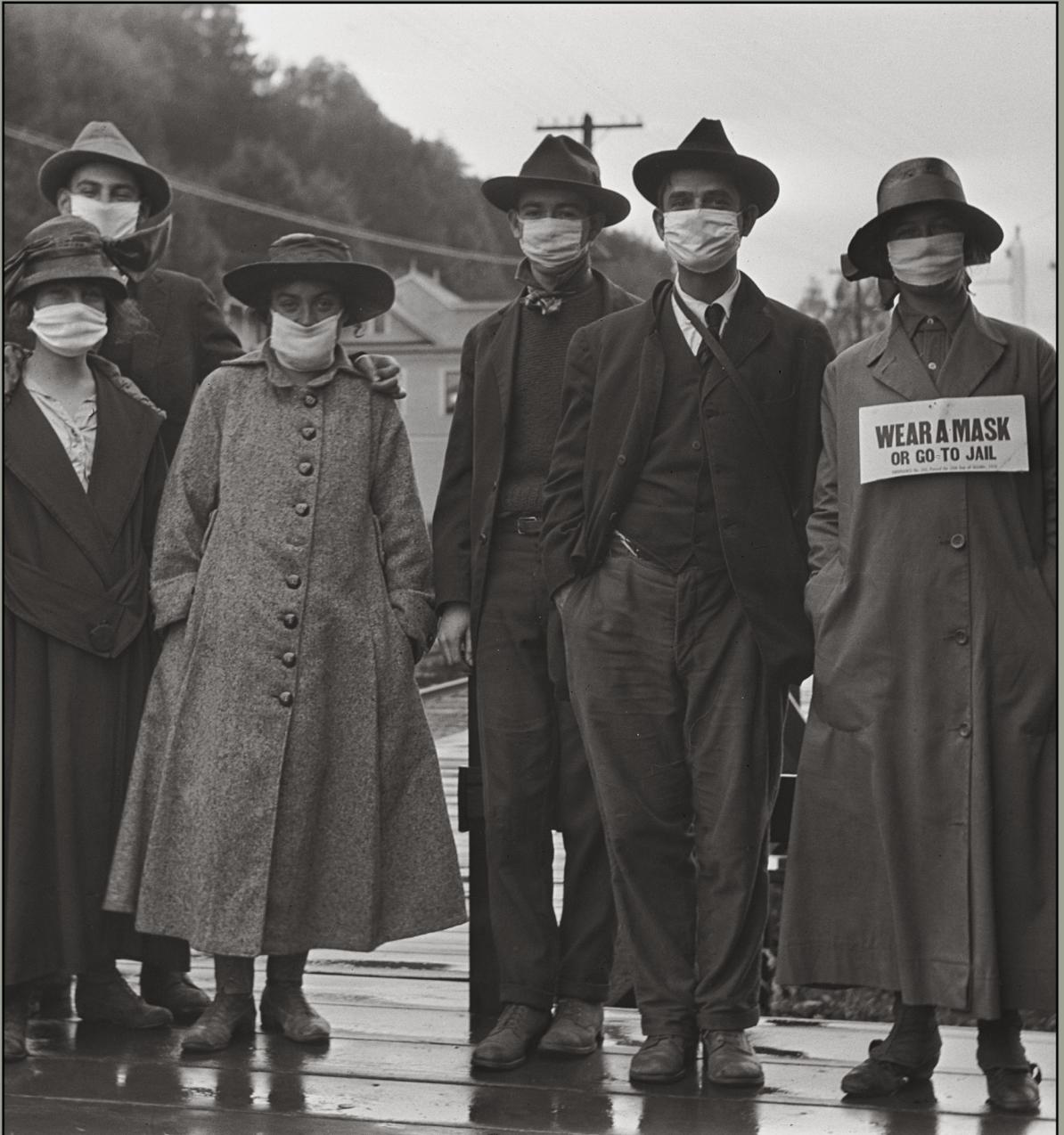




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What Did We Learn?

California Courts' Response to the 1918 Influenza Epidemic



People waiting in-line to get flu masks to avoid the spread of Spanish influenza. Montgomery Street in San Francisco, 1918. Photo: Wikimedia Commons.

What Did We Learn from the California Courts’ Response to the Influenza Epidemic of 1918–1919?

BY JENNIFER KING

THE CALIFORNIA JUDICIARY’S response to the COVID-19 pandemic was swift and thoughtful. Mindful of the need to balance community health and safety needs with individual civil and constitutional rights and liberties, the Judicial Council of California, chaired by California Chief Justice Tani G. Cantil-Sakauye, issued emergency measures beginning in March 2020.¹ Following the first statewide stay-at-home order, the Judicial Council extended several statutory deadlines, suspended jury trials for 60 days and expanded the use of technology to conduct proceedings remotely.²

