

2006

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Recommended Citation

O'Leary, N. Pieter M. (2006) "Bioterrorism or Avian Influenza: California, The Model State Emergency Health Powers Act, and Protecting Civil Liberties During a Public Health Emergency," *California Western Law Review*. Vol. 42 : No. 2 , Article 4.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol42/iss2/4>

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BIOTERRORISM OR AVIAN INFLUENZA: CALIFORNIA, THE MODEL STATE EMERGENCY HEALTH POWERS ACT, AND PROTECTING CIVIL LIBERTIES DURING A PUBLIC HEALTH EMERGENCY

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I. INTRODUCTION

The terrorist attacks of September 11, 2001 brought home for many people the need for increased national security.¹ The world became a different place after the end of the Cold War; the new enemies to the American way of life were radical ideologues, religious zealots, and homegrown ultra-patriots.² The nation's safety and stability had to be protected against future attacks from any of these groups and from the various means with which they chose to attack the American government and people.³

Even before the tragic attacks of September 11, 2001, the United States had been preparing for the eventualities of a devastating terrorist attack upon the country.⁴ After all, terror attacks come in many

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1. See Richard A. Serrano et al., *America Attacked: New York City*, L.A. TIMES, Sept. 12, 2001, at A3.

2. See generally Bruce Hoffman, *Old Madness, New Methods: Revival of Religious Terrorism Begg for Broader U.S. Policy*, RAND REVIEW, Winter 1998-1999, available at <http://www.rand.org/publications/randreview/issues/rr.winter98.9/methods.html>.

3. See Serrano et al., *supra* note 1.

4. Ali S. Khan & David A. Ashford, *Ready or Not—Preparedness for Bioterrorism*, 345 NEW ENG. J. MED. 287, 288 (2001); David P. Fidler, *Caught Between Paradise and Power: Public Health, Pathogenic Threats, and the Axis of Illness*, 35 MCGEORGE L. REV. 45, 83-85 (2004) (discussing the federal government's views and strategies regarding bioterrorist at-

shapes and sizes. One particular type of attack authorities focused on in the weeks following September 11, 2001, was the intentional release of a biological agent: a bioterror attack.⁵ The anthrax attacks of October 2001 heightened the nation's fear of a biological terror attack and revealed the ease with which such an attack could take place.⁶ With a biological agent like anthrax, there is no need for a daring, coordinated takeover of a commercial airliner. Rather, a lone individual could perpetrate a bioterror attack using the country's own postal system.⁷ The October 2001 anthrax attacks exposed the near-complete lack of preparedness and resulting confusion such acts of terrorism could have on the country.⁸

Natural occurrences of diseases, however, also raise concern about the nation's level of preparedness. New viral outbreaks, such as Severe Acute Respiratory Syndrome (SARS),⁹ highlight the danger of virulent viruses and the speed with which they may be spread around

tacks in the late 1990s). Moreover, a report compiled by the Centers for Disease Control and Prevention addressed the vulnerability of the United States to biological and chemical attack. ALI S. KHAN ET AL., DEP'T OF HEALTH & HUMAN SERV., BIOLOGICAL AND CHEMICAL TERRORISM: STRATEGIC PLAN FOR PREPAREDNESS AND RESPONSE (2000), available at <http://www.bt.cdc.gov/Documents/BTSratplan.pdf>.

5. For a definition of bioterror, see THE MODEL STATE EMERGENCY HEALTH POWERS ACT art. I, § 104 (a) (Ctr. for Law & the Pub.'s Health, Draft for Discussion 2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>.

6. E.g., Guy Gugliotta, *Anthrax Tainted Up to 5,000 Letters: Cross-Contamination Blamed for Deaths of 2 Women*, WASH. POST, May 14, 2002, at A2; Peter Slevin, *No Consensus on Who Wrote Anthrax Letters: Experts' Speculation Covers a Broad Range*, WASH. POST, Oct. 25, 2001, at A23. See generally WENDY BARNABY, *THE PLAGUE MAKERS: THE SECRET WORLD OF BIOLOGICAL WARFARE* 2-6 (3d ed., Continuum 2002) (1999) (discussing the nature of the letters, the anthrax strain identified and the repercussions of the anthrax letter attacks).

7. A profile of the anthrax mailer composed by the Federal Bureau of Investigation identified the mailer as "a man in the U.S." and "probably a loner with a scientific background." *FBI Laments Lack of Anthrax Arrests*, L.A. TIMES, Nov. 2, 2002, at A25.

8. Matthew E. Brown, *Reconsidering the Model State Emergency Health Powers Act: Toward State Regionalization in Bioterrorism Response*, 14 ANNALS HEALTH L. 95, 96 (2005).

9. Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 379, 380 (2003). SARS first appeared in Foshan City, Guangdong Province, China in November 2002. Paul Arshagouni, *An Introduction to Medical Issues Posed by International Health Threats in a Legal Framework*, 12 MICH. ST. J. INT'L L. 199, 202 (2004). Although SARS spread to nearly thirty countries around the world, the United States only reported eight people testing positive for infection and no deaths. Ctrs. for Disease Control & Prevention, Dep't of Health & Human Servs., Fact Sheet: Basic Information About SARS, May 3, 2005, available at <http://www.cdc.gov/ncidod/sars/factsheet.htm>. Currently, many view SARS as the "dress-rehearsal" for a truly global threat like avian influenza. THOMAS ABRAHAM, *TWENTY-FIRST CENTURY PLAGUE: THE STORY OF SARS* 140 (John Hopkins Univ. Press 2005) (2004).

the globe.¹⁰ SARS spread from rural China to the hospitals of metropolitan Toronto, Canada, in four months and ultimately resulted in over 8,000 cases and nearly 800 deaths in twenty-seven countries.¹¹ While not the pandemic many government and medical officials feared, the SARS experience represented a global threat due to its virility,¹² speed of dispersion,¹³ and impact on medical care around the world.¹⁴ Consequently, both the fear of bioterror attacks and the realization that newly emerging viruses can disrupt the functioning of government, moved officials to address the issue of governing during and immediately after either type of event.

Moreover, in the wake of Hurricane Katrina, "one of the worst natural disasters in our nation's history," and the threat posed by disease outbreak, the need for improved disaster relief preparedness remains evident.¹⁵ Under the direction of Mike Leavitt, Secretary of the Department of Health and Human Services, the federal government declared a public health emergency in the affected region.¹⁶ With floodwaters contaminated by sewage and decaying dead bodies, the threat of mosquito-borne disease,¹⁷ as well as cholera, dysentery, and other infections, posed a fundamental risk to security and the cleanup process.¹⁸ Although the federal government eventually appeared to

10. Robert A. Weinstein, *Planning for Epidemics—The Lessons of SARS*, 350 NEW ENG. J. MED. 2332 (2004).

11. *Id.*

12. The overall death rate for SARS was approximately nine percent globally. Arshagouni, *supra* note 9, at 201. Young adults had an average death rate of approximately three percent and the average death rate in the elderly was about fifty percent. *Id.*

13. Obijiofor Aginam, *Between Isolationism and Mutual Vulnerability: A South-North Perspective on Global Governance of Epidemics in an Age of Globalization*, 77 TEMP. L. REV. 297, 307 (2004). The term "Jet-Spread" has been used to describe the swift travel of an infectious disease virus by airplane. RICHARD E. NEUSTADT & HARVEY V. FINEBERG, *THE EPIDEMIC THAT NEVER WAS: POLICY-MAKING AND THE SWINE FLU SCARE* 28 (rev. ed., Vintage Books 1983) (1982).

