

April 20, 2020

Dear Judicial Council,

We write to you as law professors in the State of California. We wish to provide our perspective on the emergency orders and measures taken by the judiciary in this unprecedented time. We urge the Judicial Council to take the swift action needed to protect all our community members from the imminent threat of COVID-19 by amending recently issued orders that extend the timelines for criminal hearings.

As you are well aware, the novel Coronavirus poses an extraordinary risk to the health of our community members incarcerated in jails and prisons. This virus, more than others, has the ability to spread quickly; and the living conditions within our jails will facilitate this spread. Rikers Island in New York City went from 0 cases to 650 in the span of four weeks.<sup>1</sup> Warnings from medical professionals familiar with jail populations have been dire.<sup>2</sup>

We write specifically to address the orders issued on March 23, 2020 and March 30, 2020 that extend, or authorize the extension of, the statutory time for criminal proceedings, and the issues they present for people incarcerated pretrial. The March 30th order authorizes counties to triple the number of days an individual could be held in custody awaiting their preliminary hearing. For individuals whose trial dates were already set and have been waiting for at least 60 days (if not longer), the order authorizes an additional two-month delay for their trial.

As a result of the March 30th order, 48 out of the 58 California counties have adopted orders that adhere in full or in part to the extensions authorized by the Chief Justice. These extensions reflect sound, appropriate policy when they keep those who are out of custody safely away from courthouses. For people in custody, however, these orders will keep them confined longer, and in conditions where they are at imminent and high risk of illness, injury, and death from COVID-19. Such a situation clearly infringes upon

---

<sup>1</sup> Cheney-Rice, *Rikers Reports Its First COVID-Related Prisoner Death*, *Intelligencer* (Apr. 6, 2020) <<https://nymag.com/intelligencer/2020/04/rikers-island-reports-its-first-covid-related-prisoner-death.html>> (as of Apr. 15, 2020).

<sup>2</sup> Dr. Homer Venters, former chief medical officer of New York City jails, recently said, “[i]n ordinary times, crowded jails overlook prisoners’ medical problems and struggle to separate them based on their security classification...[i]f jails have to add quarantines and sequestration of high-risk prisoners to the mix...they will find managing a COVID-19 outbreak ‘simply almost impossible.’” Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, *Mother Jones* (Mar. 12, 2020) <<https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/>> (as of Apr. 16, 2020).

the due process rights of people incarcerated pretrial as laid out below, and it is urgent that these orders be amended to reflect these concerns.

In the context of pretrial detention, there are two important rights at stake: excessive bail and due process. By issuing emergency orders that reduce bail to zero dollars in the majority of criminal cases, the Chief Justice has taken a laudable step toward mitigating the excessive bail issue and decarcerating California jails. We hope that the counties throughout the state take this charge seriously and issue collective release orders that result in decarceration quickly and efficiently.<sup>3</sup>

We then must turn to the due process analysis. Courts have deemed pretrial incarceration as serving a compelling and legitimate governmental interest in community safety.<sup>4</sup> This interest must be weighed against individual liberty interests. Under the U.S. and California Constitutions, pretrial liberty is a fundamental interest “second only to life itself in terms of constitutional importance.”<sup>5</sup> The U.S. Supreme Court has expressed that the weight on either side of the balancing test may shift given the circumstances, stating in *U.S. v. Salerno*, “that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”<sup>6</sup> Both sides of this balancing test are implicated by the March 30th order.

In the context of a global pandemic, the link between pretrial detention and the compelling and legitimate governmental interest in community safety is weakened. First and foremost, the risk to people incarcerated in jails around the state is heightened; their safety is in extreme jeopardy. Further, we must consider the risk posed to the safety of the community at large when our jails are overrun with this virus. On a given day, there are 70,000 people incarcerated in this state’s jails, and thousands of people that enter the jails on a daily basis.<sup>7</sup> This is an exigent risk to public safety that is certain to cause infection and illness in communities in and outside of the jail-- a far more certain prediction than that we are able to make about people’s future dangerousness or risk of flight. High rates of pretrial detention are jeopardizing, not preserving, community safety.

---

<sup>3</sup> Unfortunately, this has not occurred in many counties around the state, forcing public defenders to file motions for release pursuant to the emergency bail schedule in each individual case, which in turn prolongs the amount of time people are incarcerated pretrial even when they are eligible for release on \$0 bail.

<sup>4</sup> *U.S. v. Salerno* (1987) 481 U.S. 739, 749.