As the pandemic evolved, so did the Judicial Council’s response. Because the coronavirus had manifested itself differently throughout the state, California’s six

appellate districts and 58 trial courts confronted different impacts. As a result, the Judicial Council moved away from statewide orders and relied on flexible advisories and orders unique to each court to address the pandemic. By December 2020, Chief Justice Cantil-Sakauye had signed 353 emergency orders to assist trial courts in their COVID-19 management efforts.³ For example, a January 2021 order concerning Los Angeles County provided flexibility for the locations of holding criminal hearings and extended a number of statutory deadlines in criminal and juvenile dependency cases, whereas January 2021 orders in smaller counties such as Lake County and Placer County provided only a 30-day extension for the time periods specified in Penal Code section 1382.⁴

Even now, when we can begin to envision a future where court operations return to some semblance of normality, the Judicial Council remains flexible, modifying its guidance to adapt to an ever-changing situation, a response that has required constant oversight

1. Merrill Balassone, “California Chief Justice: ‘No need and no right will be overlooked,’” *California Courts Newsroom*, <https://newsroom.courts.ca.gov/news/california-chief-justice-no-need-and-no-right-will-be-overlooked> (as of Mar. 6, 2021).

2. “Judicial Council of California Statewide Emergency Order by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council, March 30, 2020,” *California Courts Newsroom*, <https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/StatewideOrder%2520by%2520the%2520Chief%2520Justice-Chair%2520of%2520the%2520Judicial%2520Council%25203-30-2020.pdf> (as of Mar. 6, 2021).

3. Merrill Balassone, “California Chief Justice Issues Advisory to Courts Amid COVID-19 Surge,” *California Courts Newsroom*, <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-advisory-courts-amid-covid-19-surge> (as of Mar. 6, 2021).

4. “Court Emergency Orders,” *California Courts Newsroom*, <https://newsroom.courts.ca.gov/covid-19-news-center/court-emergency-orders> (as of Mar. 6, 2021).



“I have been inspired by what courts at every level of our justice system have been able to achieve in their unprecedented efforts to serve the public during this time.”

Chief Justice Tani Cantil-Sakauye, Mar. 12, 2021.

and vigilance. As Chief Justice Cantil-Sakauye observed early in the pandemic, “We are at this point truly with no guidance in history, law or precedent. To say that there is no playbook is a gross understatement of the situation.”⁵

At first blush, the absence of a playbook might seem surprising given that California confronted a world-wide pandemic just over 100 years ago. Between spring 1918 and mid-1919, an influenza pandemic that came to be known as the “Spanish flu” blanketed the globe, killing an estimated 50 million people, including 675,000 in the United States.⁶ There are myriad similarities between California’s overall response then and now, including that state courts adopted individualized responses based on the needs of their communities. Yet, there is no indication that the judicial system yielded any takeaways from its response to the Spanish flu.

Indeed, the lack of a playbook for the California courts might be because there were no coordinated “plays” executed in response to the 1918 pandemic. The Judicial Council did not yet exist and there is no indication that any other entity stepped in to provide centralized guidance. Instead, courts throughout the state appeared to act independently — and arguably erratically — resulting in a range of responses.⁷ At the highest level, there seems to be little evidence that the influenza outbreak caused major disruption to the work of California Supreme Court. On October 18, 1918, one week after Los Angeles had adopted a public closure order, the Court met to hear cases in Los Angeles.⁸ By mid-November, however, the Court did implement a

5. Balassone, “California Chief Justice: ‘No need and no right will be overlooked,’” *supra* note 1.

6. N. Pieter M. O’Leary, “The 1918–1919 Influenza Epidemic in Los Angeles” (2004) 86 *S. Calif. Qtrly.* 391–403.

7. The lack of centralized authority likewise means there is no central repository of information summarizing the California courts’ response to the influenza. The information about those responses outlined in this article has been obtained primarily from contemporaneous newspaper articles, as well as from more recent academic and other articles focusing on California’s response more generally.

8. *Id.* 393–94; Minute Order by the California Supreme Court (1918, Oct. 18) [Cal. Judicial Center Library].

two-week continuance for the cases it was scheduled to hear in Sacramento.⁹

At the trial court level, individual judges controlled the response of their courtrooms. They decided what safety measures to implement and/or whether to postpone proceedings. One of the most well-known photographs from the time period depicts Judge John J. Sullivan conducting a trial outside in San Francisco’s Portsmouth Square during October 1918. His stated goal was to conduct timely criminal proceedings while striving to protect public safety.¹⁰ Judge Sullivan acknowledged that physicians recommended fresh air and sunshine as preventive measures against influenza, stating, “There seems to be no great reason why several hundred persons should be cooped up together to scatter the germs when we can all go into the open air.”¹¹ During the first day of open air court, Judge Sullivan disposed of 20 criminal cases, including one involving a man who was sentenced to three months in jail for expectorating on the sidewalk and making disloyal remarks. Once court adjourned, the park superintendent informed Judge Sullivan he had broken the law by convening a large gathering without a



Open-air police court being held in Portsmouth Square, San Francisco during October 1918. *Photo: Public domain.*

permit. Undeterred, Judge Sullivan announced he would resume open-air court the next morning.¹² Perhaps the reason why only one such photograph can be found is that Judge Sullivan’s open-air court sessions quickly ended when, instead of resuming court, he stayed home the next day with a cold, amidst reports that his son had contracted the Spanish flu.¹³

9. Minute Order by the California Supreme Court (1918, Nov. 4) [Cal. Judicial Center Library].

10. S. Villaran, “Reflections on the first post-pandemic jury trial in San Francisco,” *The Daily Journal*, Sept. 23, 2020.

