asking to withdraw their petitions for fear of retaliation in the form of transfers.

These petitioners found themselves facing an unconscionable dilemma: stay at San Quentin and fight for release from a decrepit facility that could fall prey to a second COVID-19 wave, or move to other prisons and lose the rich, volunteer-led programming unavailable anywhere else in CDCR (and essential for compiling an impressive parole dossier). There were also concerns that hasty transfers would relocate people to facilities in which they would face old enemies and antagonists or bad blood merely because they have been transferred from "the COVID prison." These dilemmas were pithily addressed by the Attorney General representative, Denise Yates, thusly: "Petitioners can't have it both ways." The petitioners who did not withdraw their petitions prepared for the evidentiary hearing with a legal team comprised of private attorneys at Keker, Van Nest & Peters, LLP; seasoned solo practitioners in the prison space, such as Charles Carbone; and several public defenders from San Francisco and Marin counties.

The evidentiary hearing was held via Zoom and broadcast at San Quentin prison.[223] The incarcerated witnesses testified remotely from a room in the prison. The hearing lasted eleven days; below I briefly recount the testimony, placing particular emphasis on the testimony of incarcerated people.

In his opening statement, Khari Tillery explained that, even before the pandemic, San Quentin residents were housed in an overcrowded facility "ripe for the spread of communicable disease," which had no plan in place to address the contagion despite continuous warnings, offers to help, and a special plan for prisons from the CDC. He recounted the fateful transfer from Chino, relying on the evidence unearthed in the Office of the Inspector General's report: "Even when [prison authorities] discovered some of [the transferees] were sick, they did not isolate or test them" nor did they listen to experts. The results were "predictably devastating": more than 75% of the prison population

223. Field notes (on file with the author).

contracted COVID-19 and twenty-eight died, constituting the worst epidemiological disaster in California prison history.

Tillery explained the deliberate-indifference standard, highlighting the absurdity of the hearing: CDCR had triumphed in their bid for an evidentiary hearing at the California Supreme Court, which would now allow petitioners to prove and bolster their claims about the horrors they experienced, complete with live testimony from within the prisons. He promised that the testimony would encompass the collateral consequences of the pandemic: double celling with mixed COVID statuses, lockdown, no cooked food for days, a terrifying rumor mill, and close contact with potentially infected people.

Anticipating CDCR's argument about the ameliorative steps, Tillery preemptively warned the court that they should not be allowed to spin the end of the pandemic as a success story. Such claims, he said, would be belied by the actual results: seven times the state rate of infection and twenty-eight people dead. This, he explained, is a consequence of "nibbl[ing] at the edges of the problem" rather than taking the necessary and practical steps advised by experts: population reduction that prioritized aging and infirm people.

On behalf of CDCR, Paula Gibson argued that petitioners were misrepresenting the legal standard. Rather than rehashing the past, said Gibson, habeas cases could only address each petitioner's current condition at San Quentin, which, in the twilight of the outbreak, was no longer a risk meriting release.

The evidentiary hearing opened with testimony from John Mattox, one of the transferees from CIM. Mattox was tested (and found negative) on May 12, 2020, and proceeded to be housed under dorm living conditions, alongside 120 others, sleeping in double bunks with a three-foot distance from his neighbors. While still at CIM, he observed sick people, and was in close proximity to two people who tested positive. One of his neighbors, Francis Douglas, "ha[d] a high temperature, sweating, didn't want to get out of bed," and Mattox helped him get to the healthcare services. Subsequently, Mattox himself started feeling sick in late May. Before the transfer, he informed healthcare personnel three times that he was experiencing symptoms, but was ordered to transfer nonetheless. Subsequently, he recounted, "we were cramped like sardines," sitting shoulder to shoulder "in a holding tank before transfer with no ventilation, no movement, for 3–5 hours. It was so hot and cramped that a lot of inmates were agitated and took their masks off when talking to others—the only time to get up was to use bathroom." Mattox again complained about his symptoms, but a nurse found no temperature and chided him for lying to avoid a transfer. The transferees were then loaded onto the bus—all of them in paper jumpsuits, their legs in shackles and their wrists bound, and instructed to sit in pairs on four-foot benches and put cloth masks on.

The bus was packed shoulder-to-shoulder and unventilated for the entire 11-hour ride to San Quentin. While on the bus, Mattox witnessed

people coughing and removing their masks, leaning their heads back to try to sleep.

Upon arrival, the transferees were deboarded. They were not screened in any way and were housed in groups of five. Mattox again told a healthcare professional that he was unwell and was instructed to "let medical know when you're set up in a cell."

The transfer occurred on Saturday, and the transferees were housed in pairs in the Badger Unit; on Monday, Mattox finally received an opportunity to get tested for COVID-19. He received a swab and was put in a filthy, isolated cell. The officer took a bottle of bleach, sprayed it on the mattress and walls, and left without giving Mattox a rag to wipe it off.

Four or five days later, Mattox received his diagnosis: he was the first person at San Quentin with a positive COVID test.

On cross examination, John Walters of the Attorney General's office chose a questioning tack that would repeat itself for all incarcerated witnesses: he asked Mattox whether he had received the vaccine (he had, both doses). This strategy would support CDCR's position in two ways: for vaccinated people, it would show that a population reduction was unnecessary, and for unvaccinated witnesses, it would shift the accountability onto the petitioners themselves. Mattox was also asked about mitigation strategies and programming at San Quentin, to support the idea that the prison's ameliorative steps were sufficient to ward off a deliberate indifference finding. Walters pursued this strategy by getting Mattox to admit that there was "no chow hall, meals were brought to you." Mattox replied: "yes, by inmates." Walters then asked, "and you saw that the population was being reduced." Mattox insisted that he had not experienced any difference.