14. See ABRAHAM, *supra* note 9, at 135-36.

15. James Gerstenzang, *Katrina's Rising Toll: Bush Calls for Massive, Coordinated Recovery*, L.A. TIMES, Sept. 1, 2005, at A21 (quoting President George W. Bush). Unless the natural disaster involves the potential for a public health emergency involving a significant number of deaths due to disease, invoking the powers of the Model State Emergency Health Powers Act is unwarranted. Accordingly, use of the Model Act in situations such as the Northridge, California earthquake in 1994 or the 2003 Cedar fires in San Diego, California would be inappropriate.

16. *Id.*

17. The two primary mosquito-borne threats are the West Nile and Easter Equine Encephalitis viruses. Jessica Heslam, *Katrina's Wrath: Health Crisis Looms in Bayou*, BOSTON HERALD, Sept. 1, 2005, at 2.

18. Thomas H. Maugh II & Ellen Barry, *Katrina's Rising Toll: Healthcare Feeling the Strain*, L.A. TIMES, Aug. 31, 2005, at A19.

lead the recovery efforts, constitutionally, state governments have a great role in addressing public health emergencies in their territories.¹⁹

In addressing these types of threats, it is important to note that in the United States the responsibility for safeguarding public health falls largely to the states under their police powers.²⁰ Under the Tenth Amendment, “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²¹ Accordingly, in attempting to draft legislation necessary to protect the public safety during either a bioterror attack or during a large-scale outbreak of an infectious disease, planners focused on the powers of state officials to quell the threat.²² The result was the Model State Emergency Health Powers Act (Model Act), upon which many states now base their legislation.²³ Although many see the Model Act as a significant attempt to protect the public, opponents view it as a monumental threat to the civil liberties of all Americans, including Californians.²⁴ The power to isolate or quarantine individuals simply thought to be infected, compel the collection and reporting of a person’s private health information, appropriate vaccines and medications, and even force persons identified as health risks to undergo treatment is too much for many who criticize the broad authority granted under the Model Act.²⁵

This Article highlights government efforts, specifically California’s, in managing either a large-scale bioterror attack or a swift moving, naturally-occurring, infectious disease threat such as SARS or

19. Joseph Barrera et al., *Large-Scale Quarantine Following Biological Terrorism in the United States*, in BIOTERRORISM: GUIDELINES FOR MEDICAL AND PUBLIC HEALTH MANAGEMENT 221, 222-23 (Donald A. Henderson et al. eds., 2002). Local outbreaks of infectious disease are under the authority of local or state public health authorities; however, the federal government has authority to combat the transmission of infectious disease when the infection moves across state lines. *Id.*

20. See U.S. CONST. amend. X; Barrera et al., *supra* note 19, at 222-23.

21. U.S. CONST. amend. X.

22. However, Ken Wing argues the federal government, specifically Congress, would have authority over a large scale health emergency, because “[a]nthrax doesn’t respect state borders Whatever public health emergency we experience in Washington is likely to be a problem in Oregon and Idaho and, for that matter, Canada as well.” Ken Wing, *Policy Choices and Model Acts: Preparing for the Next Public Health Emergency*, 13 HEALTH MATRIX 71, 82 (2003). Moreover, Wing believes the Model Act should be enacted as a piece of federal legislation rather than as state law. *Id.*

23. Wendy E. Parmet, *Quarantine Redux: Bioterrorism, AIDS and the Curtailment of Individual Liberty in the Name of Public Health*, 13 HEALTH MATRIX 85, 86 (2003); THE MODEL STATE EMERGENCY HEALTH POWERS ACT (Ctr. for Law & the Pub.’s Health, Draft for Discussion 2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>.

24. Reich, *supra* note 9, at 381.

25. Thomas May, *Political Authority in a Bioterror Emergency*, 32 J.L. MED. & ETHICS 159, 161 (2004).

avian influenza. In light of the recent disaster in Louisiana and the ever-spreading threat of avian influenza, California must reconsider its own level of preparedness. Preparedness, however, must be tempered with a respect for long-held constitutional values, which many argue are jeopardized by vague, overbroad legislation designed to quell a public health emergency.

Thus, this Article focuses on balancing state authority with protecting civil liberties during a public health crisis. Specifically, if California passes legislation based on the Model Act, it must temper the authority granted to the state government with clear protections enshrined in the legislation and provide clear protections for Californians' rights. Part II briefly identifies the causes and concerns that may prompt a state governor to invoke the authority provided under the Model Act, whether bioterror attack or naturally occurring infectious disease outbreak. Part II also provides a brief history of recent threats. Part III highlights the Model Act and overviews key aspects of its development. Additionally, Part III focuses on events ranging from pre-September 11, 2001 bioterror training exercises, to the drafting of the Model Act. The bioterror exercises provide a foundation for understanding the Model Act, upon which California based its proposed public health emergency legislation in both 2002 and 2006.

Part IV explores California's attempts to adopt detailed legislation in 2002 based on the Model Act. Although the legislation was never passed, Part IV chronicles various bioterror training exercises, the key aspects of the 2002 California proposal, its most contentious aspects, as well as highlights key federal and state cases upholding broad state authority to act during a public health emergency. Part V briefly examines the more general California legislation proposed in February 2006, aimed at rectifying various criticisms of the 2002 proposal and paving the way to adopting a comprehensive plan to guide the state through a public health emergency. Finally, Part VI enumerates several recommendations California officials should consider with respect to the Model Act, including enshrining civil liberties protections within any future legislation and training judges to respond to state authority challenges during a large-scale public health emergency.

II. IDENTIFYING THE NATURE OF THE THREAT

Drafters of the Model Act recognized two primary biological threats: acts of bioterrorism and naturally occurring infectious dis-

ease.²⁶ Under the Model Act, a governor may declare a “state of public health emergency,”²⁷ thus prompting state government officials to act. A public health emergency is defined as “an occurrence or imminent threat of an illness or health condition . . . caused by bioterrorism . . . [or] novel or previously controlled or eradicated infectious agent or biological toxin,” posing a significant risk of high mortality.²⁸ How this definition applies in reality, however, may best be understood by reviewing several historical examples addressing acts of bioterrorism and naturally occurring infectious disease outbreaks.

A. Acts of Bioterrorism

While fears concerning biological weapon proliferation have increased since the 1990s,²⁹ thankfully there has been no major bioterror attack in the United States.³⁰ The most noteworthy example of an attack was perpetrated by the Japanese religious cult, Aum Shinrikyo (Aum), in 1995.³¹ Former Japanese parliamentary candidate, Shoko Ashahara, led Aum and managed to accumulate \$1.5 billion in donations and investments.³² Under the direction of Ashahara, Aum developed and experimented with a variety of biological agents in the 1990s.³³ After failed attempts to release anthrax and botulin toxin,

26. Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 6 (2003).

27. THE MODEL STATE EMERGENCY HEALTH POWERS ACT art. IV, § 401 (Ctr. for Law & the Pub.'s Health, Draft for Discussion 2001), available at <http://www.publichealth-law.net/MSEHPA/MSEHPA2.pdf>.

28. *Id.* § 104(m).