11. “Police Court to Hold Sessions in Open Air,” *San Francisco Examiner*, Oct. 20, 1918, 6.

12. “Police Court is Held in Park,” *San Francisco Examiner*, Oct. 22, 1918, 13.

13. “Open Air Judge Gets Cold; Son Has Influenza,” *Santa Ana Register*, Oct. 22, 1918, 1.



Volunteer nurses from the American Red Cross tending influenza sufferers in the Oakland Auditorium, Oakland, California, 1918. Photo: Wikimedia Commons.

Sometimes the courts' decisions were last minute. Also in October 1918, Police Judge Ray L. Chesebro established an outdoor courtroom in Los Angeles.¹⁴ Judge Chesebro's regular courtroom was in the old Normal School Building on Normal Hill.¹⁵ When a case was called against a Chinese herbalist alleged to be practicing medicine without a license, the jury panel, attorneys, court personnel and witnesses crowded into the courtroom. Once he saw the packed courtroom, Judge Chesebro ordered the proceedings to be conducted outdoors on the Normal Hill Center lawn and further ordered books, tables and chairs to be carried outside.¹⁶ Although at that point the defense waived a jury, witnesses were examined in the outdoor courtroom.¹⁷

An alternative to the outdoor courtroom was delay. Many courts did not implement trial continuances systematically but instead based them on the health of the judge, attorneys or parties. On October 22, 1918, the *Los Angeles Times* reported that a condemnation trial had been continued for three weeks because the judge, the deputy county counsel and the defendant's corporate secretary were suffering from influenza.¹⁸ The same report stated that proceedings in a different Los Angeles courtroom had forged ahead with a replacement judge while the assigned judge was out with influenza. Nonetheless, the replacement judge granted some continuances in that courtroom as a result of physicians' certificates confirming that a party or key witness was under quarantine due to influenza.¹⁹

The duration of court continuances varied. Modesto postponed setting any jury trials initially for two weeks

and thereafter for one week at a time for several weeks.²⁰ Sacramento continued its civil cases "until after the epidemic of influenza is under control" and temporarily continued its criminal cases while the jail was under quarantine.²¹ Likewise, the Placer County court halted all court proceedings "until the influenza epidemic has subsided."²² On his own motion, a Yuba County judge ordered a two-week adjournment of his court.²³ Courts in Los Angeles similarly issued various orders closing for one to two-week periods of time.²⁴ The Los Angeles federal court calendar was described as "considerably confused" due to the cessation of jury trials.²⁵ In late October 1918, all San Francisco trial courts continued jury trials and contested cases for four weeks, while a federal judge in San Francisco dismissed his jury panel and continued all jury trials "until the influenza epidemic subsides."²⁶

Sometimes in combination with delay and sometimes as an alternative thereto, courts elected to limit access to their courtrooms. Federal courts in Los Angeles started to resume jury trials without spectators after the superior courts had done so in November 1918, but ultimately decided not to resume jury trials until January 1919.²⁷ Sacramento courts continued all jury trials and "all cases likely to attract a crowd," but otherwise remained open for business.²⁸ Before turning to postponement, one Modesto judge continued to hold proceedings but cleared spectators from the courtroom.²⁹

In some instances, delay was unavailable because the influenza pandemic increased the courts' workloads. For example, Oakland's initial closure list included theaters and other places of amusement, but it omitted the closure of saloons. During the weekend of October 19–20, 1918, with saloons being the only remaining place to gather, police executed a record number of arrests for public drunkenness, which added 77 cases to the police court's

14. "Flu Cases Much Fewer," *Los Angeles Times*, Oct. 26, 1918, 1.

15. Normal Hill was a 70-foot rise that stretched from downtown Los Angeles to Elysian Park that was ultimately shaved down to allow for an extension of Fifth Street and the construction of the Los Angeles Central Library.

16. "Flu Cases Much Fewer," *supra* note 14, 1.

17. *Ibid.*

18. "Must Pay Your Taxes by Mail," *Los Angeles Times*, Oct. 22, 1918, 2.

19. *Ibid.*

20. "Jury Trials Will Be Held Over for Two Week Period," *Modesto Herald*, Nov. 3, 1918, 11; "Setting Jury Cases Postponed A Week," *Modesto Herald*, Nov. 16, 1918, 8.

21. "Criminal Trials Are Delayed By Epidemic," *Sacramento Bee*, Oct. 28, 1918, 4.

22. "No More Court Till Influenza is Over," *Press-Tribune* (Roseville), Oct. 29, 1918, 3.

23. "Court Adjourns; Saloons Close at Marysville," *Sacramento Bee*, Oct. 29, 1918, 8.

24. "May Reopen Schools Soon," *Los Angeles Times*, Oct. 24, 1918, 11.

25. "Flu Cases on Decrease Here," *Los Angeles Times*, Nov. 8, 1918, 13.