The next witness was Larry Williams, who at the time of the outbreak was a building porter at San Quentin, responsible for food distribution and maintenance. Williams testified about the horrific hygiene situation in prison; only in April did he receive training on sanitation, and despite being promised special cleaning appliances, those never materialized. Williams said that the men socially distanced "to the best of their ability," and explained, "if you're standing down and he's standing down, it's impossible to be apart . . . the showers are a foot apart. Even if you turn off a shower head in between, you're not six feet apart."

Williams said that the men did not receive cloth masks until late April, and only received N95 masks in late July. Staff members wore their masks where they could be observed by their superior officers, but inside their units, they never wore them.

When Williams and five others were ordered to handle the property of the Chino transferees, he realized that they might contract COVID-19 by handling the boxes. After finishing the job, Williams went to take a shower, and immediately after the shower, his skin felt flush, sticky,

and warm, and he called his wife immediately, informing her that he might have become infected.

Despite reporting his symptoms to the nurse in the evening, Williams was not tested for COVID-19. The nurse scanned his vitals and told him he did not have COVID-19 symptoms. Williams' effort to report his symptoms the next day received no sympathy, and he was told to continue work, which involved handling food trays. During this day, he came in contact with 300 men; he was tested that afternoon. He continued to work, while displaying symptoms, for the following four days, and it was only then that he was notified that he had tested positive.

Subsequently, Williams was moved to the adjustment center (a euphemism for solitary confinement cells), which he described as a horrific, filthy place. He was unable to launder his clothes and linen, so he washed them himself in the sink while ill. The COVID-19 bout exacerbated his preexisting hypertension, and he was moved back to his unit while still experiencing symptoms. His cellmate passed away from COVID-19, and he heard on the radio reports of dead people being removed from the prison. "It was hard to go to sleep," he said, "I was afraid I wouldn't wake up."

On cross examination, Walters pressed Williams on his refusal to get tested for COVID-19; Williams said that he and many others refused testing because of the abundance of false positives and because of the consequences they faced once they tested positive.

The next witness, Travis Vales, told of being moved in May 2020 to another unit and subsequently testing positive. He described witnessing people falling ill all around him—complaining of aches, nausea, loss of taste, and calling out, "Man down!"—a distress call to the staff—multiple times a day.

Vales's testimony was followed by that of Michael Williams, who described similar experiences—"a lot of man down calls"—and a revolving door of cellmates switched when they fell ill, culminating in him and his cellmate becoming COVID-19-symptomatic. During his thirty-nine-day quarantine, Williams explained, sometimes staff members came by twice a day, but on other days they would not come at all.

The stream of incarcerated witnesses was paused for the testimony of Dr. John Grant, who had practiced medicine at San Quentin for fifteen years. Grant, intimately familiar with San Quentin's layout, testified that only the adjustment center (consisting of 100 cells) had solid doors; the remainder of the prison had bars on the doors.

Grant testified about an op-ed he co-authored with colleague Haiyan Ramirez Batlle for the Los Angeles Times,[224] in which he wrote:

224. Haiyan Ramirez Batlle & John Grant, Opinion, *Op-Ed: Hard Lessons We Learned from the COVID-19 Tragedy at San Quentin Prison*, L.A. Times

"we have to further reduce the population in overcrowded prisons and jails to below capacity. This could be done safely by minimizing new incarcerations, releasing those within months of parole or imprisoned on technical charges, and expanding the use of compassionate release for people who are frail and at high medical risk."

Grant also offered a window into the working conditions of the healthcare professionals during the pandemic: the doctors, he said, worked eighty-hour weeks for the duration of the outbreak, and saw 80% of their June 2020 patients test positive.

Mark Stanley, the next witness, was incarcerated in San Quentin's North Block and employed in assisting mobility-impaired prisoners. He testified that, despite the posting of a form that required use of a surgical mask, gown, and gloves, he was not provided with any protective equipment except for the cloth mask and gloves he already had. After weeks of working in close quarters with the people he assisted, he began experiencing symptoms, but was required to continue working for five days, interacting with at least two people with disabilities who were also symptomatic. Predictably, Stanley's cellmate also tested positive, at which point the two of them were put in a two-and-a-half-month lockdown with no access to showers, clean linens, or cleaning implements.

The last witness on this momentous day was incarcerated journalist Juan Moreno Haines, who authored several op-eds about COVID-19 at San Quentin.[225] Haines, a senior editor for the *San Quentin News*, predicted as early as February that the pandemic would spread. His explanation—he had witnessed other contagions in prison, such as staph infections, influenza, and Legionnaire's disease—was stricken from the record.

Haines described his cell in North Block: the unventilated building contains 415 cells, five tiers and eighteen inches apart, each shared by two people (it has never been less populated than at 135% of design capacity). The fan merely recirculated existing air, and there were mesh-covered openings between the cells. During the COVID-19 outbreak, four people were allowed to simultaneously use the communal showers. The surrounding fence catwalk is filthy and cleaned every

(Sept. 4, 2020), https://www.latimes.com/opinion/story/2020-09-04/coronavirus-outbreak-san-quentin-prison [https://perma.cc/FMX2-YPX6].

225. E.g., Juan Moreno Haines, *Op-Ed: We Pleaded for Social Distancing Here in San Quentin. The State Refused, and Now COVID Is Raging*, LA Times (3:00 A.M. P.T. Jan. 28, 2022), https://www.latimes.com/opinion/story/2022-01-28/covid-prison-san-quentin-ruling [https://perma.cc/95XK-85QD]; Juan Moreno Haines, Opinion, *I Got COVID in San Quentin and Watched as Hundreds More Were Infected and 29 Died. Here's Our Story*, S.F. Chron. (Oct. 9, 2021), https://www.sfchronicle.com/opinion/openforum/article/I-got-COVID-in-San-Quentin-and-watched-as-16519424.php [https://perma.cc/A5AT-CX2V].

other year of dust, trash, and animal carcasses. In July 2020, a private contractor was to arrive and "deep clean" that space—which consisted of walking along the tiers with spray bottles and wiping down the rails.