29. Fidler, *supra* note 4, at 83.

30. See Brown, *supra* note 8, at 105-06. Brown discusses the difficulty associated with acquiring, producing, and distributing a biological agent. *Id.*; see also JEFFREY D. SIMON, THE TERRORIST TRAP: AMERICA'S EXPERIENCE WITH TERRORISM 360 (2d ed. 2001) (arguing the uncertainty and the potential for personal injury result in a “reluctance to experiment with unfamiliar weapons” on the part of would-be terrorists).

31. Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105, 1121 (2003). Aum Shinrikyo, however, had been trying to carry out a large-scale attack using various biological agents since the late 1980s. Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417, 425-26 (2001). In 1990, Aum tried to attack the Japanese parliament using a botulinum toxin aerosol spray. *Id.* at 425. In 1992, Aum sent a group to Zaire to obtain a sample of Ebola that it later hoped to return to Japan. *Id.* In 1993, the cult attempted an attack during the wedding of the Japanese crown prince. *Id.* Also during 1993, the cult tried to spray anthrax spores from a building in Tokyo. *Id.* All of these attacks were unsuccessful. *Id.*

32. Kyle B. Olson, *Aum Shinrikyo: Once and Future Threat?*, 5 EMERGING INFECTIOUS DISEASE 513, 514 (1999), available at <http://www.cdc.gov/ncidod/EID/vol5no4/pdf/olson.pdf>.

33. *Id.*

Aum focused on sarin nerve gas.³⁴ Consequently, on March 20, 1995, Aum conducted a coordinated attack on the Japanese subway system resulting in twelve deaths and injuring over 5,000 people.³⁵

The first modern, yet more minor, bioterrorist attack in the United States occurred in 1984, when members of an Oregon-based Ra-jneeshee cult "contaminate[d] salad bars in an Oregon town with salmonella."³⁶ Their purpose was to incapacitate voters in a local election, and the attack resulted in more than 750 people becoming seriously ill.³⁷

Despite these two examples and the October 2001 anthrax attacks, there are no recent cases of a major bioterrorist attack.³⁸ However, the devastating events of September 11, 2001 have spurred federal authorities and state government officials to prepare for and prevent a possibly devastating bioterrorist attack from occurring and to prepare to manage events immediately after one occurs.

B. Naturally Occurring Infectious Disease

Infectious disease is the other type of biological threat the Model Act's drafters envisioned. Some argue naturally occurring infectious disease represents the greatest threat, considering the severity of past outbreaks and the speed with which a present-day outbreak can be transmitted.³⁹ For example, the influenza outbreak of 1918-1919 is considered by some historians and epidemiologists to be the most

34. *Id.* at 513-14. For a detailed description of the characteristics of Sarin, see Ctrs. for Disease Control & Prevention, Dept. of Health & Human Servs., Facts About Sarin, May 17, 2005, available at <http://www.bt.cdc.gov/agent/sarin/basics/facts.asp>.

35. Kellman, *supra* note 31, at 425. For a detailed description of the 1995 subway attack, see BARNABY, *supra* note 6, at 39-41.

36. *History of Biological Warfare: Anthrax, Other Organisms Used for Centuries as Weapons of War* (National Public Radio broadcast Oct. 18, 2001), available at <http://www.npr.org/news/specials/response/anthrax/features/2001/oct/011018.bioterrorism.history.html>.

37. *Id.*

38. Several notable arrests of individuals possessing biological agents, however, have been made over the years. For instance, in 1972, "members of a right-wing group known as 'Order of the Rising Sun' were arrested in Chicago with between 30 and 40kg of typhoid bacteria cultures which they were going to use to poison water supplies" to create a "master race." BARNABY, *supra* note 6, at 43. In 1995, a tax protest group called the Patriots Council was found in possession of 0.7 grams of ricin. *Id.* Further, a member of a white supremacist group was arrested and charged with mail fraud after trying to acquire freeze dried bacteria that cause pneumonic and bubonic plague. *Id.*

39. See generally LAURIE GARRETT, *THE COMING PLAGUE: NEWLY EMERGING DISEASE IN A WORLD OUT OF BALANCE* (Penguin Books 1995) (1994); WILLIAM H. MCNEILL, *PLAGUES AND PEOPLES* (Anchor Books 1998) (1977).

devastating outbreak of infectious disease in history.⁴⁰ While estimates vary, some believe over one billion people were infected⁴¹ and nearly fifty million people died during an outbreak that lasted approximately one year.⁴² In comparison, today in the United States about five to twenty percent of the population contracts the flu each year.⁴³ Approximately 200,000 people are hospitalized due to their symptoms and about 36,000 die in the United States each year due to the flu.⁴⁴

Currently, international attention is focused on the spread of avian influenza among poultry and humans in Asia and Europe.⁴⁵ The threat from the current H5N1⁴⁶ strain of avian influenza raises concern be-

40. See JOHN M. BARRY, *THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY* 4 (2004); see also N. Pieter M. O'Leary, *The 1918-1919 Influenza Epidemic in Los Angeles*, 86 S. CAL. QUARTERLY 391 (2004).

41. GARRETT, *supra* note 39, at 158.

42. Estimates on the number of deaths vary from forty to one hundred million. BARRY, *supra* note 40, at 4; Helen Branswell, *Flu Pandemic Near, Experts Fear*, THE GLOBE AND MAIL, Nov. 17, 2004, at A1; Gretchen Reynolds, *The Flu Hunters*, N.Y. TIMES MAG., Nov. 7, 2004, at 37, 39.

43. Ctrs. for Disease Control & Prevention, Fact Sheet: Key Facts About Influenza and Influenza Vaccine, Sept. 28, 2005, available at <http://www.cdc.gov/flu/keyfacts.htm>.

44. *Id.*

45. Klaus Stöhr, *Avian Influenza and Pandemics—Research Needs and Opportunities*, 352 NEW ENG. J. MED. 405, 405-07 (2005). Avian influenza is an infectious disease occurring in birds. See World Health Org., *Avian Influenza-Fact Sheet: Avian Influenza ("Bird Flu") and the Significance of Its Transmission to Humans*, COMMUNICABLE DISEASE SURVEILLANCE & RESPONSE, Jan. 15, 2004, http://www.who.int/csr/don/2004_01_15/en/. It is "caused by type A strains of the influenza virus." *Id.* First identified in Italy more than 100 years ago, the current outbreak was first noted in Hong Kong where it infected eighteen people, killing six. *Id.* The 1997 avian influenza deaths in Hong Kong resulted in the culling of Hong Kong's entire poultry population, about 1.5 million birds. *Id.* The infection of humans, however, "marked the first time that an avian influenza virus was transmitted directly to humans and caused severe illness with high mortality." *Id.* The avian influenza crisis continues to spread through Asia and has recently spread via migratory birds to Europe and Africa. See Ctrs. for Disease Control & Prevention, Dep't of Health & Human Servs., *Outbreaks: Avian Influenza: Current Situation*, <http://www.cdc.gov/flu/avian/outbreaks/current.htm> (last visited May 12, 2006). As of May 5, 2006, there have been 114 deaths and 206 cases of avian influenza. World Health Org., *Cumulative Number of Confirmed Human Cases of Avian Influenza A/(H5N1) Reported to WHO*, EPIDEMIC & PANDEMIC ALERT & RESPONSE, May 5, 2006, http://www.who.int/csr/disease/avian_influenza/country/cases_table_2006_05_05/en/index.html. For a thorough overview of the avian influenza issue, see generally Tim Appenzeller, *Tracking the Next Killer Flu*, NAT'L GEOGRAPHIC, Oct. 2005, at 2.