26. "Proclamation of Mayor Asks Masks for All," *San Francisco Chronicle*, Oct. 22, 1918, 8; "Dooling Calls Halt On Trials by Jury," *San Francisco Chronicle*, Oct. 26, 1918, 9.

27. "No Federal Court Jury Trials Until January," *Los Angeles Times*, Nov. 23, 1918, 14.

28. "Home Town Items," *Sacramento Bee*, Oct. 28, 1918, 6.

29. "Courtroom Cleared Because of the 'Influ,'" *Modesto Morning Herald*, Oct. 22, 1918, 6.

docket for Monday October 21.³⁰ Some courts in San Francisco began imposing jail sentences on individuals convicted of violating an ordinance prohibiting spitting on the street, explaining that such stringent measures were necessary to prevent influenza germs from being spread in such a manner.³¹

On occasion, the impact of the influenza pandemic resulted in unusual court proceedings. In a Pasadena case, a large estate owner brought suit against his neighboring estate owner alleging negative effects from an incinerator.³² Judge John Lewis R. Work ordered an expert “smelling expedition” to personally assess the incinerator’s impacts. The problem was that the experts risked violating Pasadena’s mask mandate in order to obtain an accurate sense of the odors being emitted. As a result, Judge Work contemplated both postponing the expedition or, in the event a mask violation was alleged, he made an extraordinary offer to represent the experts in court. In the end, Judge Lewis modified his order to require a report only on the impact of cinders and sparks from the incinerator and not its smell.³³

In at least one instance, the decision to move ahead with court proceedings had dire consequences. In 1918, California resident Harry Smelser reported for jury duty and became infected with the Spanish flu. His wife Dot cared for him, and although Mr. Smelser recovered, unfortunately his wife passed away from influenza.³⁴

At the time, these decentralized and varied responses by the judiciary did not lend themselves to creating a play-book designed to guide California in future pandemics. In hindsight, we know that public health measures need to be consistent, their rationale understandable and their enforcement steadfast. But local government officials, including the judiciary, faced enormous pressure from a skeptical and at times hostile public to measures found to be inconvenient, cumbersome or seemingly ineffective. In 1918 as now, scientists, and in turn public officials, faced a steep learning curve with a new, highly contagious, widespread and deadly illness. As a result, officials sometimes waffled and backpedaled, undermining the goals of consistency and steadfastness. These challenges extended far beyond court operations. Indeed, many of the critical issues that arose during the Spanish flu are

eerily similar to those California (and other states) faced with COVID-19. Here are just a few examples:

Responses Were Local

In 1918, there was really no mechanism for the federal government to take an active role in responding to the virus. Neither the Centers for Disease Control nor the Food and Drug Administration existed. Moreover, President Woodrow Wilson’s single-minded focus on victory in World War I contributed to the disease’s massive spread. Wilson failed to acknowledge the escalating civilian loss of life, insisting on continued troop mobilization even as the fighting abroad began to wind down.³⁵ Thus, the obligation to respond fell to states and largely to local governments.³⁶ Although local governments in California relied primarily on closing places of public accommodation and on recommending or requiring masks in public, no two jurisdictions responded in identical fashion.

For example, San Diego coupled its closure and mask orders with some unique recommendations. On October 13, 1918, after several individuals were hospitalized due to influenza and additional cases were reported among the jail population in San Diego, the city board of health — not the city council — closed public amusements and facilities indefinitely, empowering the police to enforce the order. The board quickly followed with a recommendation to use a quinine bisulphate nasal spray and wear masks.³⁷ The city health board encouraged residents to spend time outdoors, advising that fresh air served as a protection against the disease. One well-known San Diego physician further opined that the influenza could not survive in certain altitudes, leading San Diegans to flock to the nearby mountains.³⁸ The city board of health rescinded its closure in mid-November, but tried to reinstate it in late November after a spike in cases. The city council did not endorse the action until December 6, at which point it issued a three-day closure order for all but essential businesses, followed by a mask mandate that lasted through Christmas Eve.³⁹

Indeed, many of the critical issues that arose during the Spanish flu are eerily similar to those California (and other states) faced with COVID-19.

30. “Municipal Buildings to Augment Infirmary Facilities; Red Cross is Enlisted in Work; ‘Masks Appearing,’” *Oakland Tribune*, Oct. 21, 1918, 7.

31. “2 Get Jail Terms for Spitting on Sidewalk,” *San Francisco Examiner*, Oct. 24, 1918, 13.

32. “Court Sniffers Face Dilemma in Sniffing Minus Masks,” *Los Angeles Evening Herald*, Jan. 22, 1919, 13.

33. *Ibid.*

34. David Raybin, “Why has the Tennessee Supreme Court suspended jury trials until Independence Day?” *Tennessean*, May 22, 2020, <https://www.tennessean.com/story/opinion/2020/05/22/tennessee-supreme-court-suspended-jury-trials-until-independence-day/5244078002/> (as of Mar. 21, 2021).

35. John M. Barry, *The Great Influenza: The Story of the Deadliest Plague in History*, New York: Penguin Books, 2004, chs. 9–11.