Haines described the fear and despair during the COVID-19 lockdown. He was desperate to get fresh air, shower, and get to the phone to inform his friends on the outside what was happening. He described hearing people cough at night and hearing "man down" calls: "that was just par for the course, a daily occurrence."

When Haines tested positive and was quarantined in Badger Unit, he was housed with someone who was recovering from COVID-19. His cellmate had not packed his property or cleaned the cell, so it was grimy and dusty. The mesh was so filthy that grime was covering parts of it. There was no power in the cell and they couldn't even make tea or soup—and this was while he was recovering from COVID. At first, Haines did not even realize what was happening to him or that he was getting short of breath until he tried to carry his property to third tier.

Tom McMahon, of the Marin Public Defender's Office, asked Haines: "Is it fair to say Respondent left you there to die?" Haines replied: "Yes." Walters interrupted: "Objection, argumentative."

The following days of the hearing proceeded in the same vein. The emerging picture was much worse than the description in the written Von Staich briefs. The cross examination, if anything, seemed to support the petitioners' case. The State's representatives' goal at the hearing was to demonstrate the use of ameliorative steps that mitigated the harm wrought by the Chino transfer (whose causal contribution to the crisis could no longer be denied), as well as to transfer some of the accountability onto the inmates who refused testing and vaccination. But some of these questions backfired spectacularly. When Walters repeatedly asked the witnesses whether—and why—they had declined testing, he opened the door to one of the main horrors of the pandemic—the fact that CDCR had lost credibility to such a degree that asking for help was putting oneself at a disadvantage.

Petitioners' later witnesses supported this factual picture. Dr. Matthew Willis, the Director of Public Health in Marin County, had an opportunity to tell how his request to test and isolate the Chino transferees was rebuffed. Dr. Fyodor Urnov, a UC Berkeley epidemiologist, testified about his offer to help speed up prison testing, which was rebuffed. The prison medical experts, Drs. Bick and Pachynski, testified about the medical ameliorative steps, explaining that they had not been involved in the transfer decision.

The disconnect between the medical and custodial staff became particularly clear during the testimony of Warden Broomfield on days four and five of the evidentiary hearing. Under cross examination, Broomfield admitted that he had no knowledge of any CDCR recommendation to cohort staff members, and that San Quentin did not comply with that policy. He also admitted that there was no policy in place to cohort incarcerated people, address a pandemic surge, or

distribute N95 masks. He was also unable to recount whether any staff members had been reprimanded for mask-wearing violations. Broomfield stressed that the medical aspect of the prison was run exclusively by the federal Receiver's staff.

The petitioners presented expert testimony by Dr. Alison Morris, who supported the causal link between the botched transfer and the outbreak, and explained that, short of population reduction, the prison's ameliorative steps did very little to curb the spread of COVID-19. Dr. Terry Kupers, an expert on mental health in prison, testified about the lack of control incarcerated people exercise on their environment, and the deleterious effect that living through the pandemic conditions had on their mental health.

On November 16, 2021, Judge Howard issued his tentative ruling in *In re Hall*. The 116-page ruling provides a comprehensive historical narrative of the outbreak at San Quentin, starting with the fateful transfer from CIM, and complete with the testimonies of incarcerated and expert witnesses.[226] Judge Howard discussed the ineptitude and mismanagement at San Quentin, from the Warden to the custodial and medical staff; he relays the many rejected offers for help. Notably, when discussing the impact on incarcerated people, the opinion takes special care to relay the impact of the crisis on mental health and morale (through the testimony of Dr. Kupers and several incarcerated witnesses).[227] Judge Howard also discussed the collateral punitive aspects of the prison's response to COVID, which amounted to solitary confinement for many long months.[228]

While the decision commended CDCR for the mitigating strategies they adopted, ultimately it relied on evidence from both petitioners and respondent to show that, had they done nothing, the rate of infection, disease, and death would have been the same.[229]

The bottom line, however, was a disappointment to petitioners: Judge Howard accepted CDCR's argument that, for the purposes of relief, he needed to examine the conditions at present. The advent of vaccines, he wrote, rendered relief in the case moot:

> [T]he vaccine changed the game for COVID-19 at San Quentin. With a nearly 80 percent inmate vaccination rate, COVID-19 has all but disappeared from inside the prison. Although COVID-19

226. *In re* Hall, Nos. SC212933, SC213244, SC213534, & SC212566, slip op. at 13–70 (Super. Ct. Cal., Nov. 16, 2021) (citation omitted) (quoting *In re* Von Staich, 270 Cal. Rptr. 3d 128, 133 (Cal. Ct. App. 2020), *cause transferred with directions to vacate and reconsider*, Von Staich on H.C., 477 P.3d 537) (denying petitions for writ of habeas corpus).

227. *Id.* at 41–43, 55–57, 92–94.

228. *Id.* at 92–95.

229. *Id.* at 87–88.

> remains a risk within San Quentin, . . . it [is] no more a risk at present than the risk faced by the community at large.
>
> But even if COVID-19 continues to pose a substantial risk of serious harm, the combination of substantial population reduction, mitigation measures, and vaccine rollout to every inmate in the prison shows that Respondent does not "knowingly and unreasonably" disregard an objectively intolerable risk of harm. By offering the vaccine to all inmates, Respondent has responded reasonably and effectively with the best tool available to mitigate the harm. This situation differs from the scenario presented to the *In re Von Staich* court, where "Absent a vaccine or an effective treatment, the best way to slow and prevent spread of the virus is through social or physical distancing, which involves avoiding human contact, and staying at least six feet away from others." Here, the vaccine, combined with other measures, allows less physical distance. Petitioners did not carry their burden to show that Respondent continues to unreasonably disregard a known serious risk by failing to take further measures such as further reducing the prison population.[230]

Despite denying relief, Judge Howard wrote that where "a question of general public interest which is likely to recur," habeas petitioners may seek a declaration of rights in these circumstances, "including where the court may have difficulty ruling on the issue while the controversy is alive, and where it presents important issues of liberty and social interest."[231] This, he says, is just such an issue. And so, the last five pages of the decision lambast CDCR and the Receivership in general, and San Quentin officials in particular, for their ongoing neglect and for the general conditions of the prison, which are conducive to future contagion. Here is Judge Howard's declaration:

> 1. *Respondent caused "the worst epidemiological disaster in California correctional history."* (October 2020 *In re Von Staich* Order at p. 60.) In doing so, Respondent recklessly ignored what it knew then and concedes now – that COVID-19 posed a "substantial risk of serious harm to the health and safety of petitioners."
>
> 2. Respondent's conduct that resulted in 75 percent of the San Quentin inmates contracting COVID-19, and 28 deaths, implicates "matters of clear statewide importance" relating to the "efficacy of the measures officials have already taken to abate the risk of serious harm to petitioner and other prisoners, as well as

230. *Id.* at 111.

