

Incarceration during COVID-19

Jail Shouldn't be a Death Sentence

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The Problem

The nation's thousands of jails originate in White supremacy and oppression—a role that has continued with the rise of mass incarceration. The spread of COVID-19 behind bars has magnified both the public health and social consequences of jails, and also the lack of timely, transparent data about who is behind bars and what they are enduring. The pandemic has shown the urgency of defunding jail construction, investing in true public health and safety measures, and mandating transparency from local authorities.

Scholars document a troubled history. Starting in the antebellum South, sheriffs and other local officials used jails to control poor White people charged with vagrancy. After the Civil War, jails became central to convict leasing—the wrongful arrest of formerly enslaved Black people by sheriffs, who sold them to corporations and plantations.

Jails still maintain their function of racialized social control, and are now central to mass incarceration. One in four incarcerated people in the world reside in the US, one third of whom are in jail. These institutions have a deep reach into communities; according to the Bureau of Justice Statistics, people are booked into jails 11 million times each year, nearly 18 times the number of prison admissions. In *Divided Justice: Trends in Black and White Jail Incarceration* (Subramanian, Riley, and Mai, 2018), researchers find the justice system jails Black people at 3.6 times the rate of White

people, and Latinx communities are both overcriminalized and persistently miscounted in jail populations.

Prior to the pandemic, a jail construction boom was underway, particularly in smaller cities and rural areas, according to the Vera Institute of Justice (hereafter “Vera”). That happened in part because jails have become default public health and social service providers, a process that advocate James Kilgore calls “carceral humanism.” However, jails cannot play those roles well; public health experts say incarceration can exacerbate substance use disorders and mental illness, and leads to other consequences, including homelessness, preterm births, and overdose deaths.

COVID-19 presented two major challenges to the status quo. First, the danger of coronavirus spurred rapid jail population reductions. Based on incomplete data, the jail population decreased by a median of 30%, with some jails cutting their populations by 70% or more. That happened because: 1) Justice system actors implemented statewide or local policies, in part because of fears of legal liability and pressure from organizers. Many of these changes focused on releasing people nearing the end of short sentences or charged with lower-level offenses or parole violations. Law enforcement reduced arrests for misdemeanor offenses; and 2) the changed societal patterns, including shelter-in-place orders, led to less opportunity for interaction with the justice system.

Second, despite that reduction, jails have become a key center of the public health crisis. Major outbreaks in Cook County, Los Angeles County, and dozens of suburban and rural jails have led to deaths, and outrage from people inside the jail and in surrounding communities.

However, the full extent of the spread of COVID-19 is unknown. Jails lack transparency, with few requirements to publicly report data, and those requirements differ by state. While some states, like Texas, have provided consistent public information about the spread of COVID-19 in jails, most have done nothing. The decarceration in response to COVID-19 should catalyze a reexamination of local justice systems, magnify scrutiny of jails, and spur reinvestment in public health. However, without significant data collection,

and subsequent policy change, the coronavirus could lead to another jail boom.

Evidence

Limited Data pre-COVID-19, Dubious Public Safety Returns

To date, jail populations have increased without any link to public safety. Evidence from decades of mass incarceration shows no statistically significant impact on decreasing crime. Further, research shows that pretrial detention actually increases the likelihood of future arrest. However, as evidenced by the lack of widespread reporting and the continued rise of jail populations in recent years, many policy-makers and justice system actors systematically fail to analyze and expose the system's flaws.

The Bureau of Justice Statistics (BJS) fields two major surveys: 1) The Annual Census of Jails, with a sample of several hundred jails; and 2) the Census of Jails, which captures all jails, and occurs roughly every five years. In both cases, BJS releases reports several years after collection, and lacks disaggregated data by race, ethnicity, gender, and charges or status.

Information about the health of people behind bars is even more limited. More than 1,000 people die annually in jails, according to a 2016 survey, the most recent federal data. However, this number is likely an undercount—reporting is uneven and, to avoid public scrutiny, sheriffs often release people to die in hospitals, according to ProPublica.