36. “Lessons Learned From the 1918 Pandemic: Historical and Legal Framework of the Spanish Flu and How It Relates to Today’s Crisis,” *Hist. Soc. of the NY Courts* (May 11, 2020) <https://history.nycourts.gov/events/lessons-learned-from-the-1918-pandemic-webinar/> (as of Mar. 21, 2021).

37. Richard Peterson, “The Spanish Influenza Epidemic in San Diego, 1918–1919” (1989) 71 *S. Calif. Qtrly.* 89, 92, 95.

38. *Id.* 94.

39. *Id.* 97–98.



This room at Wilson High School in Pasadena was converted into a flu isolation ward during the 1918 Spanish flu pandemic.

The cities of Riverside and Ontario also issued closure orders on October 13, 1918, while neighboring Redlands did not (though it quickly followed suit).⁴⁰

On October 16, 1918, the Oxnard City Council ordered its health officer to close “theaters, motion picture houses, schools, churches, both public and private dances and all public gatherings until further notice,” keeping certain “essential” businesses open.⁴¹ Beyond that order, the city council mandated that residences housing an influenza patient be “placarded,” meaning that a physical sign would be posted on the home and the address identified in the newspaper so that potential visitors could avoid exposure.⁴² The city council also directed Oxnard firefighters to wash the pavement and sidewalks of main thoroughfares daily, and Oxnard officials later pointed to this measure as a reason Oxnard fared better than neighboring Ventura.⁴³

San Bernardino similarly had a placard ordinance, together with a quarantine requirement that “No persons will be permitted to enter or leave the home until 10 days from the beginning of the attack, and all members of the family will be kept away from the influenza patient.”⁴⁴

Smaller cities like Napa were slightly slower to respond. On October 29, 1918, after Napa’s city clerk died from the Spanish flu, the mayor declared influenza an epidemic and ordered everyone in public to wear

masks of at least three thicknesses of material. He further ordered schools, churches and other public gathering places closed.⁴⁵

Although Los Angeles did not impose a mask mandate, Pasadena did and enforced it vigorously. Exhibiting their awareness of the differing local ordinances, teachers who lived in Pasadena but worked in Los Angeles would remove their masks at the city limit on the way to work and don them at the same place on their way home.⁴⁶

The South and North Differed

Los Angeles and San Francisco undertook distinctly different responses to the pandemic, with distinctly different results.

Los Angeles acted quickly, focusing on closing public spaces. Influenza surged among local residents in mid-September 1918, likely spread by infected soldiers on a naval training vessel that was quickly quarantined.⁴⁷ The first civilian case was reported on October 1, and, at the urging of Los Angeles Health Commissioner Dr. Luther M. Powers, on October 11 Mayor Frederick Woodman and the city council passed “an ‘ordinance to prevent the spread of the epidemic of influenza in the city of Los Angeles’” that required the closure of public spaces including theaters, churches and schools (but not local courts). Los Angeles officials recommended but did not mandate mask wearing, instead focusing on social distancing as the key preventive measure.⁴⁸

San Francisco was slightly slower to act, responding after cases exploded from 169 on October 9, 1918 to more than 2,000 just one week later.⁴⁹ Mayor James Rolph, in consultation with City Health Officer William C. Hassler, issued a closure order on October 17, 1918, directed to schools, social gatherings and places of public amusement, excluding churches and leaving the issue to each church leader’s discretion.⁵⁰ In contrast to Los Angeles,

40. “Closing Order May be Made for City,” *San Bernardino Sun*, Oct. 13, 1918, 1–2; Mark Landis, “How the 1918 Spanish flu ravaged Southern California,” *San Bernardino Sun*, Apr. 13, 2020, <https://www.sbsun.com/2020/04/13/how-the-1918-spanish-flu-ravaged-southern-california/> (as of Mar. 21, 2021).

41. Andy Ludlum, “Flu Fighters: The 1918 Flu Pandemic in Oxnard,” *Museum of Ventura County*, <https://venturamuseum.org/research-library-blog/flu-fighters-the-1918-flu-pandemic-in-oxnard/> (as of Mar. 21, 2021).

42. *Ibid.*

43. *Ibid.*

44. Landis, “How the 1918 Spanish flu ravaged Southern California.” *San Bernardino Sun*, <https://www.sbsun.com/2020/04/13/how-the-1918-spanish-flu-ravaged-southern-california/>, Apr. 13, 2020 (as of Mar. 21, 2021).

45. Barry Eberling, “Napa has known a pandemic before: Looking back at 1918’s deadly Spanish flu,” *Napa Valley Register*, https://napavalleyregister.com/news/local/napa-has-known-a-pandemic-before-looking-back-at-1918s-deadly-spanish-flu/article_27cd9587-e63c-5fd8-8831-c9bbb4f4866.html, Mar. 14, 2020 (as of Mar. 21, 2021).

46. “Smoke in Flu Mask Leads to Arrest,” *Los Angeles Evening Herald*, Jan. 21, 1919, 3.

47. O’Leary, “The 1918–1919 Influenza Epidemic in Los Angeles,” *supra* 86 *S. Calif. Qtrly.* 393.

48. “Peak of ‘Flu’ Is Reached Here Now, Is Hope,” *Los Angeles Evening Herald*, Oct. 26, 1918, 3; “To Establish Influenza Hospital for City,” *Los Angeles Evening Herald*, Nov. 6, 1918, 3.