231. *Id.*

the appropriate health and safety measures they should take in light of present conditions." (*Staich on H.C.*, supra, 272 Cal.Rptr.3d 813.)

3. During the 2020 COVID-19 outbreak at San Quentin, Respondent violated Petitioners' rights under the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution to be free of cruel and unusual punishment. Respondent exhibited deliberate indifference to the admitted risk posed by COVID-19, by (a) violating its own rules and procedures when it transferred the CIM inmates to San Quentin, knowing that those inmates posed a risk of introducing COVID-19 into San Quentin; (b) violating its own rules and procedures during the intake and processing of the newly-arrived CIM inmates, in particular by ignoring obvious COVID-19 symptoms, failing to quarantine the transferees, failing adequately to screen them, and failing to test them until after they had already begun to infect the existing San Quentin population; (c) ignoring advice from its own medical professionals and CDC guidance by failing to provide adequate PPE, mixing sick and well inmates, failing to cohort inmates adequately, failing to enforce social distancing, and failing to provide adequate or timely testing; and (d) ignoring Willis/MDPH's recommendations without any basis other than that MDPH purportedly had no authority over Respondent.

4. As in *Plata*, "[n]umerous experts testified that crowding is the primary cause of the constitutional violations." (*Brown v. Plata, supra*, 563 U.S. at p. 521.) The evidence shows that compliance with the Urgent Memo's population reduction recommendation in a timely fashion substantially would have reduced the scope and severity of the COVID-19 outbreak at San Quentin. Respondent knew about the Urgent Memo. It further knew that population reduction could effectively combat viral spread (as evidenced by its own population reduction efforts). Respondent failed to comply with the Urgent Memo recommendation or engage any expert of its own. Without adequate investigation or the benefit of any alternative expert opinion, ignoring the Urgent Memo's population reduction recommendation constituted further deliberate indifference. Indeed, Respondent had the means at its disposal quickly to comply with the Urgent Memo's recommendation; instead, it chose to litigate the matter while people died.

Respondent has offered no valid argument why it could not have complied with the Urgent Memo's recommendation. In *Plata*, in addition to the criteria imposed by the PLRA, the state had to consider an order involving the entire California prison system. The state could not comply with that order simply by moving inmates. It had to either release them or build more space.

Here, by contrast, the problem involves only one, antiquated prison, with architectural characteristics not shared by many other prisons in the state system. Respondent contends it would violate "contemporary standards of decency" to release Petitioners prior to the end of their sentences. (Respondent Opp. at pp. 23, 57.) But it could have reduced the population through means other than outright release. Indeed, the remedy ordered by the Court of Appeal in the October 2020 *In re Von Staich* Order did not necessarily involve releasing any inmates. (*In re Von Staich, supra*, 56 Cal.App.5th at p. 84 ["To be clear: We do not order the *release* of petitioner or any other inmate"], emphasis in original.) Instead, the Court of Appeal left to Respondent the most efficient and effective means of reducing the population, considering the variety of factors prison officials must consider. (*Ibid.*) While release is certainly one option to reduce the population at San Quentin, prison officials had several other options available to them. For example, they could have transferred inmates to a different prison (following all safety protocols). The failure to do so, or at least to make good faith efforts to do so, unreasonably exposed inmates, staff, and the surrounding community to a substantial risk of serious harm.

5. The failure to reduce the population resulted in other constitutional deprivations of liberty. Because Respondent did not reduce the population as recommended, it effectively consigned hundreds of inmates to unwarranted, unnecessary, solitary confinement. And not just for a day or two. Where Respondent had the ability to move inmates to other facilities or release them, the court can conceive of no argument to support forcing inmates to remain in a cell smaller than 50 square feet, with two bunks, and a cellmate, for virtually 24 hours a day, seven days a week, for months on end. Doing so enhanced the inmates' exposure to COVID-19. For the duration it lasted, it also amounted to solitary confinement in violation of common standards of decency, with all the physical and mental health effects that result. (6 RT 1206-07.) (See Exhibits 370.011 and 370.012, depicting the solitary confinement cells during lockdown in the "Blocks" at Sec. IV.B.1.a, *supra.*) Respondent knows about these effects. Its mental health team prepared for them, reported them, and treated them. Simply put, confinement for that long, with another person, in a space so small and foul, implicates "nothing less than the dignity of" humans. (*Trop v Dulles, supra*, 356 U.S. at pp. 100-101.)