<sup>5</sup> *Van Atta v. Scott* (1980) 27 Cal. 3d 424, 435; *Salerno, supra*, at 750.

<sup>6</sup> *Salerno, supra*, at 748.

<sup>7</sup> Pohl, *California jails, prisons on alert for coronavirus. Fear it will ‘spread like wildfire’*, The Sac. Bee (Mar. 9, 2020) <<https://www.sacbee.com/news/california/article240962761.html>> (as of Apr. 15, 2020).

On the other side of the scale is the individual liberty interest, which is heightened when the risk of contracting a deadly virus is skyrocketing and officials tasked with providing for the safety of incarcerated people are not implementing the necessary health measures to protect individuals.<sup>8</sup> In many county jails across the state, people incarcerated pretrial are being denied free soap, cannot make the choice to wear protective gloves or masks, do not have access to sufficient disinfectant for cleaning, do not have regular access to showers, cannot practice social distancing, and are being deprived of relevant medical information about the virus.<sup>9</sup> Many also remain in the dark about how their loved ones on the outside are faring.

When the world is facing rapidly changing and unprecedented circumstances, the balancing test must shift as broad issues of public health are taken into account. The March 30th order lays out the importance of a policy that “balanc[es] the constitutional due process rights of parties in both criminal and civil proceedings with the health and safety of these parties.” Here, the fundamental liberty interest of those incarcerated is inextricably linked to protecting the health of every single person in our communities. This is to say that the delays called for and adopted by [48 counties](#) will fail this balancing test. They will indeed deprive many people incarcerated in jails of their constitutional rights, and will do so specifically *because* they exacerbate risks to health and safety. Thus, the proposed time extensions for criminal hearings, when enacted by the counties as a response to the pandemic, unduly infringe upon the due process rights of people incarcerated pretrial. This is something we cannot stand behind as a state and we must do everything in our power to stop the spread of the Coronavirus in the state’s jails now.

Additionally, when the government acts to restrict a fundamental liberty interest, that action must be narrowly tailored.<sup>10</sup> The order to extend *all* arraignments, preliminary hearings, and jury trials--regardless of the type of offense and regardless of the

---

<sup>8</sup> The Eighth Amendment—and by extension, the Due Process clause—requires that “inmates must be furnished with the basic human needs, one of which is ‘reasonable safety.’” See *Helling v. McKinney* (1993) 509 U.S. 25, 33 (quoting *DeShaney v. Winnebago Cnty Dept. of Social Services* (1989) 489 U.S. 189, 200.) This extends to protection from an “unsafe, life-threatening condition” such as an infectious disease. *Id.* Orders that lengthen the amount of time individuals are incarcerated during a deadly pandemic needlessly expose these individuals to imminent danger of serious injury or death.

<sup>9</sup> Tchekmedyan & Hamilton, *L.A. jail inmates say lack of soap and toilet paper heightens coronavirus fear: ‘Like slow torture’*, L.A. Times (Mar. 30, 2020) <<https://www.latimes.com/california/story/2020-03-30/coronavirus-inmates-hygiene-supply-shortage-la-jails>> (as of Apr. 15, 2020); see also Duara, *Like a Petri dish for the virus: Tens of thousands of California inmates are at risk*, CalMatters (Apr. 13, 2020) <<https://calmatters.org/california-divide/2020/04/californias-inmates-are-at-high-risk-coronavirus/>> (as of Apr. 15, 2020).

<sup>10</sup>*Reno v. Flores* (1993) 507 U.S. 292, 301.

individual's custody status--is not narrowly tailored. An action is narrowly tailored when there are no less restrictive means to achieve the compelling governmental interest. There is no evidence that less restrictive means were considered prior to the issuance of these orders.

One step toward implementing the least restrictive means in this situation would be to extend hearing timelines for people at liberty while maintaining statutory speedy trial rights for people in custody. As the number of people released from jails increases, this should alleviate the number of in-custody hearings that are needed. To ensure the safety of staff, witnesses, and jurors who will still need to enter the courthouses, the state can work towards solutions that incorporate social distancing. Lessons can be taken from the existing mandatory practices for grocery stores and other essential businesses that maintain the safety and wellbeing of customers as well as workers.

