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Legal Background: Emergency Powers and Civil Liberties

- Covid-19: what we know is that we don't know much

- Knowing the legal background leads to informed decisions in a dynamic and complex situation



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California's Fine-Tuning

County risk level	New cases	Positive tests
WIDESPREAD Many non-essential indoor business operations are closed	**More than 7** Daily new cases (per 100k)	**More than 8%** Positive tests
SUBSTANTIAL Some non-essential indoor business operations are closed	**4-7** Daily new cases (per 100k)	**5 – 8%** Positive tests
MODERATE Some indoor business operations are open with modifications	**1 – 3.9** Daily new cases (per 100k)	**2 – 4.9%** Positive tests
MINIMAL Most indoor business operations are open with modifications	**Less than 1** Daily new cases (per 100k)	**Less than 2%** Positive tests



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Emergency Powers

- Broad authority to declare emergencies
- For example, California Emergency Services Act (Govt. Code Tit. 2, Div. 1, Ch. 7.)
- Local emergency declarations (typically codified in municipal or similar codes)
- Includes the power to suspend any statute or other rule or regulation . . . but how far is too far?



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Emergency Powers vs. Civil Liberties

- *Jacobson v. Massachusetts* (1905) 197 U.S. 11 "[T]he liberty secured by the Constitution of the United States to every person . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."



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Emergency Powers vs. Civil Liberties

- *In re Juan C* (1994) 28 Cal. App. 4th 1093
  - "[T]he government must make every effort to avoid trammeling its citizens' constitutional rights. By the same token, those rights are not absolute. '[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.'"
  - "An ***inherent tension*** exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife."



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Judicial Review of Exercise of Emergency Powers

"[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' (*Jacobson* at *31.) Courts may ask whether the state's emergency measures lack basic exceptions for 'extreme cases,' and whether the measures are pre-textual—that is, arbitrary or oppressive. (*Id.* at *38.) At the same time, however, courts may not second-guess the wisdom or efficacy of the measures." (*In re Abbott*, 956 F.3d 696, 705 (5th Cir. 2020).)



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Emergency Powers Are Not Absolute

- While courts defer to government during declared emergencies, that deference is not absolute
- “[T]he government must make every effort to avoid trammeling its citizens’ constitutional rights. By the same token, those rights are not absolute.” (*In re Juan C).*



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Emergency Powers Are Not Absolute: Sliding Scale

- Sliding scale of emergency powers vs. civil liberties

←Dire Emergency ---------- Speculative Emergency →
←Abridge Liberties ---------- Protect Liberties →

- Especially relevant as pandemic stretches out and waxes and wanes
- Frequently refresh the official emergency record



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Gish et al. v. Newsom

- Health orders barred large gatherings, including religious gatherings.
- Court applied both standards:
  - *Jacobson*:
    - Ends: LATimes death rates, CDC data, social distancing guidelines (flattening curve, reducing infections, freeing up emergency rooms)
    - Means: “Real or substantial relationship” to crisis
  - Non-emergency constitutional scrutiny
    - Facially neutral: ban also applied to secular gatherings in theaters, schools, and stadiums
    - Logical to ban longer v. shorter contacts (groceries, pharmacies)



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Ends and Means

(strict scrutiny)

- Courts rarely second-guess goals/ends:
  - Flattening curve
  - Limiting infections
  - Freeing up hospital beds
- Means/strategies are more vulnerable
- Importance of showing basis and thought-process for both
- Neutral standards (Who gets caught in net?)
- Scrub for anti-1st Amendment bias



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MIT: "Apps Gone Rogue"

Technological Intervention	Broadcast	Selected Broadcast	Unicast	Participatory	PrivateKit: Safe Paths Phase 1 (Broadcast)
ACCURACY	Limited	Limited	High	Limited	High
ADOPTION	High	Medium	Medium	Low	Medium
1. Privacy					
Privacy risks for carriers	Significant	Moderate	Moderate	Significant	Moderate to Low, although only redacted location trails are released to the public, a small chance for public identification remains.
Privacy risks for local businesses	Significant	Significant	Moderate	Significant	Moderate to Low, although only redacted location trails are released to the public, a small chance for public identification remains.
Privacy risk for users	Privacy protected	Privacy at risk	No privacy	Privacy protected	Privacy protected
Privacy risk for non-users	Privacy at risk if carriers are identified	Privacy at risk if carriers are identified	Privacy at risk if carriers are identified	Privacy at risk if carriers are identified	Privacy at risk if carriers are identified
2. Consent					
Consent of carriers	Practices vary	Practices vary	Practices vary with limited or no consent most frequently applied	Full consent	Full consent
Consent of businesses	Rare	Rare	Rare	Unlikely	Depends on government practice
Consent of users	Not applicable	Consent mostly needed	Consent mostly needed. Consent to make public their information once their are a carrier is typically required to become a user.	Not applicable	Consent needed
3. Systemic challenges					
Misinformation and panic	High risk	Medium risk	Medium risk	High risk	Medium risk
Panic	High risk	High risk	Low risk	High risk	Low risk
Risky behavior	Low risk	Low to medium risk	High risk, especially if the system is widely used	Low risk	Medium risk, due to a strong, user focused educational campaign
Fraud and abuse	High risk	High risk	High risk	High risk	Low risk, the identity of carriers and businesses are not publicized and access to the system is controlled
Security of information	Low to medium risk	Low to medium risk	High risk, large data collection appeals to bad actors	Low risk, carriers choose to share their information publicly	Low to medium risk, user data is not collected and carrier location trails are distributed among local government entities
Equal access	Mostly accessible	Limited by technological requirements (smartphone, battery, certain OS asf.)	Limited by technological requirements (smartphone, battery, certain OS asf.)	Limited by technological requirements (smartphone, battery, certain OS asf.)	Limited by technological requirements (smartphone, battery, certain OS asf.)
Socioeconomic factors	Low-income earners unequally affected	Low-income earners unequally affected	Low-income earners unequally affected	Low-income earners unequally affected	Low-income earners unequally affected