6. Isolating COVID-positive inmates in the AC contributed to the spread of COVID-19 because inmates fear the AC. Using the AC as an isolation unit disincentivizes candid

reporting of symptoms, an essential component of any effective COVID-19 mitigation strategy.[232]

Judge Howard added:

> Respondent contends population reduction "involves significant policy questions about public safety and criminal justice" best left to other branches of government. (Resp. Opp. at p. 42.) However, if Respondent insists on continuing to operate an obsolete and dangerous prison that, whenever an airborne pathogen arises, threatens the health and safety of the prison population, not to mention the surrounding community, then Respondent will leave the courts with no choice but to intervene. Moreover, the circular notion that "the operation of our correctional facilities is peculiarly within the province of the Legislative and Executive Branches of Government, not the Judicial" (*Bell v. Wolfish* (1979) 441 U.S. 520, 548), relied upon by Respondent, assumes the lack of a constitutional violation.
>
> No one knows how COVID-19 will behave in the future. No one knows what effect Respondent's efforts to vaccinate the entire inmate population will have in combating any future outbreak. Petitioners have not – at this time – carried their burden to show current deliberate indifference warranting injunctive relief. However, the record raises serious questions about whether Respondent has learned the right lessons from the 2020 COVID-19 debacle at San Quentin. It continues to operate a prison uniquely situated to allow the spread of any airborne pathogen, including COVID-19, in a manner seemingly indifferent to the specific characteristics that resulted in such extensive illness and death just last year. For example, Respondent continues to double cell prisoners in multi-tiered units with open barred doors, a living environment that enhances the risk of disease transmission. Respondent also appears intent on relying on the same population spread – as opposed to population reduction – strategy it employed in 2020. It plans to lockdown double-celled inmates, when necessary to quarantine them, in the cells measuring 49 square feet that make up the tiered housing units. Depending on the circumstances, including the severity of any future outbreak, the findings above should cast significant doubt on the wisdom of those strategies.[233]

232. *Id.* at 112–15 (emphasis added).

233. *Id.* at 115–16.

D. Phase IV: The Appeal

The denial of relief rendered Judge Howard's declaration, while symbolically valuable, practically useless to the petitioners. This was particularly poignant because, as of its publication day, relief was not moot: there were already rising cases in other prisons. Within a few weeks, as the Omicron variant spread, twenty-one prisons had significant outbreaks, many of them consisting of hundreds of cases, and San Quentin saw a rise in cases as well. At its peak, this third wave of infections consisted of more than 6,000 cases among incarcerated people and more than 4,000 among the staff.

Under these circumstances, petitioners' representatives debated whether to appeal the decision, and finally decided against it. Much to their surprise, Judge Howard's decision was appealed by the Attorney General's office. This astounding use of taxpayer money to combat a decision which offered the opposite side no material remedy remains unexplained as of the writing of this manuscript. Petitioners' attorneys, including the First District Appellate Project, are awaiting the state's briefs.

IV. Fear and Loathing: State and Federal Litigation Commonalities

So far, I have described two proceedings that varied greatly along procedural lines: a class action in federal court, in which a judge felt bound by the PLRA, and a cluster of habeas corpus cases in state courts, in which a judge felt that the facts did not merit a remedy despite a finding of constitutional violations. Nevertheless, dig underneath the procedural surface and you'll find a similar habitus, which suggests the patterns and mechanisms through which prison litigation invariably evinces great deference to the state's position.

A. Tolerating Bad Behavior

The most notable common characteristic was the plethora of examples of judicial tolerance for bad behavior. The most striking similarity was the use of circular and evasive jurisdictional maneuvers. Before Justice Kline's Court of Appeal, the Attorney General's representatives argued that the appropriate forum for addressing Von Staich's writ was the Marin Superior Court, where the remainder of the habeas cases were pending (Von Staich had filed there, lost, and lawfully appealed); before Judge Howard's Superior Court, they argued that the appropriate forum for addressing all the writs was the all-encompassing federal litigation in *Plata*; and before Judge Tigar's District Court in *Plata*, they argued that the appropriate thing would be to stop litigating altogether and defer to the prison's management of the pandemic.

Another common example of bad behavior was the cynical allocation of risk and blame, which never failed to task incarcerated

people with responsibilities for their own wellbeing. The Attorney General representatives argued, with a straight face, that exempting prison guards—the people moving freely within, into, and out of, the prison—from vaccination made sense, because the prisoners who were not vaccinated could accept the vaccine and protect themselves. Elsewhere, they argued that prisoners share a degree of responsibility for their own condition in that they refused (often sensibly) to be moved to different cells. When CDCR's cynical and vindictive implementation of Justice Kline's order as targeted transfers put the petitioners in an impossible situation, they portrayed themselves as trying to help and petitioners as hampering their own health conditions.

The perversity of the bad behavior was bolstered by the breathtaking expectation that it would be not only tolerated, but also rewarded on appeal. The extent to which the Attorney General's staff spent taxpayers' money on not only appealing the decisions, but also attempting to *obliterate* them from existence, even when they had no practical implications, was breathtaking. This similarity in strategies reflects the appeal in *In re Von Staich*, which was closely followed by an unheard-of request to *depublish* the decision after it had already been reversed; it also reflects the appeal in *In re Hall*, which had no operative relief for the prisoners. It is as if the very whisper of an Eighth Amendment violation in writing is anathema to the state.

At the government level, these examples of bad behavior were rife with hypocrisies. Governor Newsom's support of the prison guards' efforts to shirk vaccines stands in stark contrast to his position on vaccination in other congregate settings, including schools.[234] While the appeal in *Plata* was filed, Newsom held numerous public appearances in which he extolled the virtue of the vaccine and the importance of a "science forward" approach relying on vaccination mandates.[235] The bitter fruit of this inconsistent position was not difficult to predict: anti-masker protesters called Newsom to task about his school vaccine

234. *California Becomes First State in Nation to Announce COVID-19 Vaccine Requirements for Schools*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 21, 2021), https://www.gov.ca.gov/2021/10/01/california-becomes-first-state-in-nation-to-announce-covid-19-vaccine-requirements-for-schools/ [https://perma.cc/92C4-FZB3].