Same data limits hide the spread of COVID-19 in jails

COVID-19 has exposed how this lack of data might hide danger to people inside jails. The only consistent data collection efforts during the crisis have come from journalists, private-sector researchers, and a few state agencies, including the following.

- Journalism. *The New York Times* is tracking COVID-19 hot spots, and as of 27 June, approximately 24 jails had 100 or more cases. Existing data show that COVID-19 has infected more than 75,000 people incarcerated in jails and prisons and killed more than 667, though these numbers are almost certainly an undercount due to a widespread lack of testing. Reuters, the Marshall Project, and The Appeal have covered the crisis in jails, as have local media.
- Private-sector researchers. Vera collected data on more than 1,000 jails from before and after the pandemic, scraping jail rosters and aggregating reports, and collecting directly from the jailers. The NYU Public Safety Lab has gathered information from more than 1,000 jails, mostly through data scraping. Vera's analysis of the data suggests that the nation's total jail population declined by 26% in a matter of months.
- Estimates from state agencies. Texas, North Carolina, and isolated counties are voluntarily reporting COVID-19 cases and deaths from COVID-19 in jails.

Together, these data show that the jail population has significantly decreased and that the virus still continues to spread rapidly behind bars. However, the data do not break down the jail populations by gender, race, and ethnicity or help discern the differential impact of decreased bookings, increased releases, or the expedited resolution of cases.

A Possible Return

The pandemic calls for a reexamination of state and county reliance on jails, particularly as a default response to poverty, mental health, and substance use. Continued decarceration is not a foregone conclusion, however, and evidence shows that mass incarceration could worsen as a result of the pandemic. Both Vera-collected data and NYU Public Safety Lab data show that a substantial number of jail populations have already begun to increase after reaching lows in late April and early May. The Harris County jail in Texas, one of the hardest-hit by the virus, is returning to pre-COVID-19 population

levels. Some sheriffs are suggesting that larger jails would improve medical treatment and social distancing. The Dane County, Wisconsin sheriff, for example, pushed for more than \$140 million to build a new jail with enhanced medical facilities. The Henry County, Virginia sheriff is also using the coronavirus to speed jail construction, arguing that it is key to social distancing. Groups that aid sheriffs, including the National Sheriffs' Association and Major County Sheriffs' Association, are sharing webinars and memos to inform their constituents about using federal stimulus dollars to increase jail revenues. Moreover, counties have historically used federal and state payments to jails to stave off bankruptcy and to balance budgets.

Recommendations and Solutions

Even before the murder of George Floyd, the push for local, state, and federal reforms across the prison-industrial complex was well underway. Moreover, state and local spending had not uniformly returned to pre-recession levels. The COVID-19 crisis has further magnified the need for decarceration and true reinvestment in services and resources that promote public safety and public health, including treatment and education. The starting point for criminal justice after the coronavirus is to develop systems for more transparent, publicly available data, to reduce jail populations, and to disinvest in incarceration, including by restricting the construction of new jails. More specifically, we should do the following.

1. Increase data transparency. Some sheriffs and jail system authorities will say that they do not have the basic internal capacity necessary to produce data on jail population and conditions. However, voters and policy-makers need information to evaluate whether jail investments are necessary. Family members need information on their loved ones' health and well-being. The jail system, which touches 11 million lives and costs billions of dollars, should not continue to be the only

public system that evades basic questions of transparency and viability. The COVID-19 crisis has reiterated the extent to which jails operate in the shadows, at high cost to lives. To change that, we propose the following.

- Federal law should require that the Bureau of Justice Statistics implement strict requirements on data reporting and should create grants for states to build data systems, modeled on national data collection and production in the health and education fields. Jail and prison systems should also be required to implement facility-wide testing during public health emergencies and regularly report data on the health and mortality of people behind bars. US health programs have long implemented data systems to track and report health outcomes, so that small medical facilities could easily present data showing they are following basic rules and have the safety mechanisms in place to improve mortality rates. The federal government should take the lead on building a similar data system for jails, which would help provide real-time information on jail population trends.
- After prioritizing substantive reforms, state policy-makers should adopt legislation requiring data collection and public reporting on jail deaths, safety protocols, and daily population and booking data, including anonymized charge, bail, race, ethnicity, and gender data. At the state level, Florida passed a sweeping data collection bill in 2018, mandating that counties report data on jail populations, courts, and other agencies. Implementation has been slow, bedeviled by both local capacity and cost. Several states issue monthly or weekly jail reports that capture topline data, and some states and counties have contracted with vendors to build jail analytics dashboards—though the data is not always public-facing and can reflect a narrow set of policy questions. The new reforms should include public-facing data, support for local implementation, and a set of policy questions that reflect public priorities and the consequences of jail incarceration. One model is