46. Avian influenza is an "A" strain of influenza. H5N1 refers to the surface proteins on the virus, hemagglutinin and neuraminidase. GINA KOLATA, *THE FLU: THE STORY OF THE GREAT INFLUENZA PANDEMIC OF 1918 AND THE SEARCH FOR THE VIRUS THAT CAUSED IT* 86-87 (1999). Recently, researchers have addressed various similarities and differences between the 1918-1919 influenza strain and the current avian influenza strain. For example, both viruses moved directly from birds to humans without requiring passage through other animals, such as pigs. Charles Piller, *Killer 1918 Flu Gives Clues to New Virus*, L.A. TIMES, Oct. 6, 2005, at A1. Differences between the two viruses also exist. The avian influenza strain currently

cause of its spread among poultry in Asia, Africa, and Europe, despite efforts to contain it.⁴⁷ Further, signs of animal-to-human as well as sporadic human-to-human transmission raise great concern.⁴⁸ As of May 5, 2006, there have been 206 human cases of avian influenza with 114 deaths reported since December 2003.⁴⁹ Should avian influenza continue to spread among poultry in Asia and the virus mutate to allow easier human-to-human transmission, the potential for global pandemic would be drastically increased.⁵⁰ Estimates indicate an outbreak of pandemic avian influenza would last between twelve and thirty-six months.⁵¹ Further, global mortality rates from such an outbreak are estimated at between 180 and 360 million people.⁵² As one expert noted, the declaration that a pandemic was underway “would change the world overnight.”⁵³

Avian influenza currently represents the type of naturally occurring infectious disease⁵⁴ drafters of the Model Act considered when setting out to compose a method to empower state government officials during an outbreak.

III. THE MODEL STATE EMERGENCY HEALTH POWERS ACT

In the late 1990s, it was the increasing threat posed by bioterrorism, rather than infectious disease, which concerned most public health and government officials.⁵⁵ This concern was significantly

has difficulty passing directly from human to human, while the 1918-1919 strain had little difficulty. *Id.* Moreover, the 1918-1919 strain primarily attacked the lungs of its victims. *Id.* The current avian influenza strain, however, infects other internal organs as well. *Id.*

47. Ctrs. for Disease Control & Prevention, *supra* note 45; *Animal and Human Health: Sitting Ducks*, ECONOMIST, Apr. 16-22, 2005, at 35.

48. See James Hookway, *Bad Diagnosis: In Rural Cambodia, Avian Influenza Finds a Weak Spot*, WALL ST. J., Mar. 4, 2005, at A1; Reynolds, *supra* note 42, at 38-39.

49. World Health Org., *Cumulative Number*, *supra* note 45. Of the 206 cases, there have been ninety-three cases in Vietnam, twenty-two in Thailand, six in Cambodia, and thirty-two in Indonesia. *Id.*

50. See Stöhr, *supra* note 45.

51. Michael T. Osterholm, *Preparing for the Next Pandemic*, 84 FOREIGN AFF. 24, 24-26 (2005).

52. *Id.* Current estimates indicate that if a virus with the mortality rate of the 1918-1919 influenza virus reached pandemic levels, an estimated 1.7 million Americans would die. *Id.* Untold numbers would fall ill, and health care providers would be overwhelmed. *Id.*

53. *Id.*

54. See Laurie Garrett, *The Next Pandemic?*, 84 FOREIGN AFF. 3, 3-4 (2005).

55. Other than the obvious focus on avoiding another terrorist attack akin to the September 11, 2001 attacks, another explanation for the focus on bioterrorism, rather than infectious disease outbreaks, is the Swine Flu epidemic of 1976. See generally GARRETT, *supra* note 39, at 153-91; *Unthank v. United States*, 732 F.2d 1517, 1519 (10th Cir. 1984). The Swine Flu scare erupted in early 1976 when several young men at Fort Dix, New Jersey, be-

heightened in the wake of September 11, 2001, which made the threat of bioterror far more real. After reports of Iraqi attempts to develop a bio-weapons program,⁵⁶ the actions of Aum Shinrikyo in Japan,⁵⁷ and the collapse of the Soviet Union with its large stores of bio-weapons,⁵⁸ American officials seemed to have believed the true threat lay in a bioterror attack.⁵⁹ Accordingly, state and federal government officials conducted two primary simulations of a bioterror attack in the United States: Operation TOPOFF and operation Dark Winter.⁶⁰ Based on the information gathered during these simulations and the later September 11, 2001 attacks, authorities focused on and drafted legislation to manage the twin threats of attack and disease.

A. Exercises in Bioterrorism

In the months prior to the September 2001 terrorist attacks, federal and state health officials conducted two extensive tests simulating bioterror attacks. In Denver, Colorado, the first exercise, Operation TOPOFF, was conducted between May 20 and May 23, 2000.⁶¹ TOPOFF was a “national-level, multi-agency, multi-jurisdictional, ‘real-time,’ limited-notice WMD [weapons of mass destruction] response exercise.”⁶² During the course of the exercise, participants learned that plague had been released in the city three days earlier.⁶³ In response to the release of plague, many parts of the medical and

gan complaining of respiratory ailments. NEUSTADT & FINEBERG, *supra* note 13, at 17. Ultimately, a national vaccination program was implemented to stave off the perceived threat of a national epidemic. KOLATA, *supra* note 46, at 164-65. The vaccination program, however, was later perceived as an overreaction by the Carter Administration. See LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 186-87 (2000). Moreover, when reports of illness and death were linked to the nationwide vaccination program, exaggerated media attention worked to undermine the program, and it was subsequently scrapped. *Id.* Consequently, today few officials want to raise the false alarm about an epidemic that will never materialize. See generally NEUSTADT & FINEBERG, *supra* note 13, at 116-37.

56. See BARNABY, *supra* note 6, at 57-73.

57. See *supra* Part II.A.

58. See Tim Goodman, *A Chilling Look at Bioterrorism: Germs of Mass Destruction Under “Nova” Microscope*, S.F. CHRON., Nov. 13, 2001, at D1; Kellman, *supra* note 31, at 423.

59. See Fidler, *supra* note 4, at 83.

60. James F. Childress, *Triage and Response to a Bioterrorist Attack*, in *IN THE WAKE OF TERROR: MEDICINE AND MORTALITY IN A TIME OF CRISIS* 77, 90 (Jonathan D. Moreno ed., 2003).

61. *Id.* at 90. Operation TOPOFF stands for “Top Officials.” See U.S. Dep’t of State, TOPOFF (Top Officials) (July 24, 2002), <http://www.state.gov/s/ct/rls/fs/2002/12129.htm>.