235. This behavior did not go unobserved. Rebecca Bodenheimer, *I Voted Against Gavin Newsom's Recall But Can No Longer Be Silent About His Hypocrisy*, SFGATE (Oct. 27, 2021), https://www.sfgate.com/politics-op-eds/article/Newsom-hypocrisy-on-vaccine-mandates-16565826.php [https://perma.cc/N2LR-FF4J]; Sharon Bernstein, *California First in U.S. to Mandate COVID-19 Vaccines for Schoolkids -Governor*, REUTERS (Oct. 1, 2021), https://www.reuters.com/world/us/california-require-covid-19-vaccines-schoolchildren-governor-says-2021-10-01/ [https://perma.cc/XJE6-QFJ7].

mandate, arguing that if he did not require it of people working with criminals, he should not require it of their children.[236]

It is tempting, and not difficult, to speculate why his approach toward this particular kind of congregate setting was different. In November 2021, shortly after Judge Tigar's vaccination order in *Plata*, Newsom withstood—and survived—a recall challenge. His campaign was funded, in part, by $1.75 million in contributions from the CCPOA.[237]

The Attorney General's hypocrisy was also in plain view. On July 9, 2020, as the pandemic ravaged San Quentin, the #StopSanQuentinOutbreak coalition held a press conference outside the prison gate to draw attention to the medical crisis. Among the speakers at the conference was then-assembly member Rob Bonta, whose exhortations to act were so moving that they were quoted verbatim in the *Guardian*. Bonta urged Governor Newsom to tour the prison. "We are in the middle of a humanitarian crisis that was created and wholly avoidable," he said. "We need act with urgency fueled by compassion," he added. "We missed the opportunity to prevent, so now we have to make things right."[238]

A year and a half later, Bonta, now California's Attorney General, has appealed both the state and the federal cases. When pressed on his hypocrisy by CalMatters journalists he explained that his role as public official (presumably to urge vaccinations and protect Californians)

236. *E.g.*, Christina Bravo & Audra Stafford, *Parents Keep Kids Home, Employees Call Out to Protest School COVID-19 Vaccine Mandate*, NBC 7 SAN DIEGO, https://www.nbcsandiego.com/news/local/parents-keep-kids-home-employees-call-out-to-protest-school-vaccine-mandate/2750004/ [https://perma.cc/W8A7-G62K] (Oct. 18, 2021, 5:49 PM); Kevin Kiley (@KevinKileyCA), Twitter (Oct. 1, 2021, 1:24 PM), https://twitter.com/kevinkileyca/status/1443990293926211586?lang=en [https://perma.cc/2RWL-H5B4] ("Gavin Newsom just announced a vaccine mandate for K-12 students, days after opposing one for prison guards. California kids made the mistake of not giving millions to his campaigns.").

237. Andrew Sheeler, *California Prison Union Gives to Gavin Newsom's Recall Defense as Bonuses, Raises Take Effect*, THE SACRAMENTO BEE (Aug. 2, 2021, 3:57 PM), https://www.sacbee.com/news/politics-government/the-state-worker/article253144638.html [https://perma.cc/T7A5-MADW]. For an opinion piece directly linking Newsom's policy to this donation, see Editorial, *Newsom Bows Once Again to the Prison Guard Union*, ORANGE CNTY. REG., https://www.ocregister.com/2021/09/28/newsom-bows-once-again-to-the-prison-guard-union/ [https://perma.cc/R4MZ-MER3] (Sept. 28, 2021, 9:35 AM).

238. Abené Clayton, *"Make Things Right": Criminal Justice Officials Urge California to Release Prisoners Amid COVID-19 Surge*, GUARDIAN (Jul. 9, 2020, 5:54 PM), https://www.theguardian.com/us-news/2020/jul/09/california-governor-urged-release-prisoners-coronavirus-surge [https://perma.cc/ZAT6-AF5D].

differs from his role as advocate, telling the journalist, "I have a client."[239]

This approach raises serious questions about the Attorney General's professional and ethical obligations. Can, and should, the Attorney General wear two separate hats when supporting legislation and in litigation, as a government's agency's attorney? Bonta's behavior brings to mind a previous Attorney General, Kamala Harris, who declined to defend Proposition 8, an amendment to the Constitution of California passed by voter initiative, because the amendment forbade same-sex marriage.[240] Harris explained that Proposition 8 "violate[d] the Constitution. The Supreme Court has described marriage as a fundamental right 14 times since 1888. The time has come for this right to be afforded to every citizen." In the face of modest, legally sound, and practically advisable legal decisions, Bonta chose to defend the indefensible by pursuing appeals that not only display a shocking moral eclipse, but are also wasteful and serve no practical purpose: Judge Tigar's guard vaccination order is extremely narrow, and Judge's Howard's decision did not even offer the petitioners relief. As I demonstrated above, the Attorney General representatives who pursue these legal avenues do so knowing full well that their behavior will be tolerated, and that appellate courts stand guard to reverse decisions that offer even a faint threat to the correctional status quo.

B. Fetishizing Consensus

Another important common factor was the judicial psychology that characterized most of the proceedings described in this Article (excluding, perhaps, Justice Kline's impatience with the State's dawdling at the California Court of Appeal). Judge Tigar's ongoing management of the *Plata* case management conference might have been a masterful exercise in consensus building—if there had been any chance of actually building consensus among these parties. In the face of poor behavior, obfuscation, and unexplained support for indefensible staff behavior, he continued treating the staff's representatives in a kind, welcoming manner, perhaps hoping that his civility would garner cooperation; he indulged their staunch opposition to vaccine mandates by continuously pursuing, in good faith, gentle suasion methods long after it became obvious that such methods would not work. Judge Tigar's constant explanations that orders were a poor way to manage

239. *What is the CA Attorney General's Job?*, HadarAviram.com (Oct. 23, 2021), https://www.hadaraviram.com/2021/10/23/what-is-the-ca-attorney-generals-job/ [https://perma.cc/BHY3-CUB7].

240. Press Release, California Dep't of Just., Off. of the Att'y Gen., *Attorney General Kamala D. Harris Issues Statement on Prop. 8 Arguments* (Mar. 26, 2013), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-statement-prop-8-arguments [https://perma.cc/P986-6JJ6].

complex litigation (likely true in other contexts) were continuously refuted by reality: anything except orders had been tried, but failed.