49. “The American Influenza Epidemic of 1918–1919: San Francisco, California,” *Influenza Encyclopedia*, <https://www.influenzaarchive.org/cities/city-sanfrancisco.html#> (as of Mar. 21, 2021).

50. *Ibid.*; O’Leary, “The 1918–1919 Influenza Epidemic in Los Angeles,” *supra* 86 *S. Calif. Qtrly.* 393–94; James Rainey & Ron Gon Lin, “Heed the lessons of 1918,” *Los Angeles Times*, April 19, 2020; James Rainey & Ron Gong Lin, “California lessons from the 1918 pandemic: San Francisco dithered; Los

the cornerstone of San Francisco's public safety plan was the face mask. The city mandated masks for those who came into contact with the public — such as barbers, bank tellers and motel clerks — and strongly recommended all persons wear masks while in public.⁵¹

Officials in both Los Angeles and San Francisco drew on the spirit of patriotism engendered by the ongoing war, maintaining that complying with influenza precautions was one's patriotic duty.⁵² Patriotism did not always favor such precautions, however. Timing-wise, the Los Angeles ordinance preceded and thus precluded a scheduled Liberty Fair parade and rally; San Francisco's one-week delay allowed the parade to go forward there, which became what we might now term a super spreader event.⁵³

Guided by Dr. Powers, the Los Angeles City Council resisted efforts to lift the closure order in mid-November in light of reports that influenza was waning.⁵⁴ Instead, Los Angeles waited until early December to begin re-opening, when Dr. Powers advised it was safe to do so.⁵⁵ At the time of repeal, Dr. Powers expressly advised that people should continue to exercise caution and remain away from crowds as much as possible.⁵⁶ Even through mid-December 1918, when cases had declined precipitously, Dr. Powers publicly urged those with influenza symptoms to remain isolated.⁵⁷

In San Francisco, influenza cases declined dramatically while the mask ordinance was in effect, leading Dr. Hassler to recommend re-opening the city by mid-November.⁵⁸ Over the next two weeks, the city completely re-opened and rescinded the mask ordinance. Residents engaged in a mask-removing celebration on November 21, ripping the masks from their faces and throwing them in the street as a whistle sounded across the city exactly at noon.⁵⁹ Thinking they had conquered the influenza, San Franciscans streamed into theaters, movie houses

and sports arenas after the one-month closure.⁶⁰ As we might now have anticipated, influenza cases again surged. Initially, city officials requested that residents voluntarily resume wearing masks, and ultimately voted to resurrect the mask ordinance in mid-January 1919.⁶¹

California's average death rate due to influenza and resulting pneumonia during the pandemic was 538 per 100,000.⁶² Los Angeles stayed below that average with 494 deaths per 100,000,⁶³ while San Francisco well exceeded the average with 673 deaths per 100,000 people.⁶⁴

Masks Were Controversial

In the fall of 1918, only seven U.S. cities had mandated mask wearing. Four of those cities were in California: Oakland, Pasadena, Sacramento, and San Francisco.⁶⁵

Any public resistance to mask wearing in San Francisco was met with strict enforcement of the ordinance. One day in mid-November, police arrested 1,000 individuals, called "mask slackers," for refusing to wear masks in public. The city jail and later the police courtrooms quickly filled beyond capacity with maskless individuals who could not afford the \$5 bail, and those who indicated a steadfast refusal to mask were sentenced to two to ten days in jail.⁶⁶ The court held evening and weekend sessions in order to dispose of all the cases.⁶⁷ Oakland likewise relied on strict enforcement. Almost 100 individuals appeared in Oakland Superior Court on a Saturday morning in early November 1918, charged with violating the city's mask ordinance and were sentenced to pay a \$10 fine or



San Francisco police officer warning a man to wear a mask.

Angeles acted and saved lives," *Los Angeles Times*, <https://www.latimes.com/california/story/2020-04-19/coronavirus-lessons-from-great-1918-spanish-flu-pandemic> (as of Mar. 21, 2021).

51. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

52. *Ibid.*; O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 400–01.

53. *Id.* 395.

54. "Influenza Declining Rapidly Here," *Los Angeles Evening Herald*, Nov. 9, 1918, 3.

55. O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 398–99.

56. "1463 Fewer Cases This Week Than Last," *Los Angeles Evening Herald*, Nov. 30, 1918, 3.

57. "Heavy Decrease Again Shown in Flu Cases," *Los Angeles Evening Herald*, Dec. 19, 1918, 3.

58. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49; O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 401.

59. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

60. *Ibid.*

61. *Ibid.*

62. Diane North, "California and the 1918–1920 Influenza Pandemic," *Boom California* (June 18, 2020), <https://boomcalifornia.org/2020/06/18/california-and-the-1918-1920-influenza-pandemic/> (as of Mar. 22, 2021).

63. O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 393–94; Rainey & Lin, "Heed the lessons of 1918," *supra* note 50.

64. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

65. Christine Hauser, "The Mask Slackers of 1918," *New York Times*, Aug. 3, 2020, <https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html?searchResultPosition=1> (as of Mar. 22, 2021).

66. "1000 Taken as Mask Slackers," *San Francisco Chronicle*, Nov. 10, 1918, 6.

67. "1000 Alleged Mask Slacker Cases in Jails," *San Francisco Examiner*, Nov. 10, 1918, 13.

spend five days in jail.⁶⁸ Among those charged was Congressman J. Arthur Elston, whose mask dropped while he was arguing with his law partner as they emerged from their law offices onto the street. In view of the congressman's clean record and averments that he typically wore his mask in public, his sentence was suspended.⁶⁹

When San Francisco revived its mask ordinance in early 1919, the opposition was more pronounced and led to its demise two weeks later. Several well-known San Franciscans, including some members of the Board of Supervisors, formed "The Anti-Mask League" to condemn the ordinance and advocate its repeal.⁷⁰ More than 2,000 individuals attended one of the group's public meetings where they raised objections, maintaining that science did not support the efficacy of masks and mandating them was unconstitutional.⁷¹

In Los Angeles, Dr. Powers declined to push for mandatory masks, asserting it would be too difficult to educate the public on their proper and effective use. Moreover, Los Angeles was already home to the entertainment industry. Though it is unclear to what extent the city council bowed to pressure from Hollywood, celebrities tended to eschew mask wearing because it was "so horrid" to not be recognized in public.⁷² Messaging from city officials, coupled with the decline in cases following the implementation of other measures, led a once potentially willing community to become hostile to mask wearing.⁷³ Even when cases spiked in January 1919 due to a second influenza wave, Dr. Powers considered but declined to support a mask ordinance. By then, the notion that masks were ineffective had become part of Los Angeles' culture.⁷⁴ In a recent article, the *Los Angeles Times* conceded its own contribution to that culture. In 1918, the paper criticized physicians who advocated for a mask ordinance and published data showing that cities with mask mandates had fared worse than Los Angeles. The reporting stoked Los Angeles' rivalry with San Francisco by labeling the latter as the "City of Masks" while highlighting that its influenza toll exceeded that of Los Angeles.⁷⁵

In San Diego, an editorial in the local newspaper mocked the wearing of masks: "Modern civilization has abolished the mask as part of human wearing apparel . . .

only highwaymen, burglars, and hold-up men wear masks professionally . . . We sincerely regret . . . that some of the younger women in public employment are compelled to wear these masks. We miss the pretty faces, and we have not yet learned to interpret the glances of the eyes that flash and sparkle above the concealing gauze."⁷⁶

Closure Orders Were Controversial

By way of example, Los Angeles implemented one of the more stringent closure orders in California. Nonetheless, the city council rejected an effort to close all "unessential" businesses for a brief time period in November 1918 when influenza cases spiked.⁷⁷ Retailers were uniformly opposed to closure. Speaking to the city council, one retailer asserted that existing precautions — which included proper ventilation, extra sanitation, air space between people and the practice of immediately excusing employees who showed any influenza symptoms — afforded adequate protection.⁷⁸ Members of the Motion Picture Theater Owners' Association, whose businesses had been closed since early October, maintained that the city should either be tightly closed or opened entirely. They threatened to sue the city for alleged discriminatory treatment.⁷⁹

Christian Science churches in Southern California notified local police departments that they intended to hold services the first weekend in November 1918, while the closure order was in effect, so as to create a test case allowing them to challenge the constitutionality of the ordinance.⁸⁰ One case succeeded on a technicality. In Pasadena, Superior Court Judge Leslie R. Hewitt lifted the ban against church services, not on constitutional grounds but rather because the Pasadena Board of Trustees had issued only a resolution and not an order, and therefore no official ban existed.⁸¹ Another Christian Science test case was continued indefinitely after both the first and second judges assigned to the case contracted influenza.⁸² Shortly thereafter, the prosecutor became afflicted with influenza.⁸³ Other churches

68. "Hundred in Toils for Not Having Mask," *Oakland Tribune*, Nov. 2, 1918, 7.

69. "Congressman Nabbed as He Drops Mask," *Oakland Tribune*, Nov. 2, 1918, 7.

70. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

71. *Ibid.*; Hauser, "The Mask Slackers of 1918," *supra* note 65.

72. Hauser, "The Mask Slackers of 1918," *supra* note 65.

73. Gustavo Arellano, "In 1918, L.A. failed on mask policy. Debates over COVID are eerily reminiscent of arguments during Spanish flu pandemic," *Los Angeles Times*, Dec. 29, 2020, B.1.

74. *Ibid.*

75. *Ibid.*

76. Peterson, "The Spanish Influenza Epidemic in San Diego," *supra* 71 *S. Calif. Qtrly.* 94–95.

77. "Council Rejects Flu Fight Plan to Close City. Hot Clash in Debate Before Action. Merchants Take Stand Against Ordinance Submitted as Emergency Measure," *Los Angeles Evening Herald*, Nov. 27, 1918, 1.