62. U.S. Dep’t of State, *supra* note 61.

63. Childress, *supra* note 60, at 90.

public health system went into action.⁶⁴ Denver area hospitals, local law enforcement, county and state health agencies, the “CDC [Centers for Disease Control and Prevention], the Public Health Service, and the Office of Emergency Preparedness” were all involved in the response to the simulated attack.⁶⁵ The result demonstrated “serious weakness” in the nation’s “public health system.”⁶⁶ Efforts to contain the spread of the simulated attack and treat more than 4,000 cases were slowed by individuals who fled the city.⁶⁷ Further, lack of facilities and supplies contributed to nearly 2,000 deaths and revealed a lack of clear lines of communication and authority in handling the crisis.⁶⁸ More relevant questions of who had authority to impose curfews, quarantine sick individuals, and regulate city and state borders highlighted the realization that greater preparedness was required.⁶⁹

Since the original May 2000 TOPOFF exercise, TOPOFF 2⁷⁰ and TOPOFF 3⁷¹ have taken place. Both subsequent simulated exercises

64. See Thomas V. Inglesby, Assistant Professor, Johns Hopkins Univ. Sch. of Med., *Lessons from TOPOFF* (Nov. 29, 2000).

65. *Id.*

66. Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Disease*, 288 J. AM. MED. ASS'N 622, 623 (2002).

67. May, *supra* note 25, at 160. Some individuals fled Denver for surrounding states and even foreign countries, thereby drastically increasing the potential spread of the outbreak. *Id.*

68. *Id.*

69. *Id.*

70. Press Release, U.S. Dep't of Homeland Sec., “TOPOFF 2”: Week-Long National Combating Terrorism Exercise Begins May 12, 2003 (May 5, 2003), <http://www.dhs.gov/dhspublic/display?content=735>. TOPOFF 2 began on May 12, 2003, at 3:00 p.m. EDT, and involved the U.S. Department of Homeland Security and U.S. Department of State, in cooperation with federal, state, and local governments, as well as the Canadian government. *Id.* The exercise was conducted over five days and simulated how the United States “would respond in the event of a weapon of mass destruction (WMD) attack.” *Id.* The exercise consisted of simulated attacks in Chicago and Seattle. *Id.*

The State of Washington, King County, and the City of Seattle respond[ed] to a hypothetical explosion containing radioactive material. The State of Illinois, Cook, Lake, DuPage and Kane Counties, and the City of Chicago respond[ed] to a covert release of a biological agent. Nineteen Federal agencies and the American Red Cross [were also involved, as was the] . . . Government of Canada, including the Province of British Columbia and the City of Vancouver. *Id.*

71. U.S. Dep't of Homeland Sec., *The TOPOFF 3 Full-Scale Exercise*, http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0594.xml (last visited Apr. 24, 2006). TOPOFF 3 was conducted “April 4-8, 2005 and involve[d] more than 10,000 participants representing more than 200 Federal, State, local, tribal, private sector, and international agencies and organizations and volunteer groups.” *Id.* Again, the purpose was to test the “national and international response to a large-scale, multipoint terrorist attack.” *Id.* A simulated chemical attack was conducted in New London, Connecticut, and a biological attack was conducted in Union and Middlesex counties, New Jersey. *Id.* Further, the governments

revealed further need to increase national and international cooperation in treating the sick, stemming the spread of an outbreak, and establishing clear lines of authority in managing the health crisis.⁷²

The second simulated exercise of note was Dark Winter, which took place in 2001.⁷³ Dark Winter was a two-day simulated outbreak of smallpox originating in an "American city" and later spreading to twenty-five other states and fifteen other countries.⁷⁴ The simulated exercise resulted in over 16,000 cases of smallpox in the United States alone and revealed many of the same shortcomings noted in the TOPOFF exercise.⁷⁵ Of further note were questions of who possessed authority to close city and state borders, call for vaccination of the public, quarantine sick individuals, and generally insure public cooperation.⁷⁶

Based on these simulated exercises, officials realized a clear line of authority needed to be established.⁷⁷ Because local healthcare providers and state emergency officials would be the first responders in the event of a bioterror attack or naturally occurring outbreak of disease,⁷⁸ legislation had to be drafted to empower states to handle a local outbreak while also protecting national security.

B. Genesis of the Model Act

The Model Act was born out of the earlier exercises, which demonstrated a need to maintain governmental control during a bioterror

of Canada and the United Kingdom were involved. *Id.*

72. See generally Michel Chossudovsky, *Is America Preparing for Martial Law?*, CTR. FOR RESEARCH ON GLOBALISATION, Apr. 10, 2005, <http://www.globalresearch.ca/articles/CHO504B.html>; Donna Young, *States, Hospitals Learn Emergency-Preparedness Lessons in TOPOFF 3*, 62 AM. J. HEALTH-SYS. PHARMACY 1000, 1002-04 (2005), available at <http://www.ajhp.org/cgi/reprint/62/10/1000.pdf>.

73. Childress, *supra* note 60, at 90-91.

74. Lorena Matei, *Quarantine Revision and the Model State Emergency Health Powers Act: "Law for the Common Good,"* 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 433, 433-34 (2002).

75. See *id.* Noted observations included unfamiliarity with the character of bioterrorist attacks, lack of sufficient supplies and surge capacity in hospitals, conflicting authority between state and federal decision makers, and the response of local citizens to a bioterror attack. *Id.*; Nat'l Mem'l Inst. for the Prevention of Terrorism, *Dark Winter*, <http://www.mipt.org/darkwinter06222001.asp> (last visited Aug. 29, 2005).

76. See Nat'l Mem'l Inst. for the Prevention of Terrorism, *supra* note 75; Childress, *supra* note 60, at 91.

77. May, *supra* note 25, at 160.

78. Marlene Cimons, *Doctors Warned on Bioterrorism*, L.A. TIMES, Apr. 24, 2000, at A17.

attack.⁷⁹ The Model Act was designed to “grant state officials the authority necessary to coordinate an effective response to biological terror”⁸⁰ and naturally occurring health threats.

In response to growing concern about the likelihood of a large-scale bioterror attack and in light of the anthrax attack in October 2001,⁸¹ “the General Counsel for the Centers for Disease Control and Prevention (CDC) invited the Center for Law and Public’s Health (CLPH), a public health resource center run by Georgetown and John Hopkins Universities, to draft a model emergency response code.”⁸² Additionally, a large contingent of state level organizations, such as “the National Governors Association, the National Conference of State Legislatures, the Association of State and Territorial Health Officials, the National Association of City and County Health Officials, and the National Association of Attorneys General,” provided input into the initial draft.⁸³ It took less than four weeks to compose the first draft of the Act, which was submitted to the Secretary of Health and Human Services, Tommy Thompson, in October 2001.⁸⁴

The Model Act represents the method individual states may choose to control major outbreaks of disease or the consequences of a bioterrorist attack.⁸⁵ To act quickly, government officials must have broad powers to collect information, treat the infected, and restrict the spread of a contagion.⁸⁶ The Model Act, therefore, sets out to modernize outdated legislation in many states and assist state officials in making quick, coordinated decisions in response to a disease outbreak or bioterror attack.⁸⁷ Specifically, while attempting to balance civil liberties, the Model Act, addresses the development of emergency plans, quarantine or isolation of sick persons, collection and reporting of private medical information, treatment of the sick, and appropriations of supplies.⁸⁸

Opponents, however, argue the Model Act is flawed and the authority it grants to government officials is too broad and thus subject

79. May, *supra* note 25, at 159-60.

80. *Id.* at 159.