As our communities adjust to the pandemic, many workers have been appropriately characterized as "essential." Their continued efforts meet our basic needs. There is an implicit duty to maintain medical services, food supply chains, and delivery routes. Certainly, where presumptively innocent people are detained and seeking to exercise their rights, judges and other court personnel are essential in responding to this crisis and preventing the spread of the virus. The circumstances in this moment arguably place upon them a duty to process faster, rather than slower, the cases of those who are in custody.

As scholars, lawyers, advocates, and residents of the State of California, we welcome any opportunity to consult with the Judicial Council in order to provide solutions that protect constitutional rights, are aligned with good public health practices, and ensure that we flatten the curve and keep all of our community members safe and healthy.

Sincerely,

Ty Alper  
Clinical Professor of Law  
UC Berkeley School of Law

Jody Armour  
Roy P. Crocker Professor of Law  
University of Southern California Gould School of Law

Rosa Bay  
Interim Clinical Director  
East Bay Community Law Center, a Clinical Program of UC Berkeley School of Law

Caitlin F. Bellis  
Clinical Fellow, UCI Immigrant Rights Clinic  
UC Irvine School of Law

Juliet Brodie  
Professor of Law  
Stanford Law School

Samantha Buckingham  
Clinical Professor and Director, Juvenile Justice Clinic, Center for Juvenile Law and  
Policy  
LMU Loyola Law School

Jennifer Chacon  
Professor of Law  
UCLA School of Law

Erwin Chemerinsky  
Dean and Jesse H. Choper Distinguished Professor of Law  
UC Berkeley School of Law

Tony Cheng  
Director, Youth Defender Clinic  
East Bay Community Law Center, a clinic of UC Berkeley School of Law

Sharon Dolovich  
Professor of Law, UCLA School of Law  
Director, UCLA Prison Law and Policy Program  
Director, UCLA COVID-19 Behind Bars Data Project

Donald Dripps  
Warren Distinguished Professor of Law  
University of San Diego School of Law

Ingrid Eagly  
Professor of Law  
UCLA School of Law

Malcolm M. Feeley  
Claire Sanders Clements Professor (Emeritus)  
UC Berkeley School of Law

George Fisher  
Judge John Crown Professor of Law  
Stanford Law School

Fanna Gamal  
Binder Clinical Teaching Fellow  
UCLA School of Law

Kathy Khommarath  
Staff Attorney, Program Manager, and Adjunct Professor  
Southwestern Law School Pro Bono Removal Defense Program and Removal Defense  
Clinic

Christopher Kutz  
Maxeiner Distinguished Professor of Law  
UC Berkeley School of Law

Máximo Langer  
Professor of Law  
Faculty Director of the Criminal Justice Program  
UCLA School of Law

Aaron Littman  
Binder Clinical Teaching Fellow  
UCLA School of Law

Susan Luban  
Supervising Clinical Attorney  
Stanford Law School

Eric J. Miller  
Professor and Leo J. O'Brien Fellow  
LMU Loyola Law School

Paula Mitchell  
Legal Director, Loyola Law School Project for the Innocent  
LMU Loyola Law School

Saira Mohamed  
Professor of Law  
UC Berkeley School of Law

Brenda Montes  
Adjunct Supervising Attorney  
Southwestern Law School

Claudia Polsky  
Assistant Clinical Professor of Law  
UC Berkeley School of Law

Jeff Selbin  
Clinical Professor of Law  
UC Berkeley School of Law

Elisabeth Semel  
Clinical Professor of Law  
UC Berkeley School of Law

Dan Simon  
Richard L. and Maria B. Crutcher Professor of Law & Psychology  
University of Southern California Gould School of Law and Department of Psychology

Jonathan Simon  
Professor of Law  
UC Berkeley School of Law

Robert Solomon  
Clinical Professor of Law  
UC Irvine School of Law

Megan Stanton-Trehan  
Director and Adjunct Professor, Youth Justice Education Clinic, Center for Juvenile Law  
and Policy  
LMU Loyola Law School

Ronald Tyler  
Professor of Law  
Stanford Law School

Julia Vázquez  
Associate Clinical Professor of Law  
Southwestern Law School

Alicia Virani  
The Gilbert Foundation Associate Director, Criminal Justice Program  
UCLA School of Law

Charles D. Weisselberg  
Josef Osheawich Professor of Law  
UC Berkeley School of Law

Andrew R. Whitcup  
Lecturer in Law  
David J. Epstein Program in Public Interest Law & Policy  
UCLA School of Law

Franklin E. Zimring  
Simon Professor of Law  
UC Berkeley School of Law