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Case Applications

- Political Protest
- Elections and Initiatives
- Second Amendment
- Substantive Due Process
- Eviction Moratoria
- Political Speech



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Caveats

- Many cases are interlocutory (TRO's, procedural, etc.)
- Distinct orders (*First Baptist Church v. Kelly – Kansas)*
- Separation of powers/rulemaking (*Wisconsin Legislature v.* Palm)
- Federalism/preemption



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Resilience Roadmap

- Where to find it:
  - Covid19.ca.gov
    - Double-check “county variance info”
    - Counties can be stricter than state
    - Many measures are advisory
    - Many relate to individuals, not government
    - Some contain numerical thresholds
  - Fast-moving and often moot



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Worker Safety, Liability and Insurability

- Ownership or maintaining public facilities in contravention of State or County health orders
- Violations as breach of a mandatory duty not protected by government immunity?
  - No: Orders are directed in large part toward individuals.
  - Yes: Specificity and detail apply to government.
- Consultation with risk pool and carrier re tort immunity.
- ”Virus” exclusions in coverage.



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Leases, Concessions, and Grants

- "… improper, immoral, *unlawful*, or objectionable purposes…"
- "…promptly comply with all laws and regulations of governmental entities"
- " … all regulations, orders, permits, and other requirements issued or made pursuant to any such ordinances and statutes."



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Face Coverings in Public Spaces

- CDC: recommend face coverings by all who enter public spaces, including public facilities.
- Some legal challenges
  - *Power v. Leon County* (Fla.Cir.Ct. June 25, 2020) 2020 WL 3468349: denied a motion to enjoin the county's mask ordinance.
  - Early July, the Freedom Foundation filed a complaint challenging Washington state's face covering mandate.
  - Late July the Governor of Georgia filed a complaint challenging the City of Atlanta's face mask mandate.
  - Over 30 customers have sued a Pittsburgh-based grocery chain over its mask requirement,
  - Judge in Louisiana granted a temporary restraining order to businesses, preventing authorities from enforcing the mayor's mask requirement.



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Temperature Screenings and the Fourth Amendment

- U.S. Supreme Court: physical examinations of aspects of persons' bodies that are normally hidden implicate protected privacy interests (see *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652.)
- No case law directly on point, but . . .
- Likely that screenings = Fourth Amendment search
- Must be justified if not warranted



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Temperature Screenings and the Fourth Amendment

- Exceptions to the warrant requirement:
  - Consent
  - Exigent Circumstances
    - Broad deference to government during emergency
    - Sliding scale: constantly reexamine the need for screenings, and refresh the emergency record



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Temperature Screenings Best Practices: Employees

- Official procedure and protocols for screenings
- Privacy is paramount
- Example
  - Screening as cars enter lot
  - If temperature too high or answer yes to any screening questions, employee asked to work from home.



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Temperature Screenings Best Practices: Visitors

- Procedure should be reviewed and approved by legislative body coupled with findings
- Screening questions
- Ensure privacy of those being screened
- Non-contact laser/infrared thermometer
- CDC guidelines re temperature (100.4+)



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Temperature Screenings and the First Amendment

- “City Hall” as a nonpublic forum: place of business
- No First Amendment rights
- However, alternative access to transacting business should be provided
- Always looks for ways to accommodate



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Temperature Screenings and the First Amendment

- Public meeting as a limited public forum with free speech rights
- Screenings therefore carry risk of violating both Fourth and First Amendment rights
- If agency implements screenings, alternative means of communication and access are vital to avoid challenge



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Temperature Screenings: the ACLU's Warning Shot

- "Temperature Screening and Civil Liberties During an Epidemic"
- Effectiveness?
  - Skin temperature can vary based on sunburn, sweat, or location.
  - Thermometers that gauge temperature at a distance can be inaccurate, finicky, and may need to be frequently recalibrated.
  - Even if they were more accurate they could miss many people who were infected but not running a fever.
- Privacy issues
- Exercise Caution!



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Next Steps

- Until we have a vaccine, public agencies will have to balance safety with access, which must be done constitutionally and in compliance with privacy laws
  - 14th Amendment: practices can't treat different classes of people differently (e.g., seniors and at-risk populations)
  - Age discrimination: do orders or local policies not allow older residents to participate fully? Are they singled out?
  - Disability discrimination: do orders or local policies single out the sick of those with comorbidities?
- Remember: the further we move on the scale from the dire emergency, the harder it is to justify encroaching on liberties



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Questions?





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