81. See *supra* note 6 and accompanying text.

82. Brown, *supra* note 8, at 98.

83. Matei, *supra* note 74, at 435.

84. Brown, *supra* note 8, at 98.

85. See *id.* at 96-97; May, *supra* note 25, at 159.

86. Brown, *supra* note 8, at 99-100.

87. Reich, *supra* note 9, at 382-83.

88. James G. Hodge, Jr. & Lawrence O. Gostin, *Protecting the Public’s Health in an Era of Bioterrorism: The Model State Emergency Health Powers Act*, in *IN THE WAKE OF TERROR: MEDICINE AND MORTALITY IN A TIME OF CRISIS*, *supra* note 60, at 17, 25.

to abuse.⁸⁹ Further, the definition of what constitutes a public health emergency is vague, which, in the worst case scenario, may lead to the declaration of a public health emergency for outbreaks similar to HIV or AIDS, whereby infected individuals could be quarantined.⁹⁰ Additionally, in light of the scare regarding the flu vaccination shortage of 2004-2005,⁹¹ the Model Act could be invoked to confiscate precious vaccinations and other necessary commodities prior to accurately assessing the need.

However, many of the most contentious articles of the Model Act were based on enacted California Health and Safety Code provisions.⁹² Consequently, some in California questioned why the state would need further measures when the Model Act largely mirrors pre-existing California legislation.⁹³ Despite this criticism, California Assemblyman Keith Richman proposed legislation in 2002 based on the Model Act. Assemblyman Richman recognized California remained vulnerable to the twin threats of bioterror and naturally occurring infectious disease.⁹⁴ Moreover, considering the chaos in New Orleans after Hurricane Katrina, California legislators should reconsider the state's preparedness in light of the federal government's seeming inability to cope with the massiveness of a future public health crisis.

89. Ronald Bayer & James Colgrove, *Rights and Dangers: Bioterrorism and the Ideologies of Public Health*, in *IN THE WAKE OF TERROR: MEDICINE AND MORTALITY IN A TIME OF CRISIS*, *supra* note 60, at 51, 60-61; George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 *NEW ENG. J. MED.* 1337, 1338-39 (2002); D. George Joseph, *Uses of Jacobson v. Massachusetts in the Age of Bioterror*, 290 *J. AM. MED. ASS'N.* 2331, 2331 (2003); May, *supra* note 25, at 161. Bayer and Colgrove note, for example, that a broad coalition argued that it was not necessary to enhance public health emergency powers. See Bayer & Colgrove, *supra*, at 61. Rather, what was needed was the "imposition of constitutional limits on older public health statutes." *Id.*

90. May, *supra* note 25, at 161.

91. Ctrs. for Disease Control & Prevention, Selected Video Clips From the Satellite Media Tour on Flu Vaccine Shortage (Oct. 26, 2004), <http://www.cdc.gov/flu/satellitetur04.htm> (last visited Sept. 2, 2005).

92. For instance, Article VI, section 603 of the Model Act relating to vaccinations and treatment during a public health emergency is adapted from sections 120175, 120575, and 120605 of the California Health and Safety Code. See *THE MODEL STATE EMERGENCY HEALTH POWERS ACT* art. VI, § 603 (Ctr. for Law & the Pub.'s Health, Draft for Discussion 2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>.

93. Tara Treasurefield, *Paranoid California: Can Civil Liberties Survive a Public Health Emergency?*, *NORTH BAY BOHEMIAN*, Mar. 28-Apr. 3, 2002, available at <http://www.metroactive.com/papers/sonoma/03.28.02/health-0213.html>.

94. See generally Telephone Interview with Keith Richman, Cal. Assemblyman from L.A., Cal. (Oct. 24, 2005).

IV. THE MODEL ACT AND CALIFORNIA

California has long been identified as a primary target for terrorist attacks,⁹⁵ and there have been serious questions as to whether the state is prepared for a statewide health threat.⁹⁶ Having the largest population and largest economy in the nation, as well as being a major port of entry for goods and travelers,⁹⁷ California is particularly susceptible to both naturally occurring infectious disease and biological agents for intentional release.⁹⁸ Following the September 11, 2001 terrorist attacks, California legislators sought to enable the state to better respond to the threats.⁹⁹ Accordingly, despite some criticism, California Assemblyman Keith Richman¹⁰⁰ introduced what would have been the state's version of the Model Act.¹⁰¹ California's proposed 2002 Emergency Health Powers Act (EHPA) and the Model Act were iden-

95. Vanessa Kaneshiro, *California's Weakened Health System Easy Target for Bioterrorism: Experts Warn that Smallpox Would Pose Much Greater Challenge than Anthrax*, THE NEW WORLD: AMERICA'S BOARDERS IN AN AGE OF TERRORISM, <http://journalism.berkeley.edu/ngno/reports/newworld/bioterrorism.html> (last visited Sept. 7, 2005). CAL. DEP'T OF HEALTH SERV., BIOTERRORISM SURVEILLANCE & EPIDEMIOLOGIC RESPONSE PLAN, JANUARY 2002, 4 (2002), available at http://www.dhs.ca.gov/dcdc/bu/pdf/CA_BT_Surv_Epi_Plan-2002b.pdf.

96. Miguel Bustillo, *Health Network Called Unready for Bioterror*, L.A. TIMES, Nov. 8, 2001, at B8; RAND CTR. FOR DOMESTIC AND INT'L HEALTH SEC., GAPS IN PUBLIC HEALTH PREPAREDNESS: LESSONS LEARNED IN CALIFORNIA, available at http://www.rand.org/publications/RB/RB9080/RAND_RB9080.pdf (last visited Apr. 24, 2006).

97. For example, nearly four million shipping containers arrived at the Port of Los Angeles, the busiest port in the country, in 2004. PORT OF L.A., 2004 STATISTICS, available at http://www.portoflosangeles.org/factsfigures_Annual_2004.htm (last visited Sept. 23, 2005).

98. CAL. DEP'T OF HEALTH SERV., *supra* note 95, at 4-5.

99. See generally *id.*; Telephone Interview with Keith Richman, *supra* note 94. Assemblyman Richman describes the proposed Emergency Health Powers Act, which he introduced in the California Assembly, as a "response to September 11, 2001, but to be applied broadly to a public health emergency." *Id.*

100. At the time he introduced the Emergency Health Powers Act, Assemblyman Keith Richman was the only doctor sitting in the California Legislature. Mimi Hall, *Many States Reject Bioterrorism Law*, USA TODAY, July 22, 2002, at 1A. Further, he was the only member to hold a master's degree in Public Health. *Id.* For a biography of Assemblyman Keith Richman, see Assemblyman Keith Richman: Member: Biography, <http://republican.assembly.ca.gov/members/index.asp?Dist=38&Lang=1&Body=Bio> (last visited Apr. 24, 2006).