Similarly, Judge Howard sought to run the evidentiary hearing with flexibility and deference to the schedule of prison officials, including the warden—a practice that would be commendable in many other scenarios, but not in a situation that involved live testimony from busy experts, medical professionals, and incarcerated people, whose testimony machinations were already complicated.

C. Justice Delayed is Justice Denied

Finally, in both cases, we see the perverse effects of the passage of time. All the judges who litigated these cases were shocked by the tragedies they were exposed to, and surely all of them realized that urgency was the only way to save lives (recall Justice Kline's sentiment, We must act hastily!). Nevertheless, the litigation structure in both federal and state courts is not conducive to emergency management. In both cases, the lengthy delays worked cruelly in favor of the State and against the incarcerated people. In *Plata*, the two turning points—the advent of vaccination and the high vaccine acceptance rate among incarcerated people—served the State's interest in that they significantly narrowed the scope of the proceeding. In *In re Von Staich* and *In re Hall*, the delays allowed the virus to run its course through the prison, ironically helping the state's case because population reductions could not address damage that had already occurred. Far from being innocent bystanders, the State's representatives knowingly exploited these delays by allowing CDCR to engage in vindictive, perverse tactics (such as the threat of forced transfers) and exploiting the new factual situations to absolve their clients from accountability. After the fact, the State is content to pursue appellate proceedings, depublication requests, and order stays, which do not save or serve anything except CDCR's organizational vanity.

Conclusion

It is important to clarify that the stacked deck in prison conditions litigation does not reside solely in the courts. Sharon Dolovich's observations on these cases show that this capitulation to the interests of correctional institutions is not limited to the judiciary.[241] Indeed, the gubernatorial prison-release strategies of the pandemic era evince the same type of capitulation, hypocrisy, and lack of sensitivity to timing that results in more illness and death.

Elsewhere, I explain that some of the paralysis characterizing the reluctance to parole, pardon, or administratively release a considerable percentage of the prison population stems from deep misunderstandings

241. *See generally*, Dolovich, *supra* note 12.

of the nature of the relationship between age and violence.[242] Aging and frail inmates—previously an ignored demographic—have drawn interest in recent years because of the heightened costs of their incarceration[243] and their low reoffending risks. Life-course criminologists consistently find that people age out of violent crime, though the trajectory of desistance varies.[244] This high-cost/low-risk equation poses a strong argument against lengthy incarceration of elderly and frail inmates; while this argument is partly humanitarian,[245] it largely reflects concerns about prison healthcare expenses,[246] exacerbated by the growth of the elderly and infirm prison population itself.[247]

Aging inmates are the fastest growing demographic in U.S. prisons. Between 1999 and 2008, the number of prisoners aged fifty-five and older increased by 76% (from 43,300 to 76,400), while the entire prison population increased only by 18%.[248] Despite state efforts to ameliorate

242. *See generally* Aviram, *supra* note 57.

243. *See generally* B. JAYE ANNO, CAMELIA GRAHAM, JAMES E. LAWRENCE & RONALD SHANSKY, U.S. DEP'T OF JUST., NIC ACCESSION NO. 018735, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES (2004), https://s3.amazonaws.com/static.nicic.gov/Library/018735.pdf [https://perma.cc/NK9P-UPYM].

244. *See generally* Michael Massoglia & Christopher Uggen, *Settling Down and Aging Out: Toward an Interactionist Theory of Desistance and the Transition to Adulthood*, 116 AM. J. SOCIO. 543 (2010); *see also* Caitlin V.M. Cornelius, Christopher J. Lynch & Ross Gore, *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling*, AGENT-DIRECTED SIMULATION SYMP., Apr. 2017, at 25, 25–26.

245. SIMON, *supra* note 28, at 87–93, 95–97.

246. Christine Vestal, *For Aging Inmates, Care Outside Prison Walls*, THE PEW CHARITABLE TRS.: STATELINE (Aug. 12, 2014), www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/08/12/for-aging-inmates-care-outside-prison-walls [https://perma.cc/F9UR-4XHA]. *See generally* ACLU, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY (2012), https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf [https://perma.cc/234E-YXCH].

247. *See generally* HUM. RTS. WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES (2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0_0.pdf [https://perma.cc/6YYQ-NNSF]; KIDEUK KIM & BRYCE PETERSON, URB. INST., AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM (2014), https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF [https://perma.cc/X77S-FM4L].

248. *Surge Reported in Elderly Inmates, Who Cost $72K Annually to House*, THE CRIME REP. (Aug. 14, 2010), http://thecrimereport.org/2010/08/14/surge-reported-in-elderly-inmates-who-cost-72k-annually-to-house/ [https://perma.cc/U6TB-YBXB]; *accord* E. ANN CARSON & WILLIAM J.

this trend, it persisted throughout the recession.[249] The graying of the prison population is a function of two factors: the rising numbers of inmates entering prison at older ages[250] and, more influentially, the advent of tough sentencing laws that increased the length and likelihood of incarceration, as well as harsh parole revocation policies. Twenty percent of prisoners between the age of sixty-one and seventy are serving sentences of more than twenty years (not including life sentences), compared to 11.4% of prisoners age thirty-one to forty.[251] State lifers' numbers between 1984 and 2008 ballooned from 34,000 to 140,610, to the point that one in ten to eleven state inmates is serving a life sentence. In the federal system, the number of lifers grew from 410 in 1998 to 4,222 in 2009.[252] Of federal prisoners aged fifty-one or older, Human Rights Watch[253] estimates that 11% are serving sentences ranging from thirty years to life. The long prison sentences are mostly correlated with violent offenses. A higher percentage of older prisoners (by contrast to younger offenders) were serving state sentences for violent crimes (65.3% vs. 49.6%), reflecting a "stacking phenomenon": inmates enter the system but do not leave it at nearly the same rates.[254]

Studies in prison gerontology identify a pattern of ignorance and neglect. Despite the decline in overall prison population in the recession's aftermath, the share of inmates whose healthcare is costly has risen to nearly 10% of the prison population.[255] Quality healthcare is unavailable, not only in prison, but also upon release. Ignorance about this problem is prevalent: a survey of legal professionals in the criminal-justice system, which included judges, prosecutors, defense attorneys, and court-affiliated social workers, revealed knowledge deficits regarding age-related health, identification of cognitive impairment, assessment of safety risk, and optimization of services upon

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SABOL, U.S. DEP'T OF JUSTICE, AGING OF THE STATE PRISON POPULATION, 1993–2013 (2016) (indicating the continued rise of the aging incarcerated population).