78. *Ibid.*

79. *Ibid.*

80. "Will Enforce Ordinance," *Los Angeles Times*, Nov. 3, 1918, 10.

81. "Scientists of Pasadena Win," *Los Angeles Times*, Dec. 12, 1918, 22.

82. "Judge's Illness Delays Case of 5 Scientists," *Los Angeles Evening Express*, Nov. 29, 1918, 2.

83. "Lyle Pendegast, Victim of Influenza Attack," *Los Angeles Evening Express*, Nov. 30, 1918, 5.

subject to bans, for example those in Berkeley, adapted to local ordinances and held services outdoors.⁸⁴

Moreover, the impact of closure orders was certainly more significant without the benefit of the Internet or any form of video technology. The acting superintendent of schools in Los Angeles instructed parents of elementary school age children to set aside time to read with their children and directed high school students to study four hours each day, threatening examinations as soon as school reopened. Some Los Angeles area teachers also posted their assignments in the local newspapers.⁸⁵ Likewise, some Los Angeles religious leaders posted their sermons in the local newspapers.⁸⁶

People Sought Novel Remedies

Some individuals recommended eating lemons, claiming their acidity would combat influenza.⁸⁷ Others claimed that milk and milk products such as buttermilk and ice cream were best to strengthen the system and increase resistance to influenza.⁸⁸ Some doctors recommended whiskey, including in a glass of hot milk, as both prevention and treatment.⁸⁹ Dr. R. F. Tisdale of Oakland opined that onions were an effective cure. He claimed to have relied on onions to treat 78 influenza patients, not losing a single one.⁹⁰ Some police courts in San Francisco changed their rules to allow smoking in the courtroom because smoke was thought to be an effective antiseptic against influenza.⁹¹

Early, Stringent and Compound Efforts Were Effective Against the Pandemic

In one area of California, the response to the pandemic was close to perfect. Not one person at the Naval Training Station on Yerba Buena Island was infected at the height of the Spanish influenza.⁹² Navy officials learned

84. "Alameda Flu Cases Are Stationary, Berkeley Keeps Up Restrictions," *Oakland Tribune*, Nov. 9, 1918, 7.

85. Hadley Meares, "How Did LA Cope With The Influenza Pandemic Of 1918?" *LAist*, https://laist.com/2020/03/25/how_did_la_cope_with_the_influenza_epidemic_of_1918.php. Mar. 25, 2020 (as of Mar. 22, 2021).

86. *Ibid.*

87. "Lemons Bound Upward as 'Flu' Remedy," *Santa Barbara Daily News and Independent*, Oct. 23, 1918, 6.

88. Dr. Lee H. Smith, "Health Talk: Spanish Influenza or Grip," *Los Angeles Times*, Nov. 8, 1918, 18.

89. "Poor Old Demon Rum Comes to the Rescue of His Former Assailants in 'Flu' Pandemic," *Sacramento Bee*, Oct. 30, 1918, 5.

90. "Onions Are Latest Influenza Specific," *San Francisco Examiner*, Oct. 30, 1918, 1.

91. "Happenings at the Bay," *Sacramento Bee*, Oct. 24, 1918, 10.

92. Douglas Zimmerman, "How a quarantine saved everyone on Yerba Buena Island during the 1918 flu pandemic," *SFGATE*, Mar. 18, 2020, <https://www.sfgate.com/sfhistory/article/flu-quarantine-saved-everyone-Yerba-Buena-SF-15136501.php> (as of Mar. 22, 2021).

of the influenza as early as August 1918. Though no cases had been reported among the more than 6,000 soldiers and military families stationed on the island, the commandant quarantined the base on September 22 as a precautionary measure. The quarantine's protocols were strict: No outsiders were permitted on the island; those delivering supplies maintained a 20-foot distance from anyone else; health inspectors conducted daily temperature checks and enforced hygiene rules; gatherings were moved outdoors; screens were placed in the barracks between beds; and sailors reassigned to the island during the quarantine period were isolated and required to wear gauze masks.⁹³ Navy officials even thought to address mental health issues, providing a carnival and outdoor circus for the soldiers' entertainment. Yerba Buena's quarantine lasted 62 days. Though the island saw a handful of cases in December 1918 and January 1919 after the quarantine was lifted, Yerba Buena's success was unparalleled in California.

In contrast, the Navy commandant at nearby Mare Island declined to impose an absolute quarantine, instead implementing almost all of the Yerba Buena safety measures but allowing civilians to come and go from the base. By the end of November 1918, approximately 20 percent of the more than 7,700 Navy personnel on Mare Island had been treated for Spanish influenza.⁹⁴

It is a cliché to say that history repeats itself, yet the parallels between California's response to Spanish flu and COVID-19 are inescapable. Fortunately, particularly when compared to other measures, the response by the California courts has evolved over the last 100 years. The Judicial Council was able to utilize its centralized management to craft responses that provided a balance of certainty and flexibility that was needed to address the competing interests at stake. One hopes that during the next pandemic the courts will be able to take advantage of the playbook that Chief Justice Cantil-Sakauye is certainly creating. ★

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93. *Ibid.*

94. North, "California and the 1918–1920 Influenza Pandemic," *supra* note 62.

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