101. Assemb. B. 1763, 2001-2002 Leg., Reg. Sess. (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020108_introduced.pdf. California Assemblyman Keith Richman proposed the Emergency Health Powers Act in January 2002. Ctr. for Law & the Pub.'s Health, *The Model State Emergency Health Powers Act (MSEHPA): State Legislative Activity*, <http://www.publichealthlaw.net/MSEHPA/MSEHPA%20Leg%20Activity.pdf> (last visited May 14, 2006). The bill, however, eventually died in the Assembly. *Id.* Assemblyman Richman later introduced another version of the bill in January 2003, but it died in Committee as well in February 2004. *Id.* However, in February 2006, Assemblyman Richman again introduced legislation aimed at protecting Californians during a public health emergency. *Id.*; see *infra* Part V.

tical in nearly every way.¹⁰² However, California's 2002 legislation, despite two amendments,¹⁰³ was never adopted.¹⁰⁴ As a result, the state and its citizens were arguably left more vulnerable than necessary to either threat. However, in February 2006, new, less provocative legislation was introduced to fill the void and eliminate the vulnerability.¹⁰⁵

A. California's Exercises in Preparedness

Like the federally coordinated exercises TOPOFF and DARK WINTER,¹⁰⁶ the state of California also engaged in practice exercises to prepare for the worst-case scenario.¹⁰⁷ Based on these exercises, state authorities realized that California and its various counties were not adequately prepared to handle a major public health emergency.¹⁰⁸ Authorities also did not have a plan to address the public's response to

102. Compare THE MODEL STATE EMERGENCY HEALTH POWERS ACT (Ctr. for Law & the Pub.'s Health, Draft for Discussion 2001), available at <http://www.publichealth-law.net/MSEHPA/MSEHPA2.pdf>, with Assemb. B. 1763, 2001-2002 Leg., Reg. Sess. (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_2002108_introduced.pdf. However, Assemblyman Keith Richman, believing he would jeopardize the passage of his bill by including HIV or AIDS as one of the communicable diseases, excluded it from California Assembly Bill 1763. See Keith Richards, Cal. Assemb. Member, Responding to the Threat of Bioterrorism: Is California's Public Health System Ready, California Health Policy Roundtable (Mar. 18, 2002), available at http://www.kaisernetwork.org/health_cast/uploaded_files/3.19.02_Transcript_Bioterrorism.pdf.

103. See Assemb. B. 1763, 2001-2002 Leg., Reg. Sess. (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020418_amended_asm.pdf (second amended version).

104. Ctr. for Law & the Pub.'s Health, *supra* note 101. In describing the defeat of his bill in April 2002, California Assemblyman Keith Richman lamented that California lawmakers were "already suffering from disaster amnesia. They have their heads stuck in the sand." Hall, *supra* note 100 (quoting Assemblyman Richman).

105. On February 23, 2006, Assemblyman Keith Richman again proposed legislation aimed at protecting Californians during a public health emergency. See Assemb. B. 2451, 2005-2006 Leg., Reg. Sess. (Cal. 2006), available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2451-1800/ab_2451_bill_20060223_introduced.pdf; see also *infra* Part V.

106. See *supra* Part III.A.

107. State and local officials not only conducted theoretical planning exercises, but also practiced implementing various responses and coordinating spending to address different regional threats. See generally Sabin Russell, *Health Experts Ponder Pandemic*, S.F. CHRON., May 3, 2005, at B3.

108. Telephone Interview with Keith Richman, *supra* note 94. Assemblyman Richman acknowledged that much has been done since September 11, 2001 to prepare California for a public health emergency, but he points to the findings of the Little Hoover Commission as evidence California remains unprepared in certain areas. *Id.* See generally LITTLE HOOVER COMM'N, STATE OF CALIFORNIA, RECOMMENDATIONS TO GOVERNOR SCHWARZENEGGER (June 23, 2005), available at <http://www.lhc.ca.gov/lhcdir/emergprep/report170a.pdf>.

either the emergency or the measures the state planned to undertake while responding to the emergency.¹⁰⁹

Recently, San Diego, California, engaged in a one-day table-top exercise¹¹⁰ studying the implementation of a quarantine in San Diego County.¹¹¹ It was noted that San Diego County had little real world experience in dealing with a public health crisis and issues related to quarantine.¹¹² The results of the San Diego exercise revealed a need for greater collaboration between medical and non-medical personnel, as well as civilian and military officials.¹¹³ Further, issues related to voluntary compliance with quarantine measures were studied, and it was determined that a loss of income during a quarantine was a great impediment to successfully implementing a quarantine.¹¹⁴ While military personnel were assured their income was guaranteed, employees in the private sector did not receive the same assurances and were less likely to comply with quarantine orders.¹¹⁵

The RAND Corporation¹¹⁶ also conducted a series of table-top exercises testing the public health response to a smallpox outbreak.¹¹⁷ While each testing area was deemed to have done considerable planning for a major event, a wide range in preparedness levels remained and “[h]ealth departments varied dramatically in their ability to rap-

109. Telephone Interview with Keith Richman, *supra* note 94.

110. Table-top exercises involve a collection of experts, as well as local and state officials, among others, who run through a scenario, determine how to handle the situation, and develop plans to implement in subsequent live exercises or actual threats. Different cities and counties in California, however, also engage in their own independent practice exercises involving real-life, on-the-ground training. *See, e.g.*, Ivy Dai, *Avian Flu Seen as Threat by Area's Health Officials*, WHITTIER DAILY NEWS, Jan. 29, 2005; Lois Gormley, *Drill Tests Bio-Terrorism Response*, DESERT SUN (Palm Springs, Cal.), May 28, 2004, at 1B.

111. Cleto DiGiovanni et al., *Quarantine Stressing Voluntary Compliance*, 11 EMERGING INFECTIOUS DISEASE 1778, 1779 (2005), available at <http://www.cdc.gov/ncidod/EID/vol11no11/05-0661.htm>. This exercise was conducted in December 2004 and “emphasized voluntary compliance with home quarantine to control an emerging infectious disease outbreak.” *Id.* It investigated local civilian-military collaboration in public health emergency management and addressed concerns civilians had about lost income during the quarantine. *Id.* *See also* Cheryl Clark, *County Seen as Especially Vulnerable to Pandemic*, SAN DIEGO UNION-TRIB., Oct. 16, 2005, at A1.

112. DiGiovanni et al., *supra* note 111, at 1778.

113. *Id.* at 1779.

114. *Id.* at 1778.

115. *Id.*

116. The RAND Corporation is a research institute based in California. *See generally* History and Mission: RAND Overview, <http://www.rand.org/about/history/> (last visited Apr. 25, 2006).

117. Nicole Lurie et al., *Local Variation in Public Health Preparedness: Lessons from California*, HEALTH AFFAIRS—WEB EXCLUSIVE 341, June 2, 2004, <http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.341v1>. The exercise tested seven jurisdictions comprising approximately thirty-nine percent of the states’ population. *Id.* at 343.

idly alert the physician and hospital community to a potential outbreak.”¹¹⁸ Interestingly, in the area of communication, the seven tested jurisdictions varied on when the public would be informed about a major public health emergency.¹¹⁹ Some would notify the public as soon as they began to investigate a suspicious case, while “others would wait until a diagnosis was confirmed (days later) to hold a press conference.”¹²⁰ Also, considering the diversity of California’s population, it was noted “[o]ne health department can communicate health information in nine languages, while another is not prepared to communicate in any language except English.”¹²¹

Contra Costa County, California, also engaged in a recent tabletop exercise involving local and state health department officials.¹²² The exercise considered the county’s response to the initial outbreak of avian influenza in the region.¹²³ It was determined the initial illness was difficult to distinguish from other patients with similar symptoms.¹²⁴ Once it was determined the fictional patient had recently returned from traveling to Asia, however, a state of emergency was declared and federal authorities contacted.¹²⁵

The Contra Costa County exercise and other exercises highlight that while California has made many improvements since September 11, 2001, more needs to be done to prepare state authorities for the eventualities of either a bioterrorist attack or a large-scale outbreak of disease.¹²⁶ Clearly, the initial response would be local; however, the state must be able to coordinate a large, effective response to either type of event. This would entail early detection, continued surveillance, treatment of the ill, and the implementation of both quarantine and isolation measures. Because local public health officials and police services would be unable to independently implement a coordi-

118. *Id.* at 348.