249. HUM. RTS. WATCH, *supra* note 247, at 6–7.

250. ACLU, *supra* note 246, at v–vi.

251. RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS, at v–vi (2003).

252. HUM. RTS. WATCH, *supra* note 247, at 33–34.

253. *Id.* at 6.

254. *Id.* at 30.

255. *Cf.* Cyrus Ahalt, Robert L. Trestman, Josiah D. Rich, Robert B. Greifinger & Brie A. Williams, *Paying the Price: The Pressing Need for Quality, Cost, and Outcomes Data to Improve Correctional Health Care for Older Prisoners*, 61 J. AM. GERIATRIC SOC'Y 2013, 2013 (2013) (indicating that prison costs and the population of the incarcerated elderly continues to rise, and that, in 2013, health-care costs made up 10% of total costs).

release from jail.[256] These problems, compounded with the inmates' fragility and vulnerability and the unsuitability of prison facilities, inhibit the provision of healthcare, be it pain alleviation[257] or palliative care.[258]

If prison authorities, courts, and the Governor's office truly considered arguments rooted in public health and safety, the obvious candidates for COVID-19-related release would be aging and infirm people who, by definition, are serving time for violent crime (sentences long enough to considerably age through.) But the Newsom Administration's COVID-19 release plan, published in early July 2020, chose to exclude this obvious group and, instead, release people whose release would not harm the political optics of pandemic prevention[259]—primarily those serving relatively short sentences with merely a few months of incarceration left. "Medically high risk" people aged sixty-five and up and suffering from a chronic medical condition or respiratory illnesses were to be individually assessed for release, depending on their low risk for violence or for sexual offending. The total number of released people would account for approximately 6% of California's prison population at the time, while doctors urged a much more drastic population reduction plan (50% of design capacity in some institutions) to allow for social distancing. The proposed individual assessment could not be carried out given the state of emergency in all CDCR facilities. Most importantly, the plan sought to avoid public controversy by focusing on a familiar target population for reform: those serving time for nonviolent, non-serious, non-sexual offenses. Instead of trimming the edges of the state prison population, the governor and correctional officials should have confronted head-on the age/violence knot and target for release the most obvious population from a public health perspective: aging people serving lengthy sentences.

256. Tacara Soones, Cyrus Ahalt, Sarah Garrigues, David Faigman & Brie A. Williams, *"My Older Clients Fall Through Every Crack in the System": Geriatrics Knowledge of Legal Professionals*, 62 J. AM. GERIATRIC SOC'Y 734, 734 (2014).

257. Brie A. Williams, Cyrus Ahalt, Irena Stijacic-Cenzer, Alexander K. Smith, Joe Goldenson, & Christine S. Ritchie, *Pain Behind Bars: The Epidemiology of Pain in Older Jail Inmates in a County Jail*, 17 J. PALLIATIVE MED. 1336, 1336 (2014).

258. *See* Monica E. Williams & Robert Vann Rikard, *Marginality or Neglect: An Exploratory Study of Policies and Programs for Aging Female Inmates*, 15 WOMEN & CRIM. JUST. 121, 135–36 (2004).

259. Hadar Aviram, Opinion, *Gov. Newsom's Prison-Release Plan Is Not Enough*, S.F. CHRON. (July 15, 2020), www.sfchronicle.com/opinion/openforum/article/Gov-Newsom-s-prison-release-plan-is-not-enough-15408726.php (last visited Apr. 2, 2022) [https://perma.cc/R8SC-JUXU].

The result—as evidenced in data obtained in late November 2020[260]—was predictably disappointing. Ninety-nine percent of those released were close to their release date anyway—91.8% of them within mere months of release—and a mere 0.8% were people deemed "COVID high-risk medical." People aged fifty and older were a mere 18.5% of those released; people aged sixty and older were less than 5%. The thorny age/violence knot was at work: People convicted of violent crime—more than two thirds of CDCR's prison population—were no more than 25.6% of those released. By 2021, transfers from jails increased the prison population beyond pre-pandemic numbers, erasing the Governor's effort and effecting no change even as the Omicron variant began to spread among the still-overcrowded facilities.

These disappointing solutions in the face of a dangerous pandemic, which sickened more than half of the prison population and killed 254 incarcerated people, suggest that the *Plata* and *In re Hall* cases are not anomalies. These judges and political officials are not comic book villains; they are caught in a habitual thought pattern that regards the prospect of population reduction a threat to its very existence, leading courts to coddle and defer to prison authorities even when lives are at stake. The results of *Plata* and *In re Hall* do not bode well for future pandemics, which are sure to ravage our bloated correctional facilities. Worst of all, these decisions represent a tragically missed opportunity to learn from the virus about our common humanity and foster true solidarity among people on the inside and the outside of the prison gate.

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In memory of the 254 incarcerated people and 50 staff members in CDCR facilities who, as of May 25, 2022, lost their lives to COVID-19. What is remembered, lives.

260. Nora Mishanec, *Chronicle Exclusive: Amid Virus Outbreaks, Majority of Medically High-Risk Prisoners Were Not Considered for Release*, S.F. CHRON., https://www.sfchronicle.com/crime/article/Chronicle-exclusive-Amid-virus-outbreaks-15778887.php/ [https://perma.cc/5L77-GMXW] (Dec. 7, 2020, 4:17 PM).