Utah's Senate Bill 205, which was signed into law in 2018 and requires the Department of Corrections and county jails to report deaths in custody—including deaths that occur while someone is being transported for medical care or has been hospitalized directly from the jail to close reporting loopholes. Current events have pushed organizers to refocus their attention on those who die at the hands of law enforcement, which should include those in jail.

2. Further decrease jail populations.

- Sustain COVID-19-era reforms that reduce jail admissions and lengths of stay. Judicial actors and prosecutors have broad discretion to make decisions about pretrial detention, diversion, speedy trials, and dispositions. Law enforcement and jailers can exercise discretion too, by decreasing arrests and bookings and facilitating early releases. Aaron Littman of UCLA outlines the discretionary power of sheriffs, wardens, and jailers in every state, including:
 - The ability of an arresting officer to cite and release or release people with verbal warnings;
 - the ability of a sheriff or relevant jail personnel, regardless of the arresting agency, to release people at booking;
 - the ability of sheriffs, wardens, and jailers to release people from jail based on an emergency, overcrowding or time served.

Before this emergency, fewer arrests, fewer bookings, and quicker releases would have reduced deaths and improved public health outcomes. Justice system actors should make these changes permanent after the COVID-19 crisis and shift responsibility for first-response to mental health and substance use crises away from police to non-law enforcement emergency personnel.

- State policy-makers should follow suit by reducing the use of incarceration as a punishment or sanction. Emergency legislation should narrowly define who can be subject to pretrial detention, decriminalize many misdemeanor crimes and felonies, eliminate

incarceration as a response to violations of supervision, increase funding for alternatives to incarceration, eliminate most or all legal financial obligations that further criminalize poverty, and expand multiple release mechanisms.

3. Stop jail growth and new construction projects. This moment has made clear the dangers of jail construction, particularly at the expense of community-level investments that serve public safety, and should mark the end of jail expansion. This should include the following.
 - Eliminate federal funding sources that incentivize county governments to invest in new jail construction that sustains the ongoing jail construction boom. This includes Intergovernmental Service Agreements (ISGAs) with Immigration and Customs Enforcement (ICE) and the US Marshals Service, which incentivize counties to build new jails with the capacity to house federal detainees. Jails should also be ineligible for federal loan and grant dollars meant for essential community facilities or economic development.
 - Counties and jail oversight bodies should pause all jail construction and expansion until they have undertaken meaningful analysis, in partnership with communities, of the drivers of incarceration and implemented all policies and investments that can safely reduce incarceration. County commissioners should earmark the cost savings from reduced incarceration for community-based services and resources and non-law enforcement responses to mental health and drug crises.

As investment in and oversight of law enforcement gains national attention, local reformers continue to advance decarceration and decriminalization. Those local organizers are leading the way, reining in arrests and pretrial detention, curtailing law enforcement discretion, challenging the school-to-prison pipeline, limiting law enforcement budgets, and calling for additional accountability and transparency. These efforts, including the response to the murders of George Floyd and Breonna Taylor, are pushing for a future where any

interaction with jails is far more limited and won't be a death sentence. *Another world is possible.*

Key Resources

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mass incarceration, and elevating the surprising truth that America's highest rates of incarceration are not in the biggest cities, but in the nation's hundreds of smaller cities, towns, and rural areas. Her work is meant to inform the public dialogue, engage new allies, and advance change in order to end mass incarceration where it begins—in all of our backyards.

Max Rose is the Executive Director of Sheriffs for Trusting Communities, which works with organizers to stop deportations, end mass incarceration, and build progressive, multiracial political power. His research and writing, both academic and for popular publications, has focused on race, inequality, and the American South.