119. *Id.* at 349.

120. *Id.*

121. *Id.*

122. Russell, *supra* note 107.

123. *Id.*; see also L.C. Greene, *Officials Brace for Avian Flu*, SAN BERNARDINO SUN, Dec. 25, 2004 (discussing the response to an avian influenza outbreak in Los Angeles, San Bernardino, and Riverside Counties).

124. Russell, *supra* note 107.

125. *Id.*

126. See Sharon Bernstein, *Southland Not Ready for Disaster*, L.A. TIMES, Sept. 17, 2005, at A1 (noting that despite massive spending to prepare the state for a large-scale calamity, it is unprepared for a major catastrophe). See generally Matthew B. Stannard, *U.S. Ill-Prepared to Handle Bioterror Attack, Experts Warn*, S.F. CHRON., Nov. 1, 2004, at A1 (noting a UCSD School of Medicine infectious disease specialist’s comments that the nation, including California, was not well-positioned to either fight or even detect new threats).

nated system of communication, let alone a unified policy of how to cope with potentially millions of displaced persons,¹²⁷ the state must take the lead and act now to insure a swift, smooth response with clear guidelines in the eventuality of a statewide threat.¹²⁸

B. California's 2002 Proposed Emergency Health Powers Act

The legislation proposed by Assemblyman Richman in 2002 was nearly identical to the Model Act drafted by the Center for Law and the Public's Health. Although it never passed, the 2002 proposal contains the detail needed to address a large-scale threat to the public health. Accordingly, the 2002 proposal is examined in detail here since it will likely serve as the basis of any future *comprehensive plan*, as called for in the more general February 23, 2006 proposed legislation discussed in Part V.¹²⁹

The proposed 2002 EHPA, if passed, would have required the Governor of California "to appoint a Public Health Emergency Planning Commission . . . that would be required to submit to the Governor a designated public health emergency plan."¹³⁰ Further, "the State

127. See Lisa McPherson & Bettye Wells Miller, *Katrina: Learning from Chaos*, PRESS ENTERPRISE (Riverside, Cal.), Sept. 11, 2005, at A15 (noting that a bioterror attack in Los Angeles or San Diego, California, could force residents of those cities inland, overwhelming the region's ability to handle the emergency).

128. In November 2005, local and state authorities conducted "Golden Guardian," an exercise involving "more than 2500 participants representing more than 120 federal state and local agencies." *Post-Katrina Readiness for Terrorist Attacks: Before the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Matt Bettenhausen, Director, California Office of Homeland Security), available at <http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=656&topicId=10671&docId=1:321925523&start=2>. "The Golden Guardian 2005 scenario involves simultaneous attacks on critical infrastructure at sites in the San Francisco/Oakland Bay Area and State Capitol regions." *Id.* While not a bioterrorism preparedness exercise, the exercise will improve coordination and communication between local, state, and federal authorities and help identify weakness in the response to terrorist attack. *Id.*

129. The proposed Public Health Preparedness Act, as introduced on February 23, 2006 by Assemblyman Keith Richman, calls for the development of a "comprehensive plan to provide for a coordinated, appropriate response in the event of a public health emergency." Assemb. B. 2451, § 130505(a), 2005-2006 Leg., Reg. Sess. (Cal. 2006), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_2451-2500/ab_2451_bill_20060223_introduced.pdf. The 2002 legislation, although never enacted, will likely serve as the basis for any plan developed in California.

130. Assemb. B. 1763, 2001-2002 Leg., Reg. Sess., Legislative Counsel's Digest, (Cal. 2002) (as introduced by Assemb. Member Richman on Jan. 8, 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020108_introduced.pdf. References to the EHPA are to the introduced version, rather than the amended versions.

Department of Health Services . . . [would have had] principal responsibility to protect the public's health."¹³¹

As previously noted, the EHPA would have empowered the Governor of California to declare a "state of public health emergency."¹³² Once a public health emergency had been declared, the Governor would possess authority to carry out a number of actions, which include (1) suspending statutory provisions regulating the conduct of "state business [where the provisions] . . . "would prevent, hinder, or delay action . . . by the public health authority,"¹³³ (2) utilizing state resources "reasonably necessary to respond to the public health emergency,"¹³⁴ (3) transferring state government functions and personnel as needed,¹³⁵ (4) mobilizing the state militia,¹³⁶ (5) coordinating responsive action with other states,¹³⁷ and (6) seeking federal aid.¹³⁸

Further, the 2002 EHPA laid out procedures by which the Governor's declaration of a public health emergency may be enforced or terminated. "During a state of public health emergency, a public health authority¹³⁹ may request assistance in enforce[ment] . . . from a public safety authority. The public safety authority may request assistance from the organized militia in enforcing the orders of the public health authority."¹⁴⁰ With respect to terminating the state of public emergency, the EHPA would have laid out three separate methods. The first is by executive order of the Governor "upon finding that the occurrence of an illness or health condition that caused the emergency no longer poses a high probability of a large number of deaths."¹⁴¹ Second, the state emergency would terminate automatically if, after

131. *Id.*

132. *Id.* § 130410.

133. *Id.* § 130420(a); *see also* Reich, *supra* note 9, at 395.

134. Assemb. B. 1763 § 130420(b).

135. *Id.* § 130420(c).

136. *Id.* § 130420(d). The state militia is defined by section 130360 as "the California National Guard, the army national guard, the air national guard, or any military force organized under the laws of the state." *Id.* § 130360.

137. *Id.* § 130420(e).

138. *Id.* § 130420(f).

139. In California, the "Department of Health Services, any local governmental agency . . . responsible for protecting and preserving the public[] health . . . [or] any person that is designated directly by the department or local governmental agency to act on [its] behalf" would constitute the "public health authority." *Id.* § 130362(b).

140. *Id.* § 130426. The proposed EHPA defines the "public safety authority" as "the Department of the California Highway Patrol and any local governmental agency that acts principally to protect or preserve the public safety or any person authorized to act on behalf of the Department of the California Highway Patrol or the local government agency." *Id.* § 130362(d).

141. *Id.* § 130430.

thirty days, it has not been renewed by the Governor.¹⁴² Finally, “[t]he Legislature, by a majority vote of each house,” could terminate the declaration upon finding that the cause of the emergency or condition no longer poses a high probability of danger.¹⁴³

Various sections of the 2002 EHPA, however, are contentious due to the potential constitutional issues that may arise after a public health emergency has been declared. For example, there are provisions outlining the reporting, tracking, and sharing of private health information¹⁴⁴ the PHA could implement to detect and track the emergency.¹⁴⁵ Healthcare providers, including pharmacists¹⁴⁶ and veterinarians,¹⁴⁷ for example, would be required to report all cases of sick persons or animals that could indicate a public health emergency, as well as unusual or increased prescription rates.¹⁴⁸ Based on these initial reports, the PHA may then track the reports by investigating and identifying exposed individuals and, if need be, communicate the information to the state or federal health authorities.¹⁴⁹

The EHPA also outlines the “Special Powers During a State of Public Health Emergency” with respect to “[c]ontrol of [p]roperty.”¹⁵⁰ The PHA could close, evacuate, or decontaminate any facility posing a danger to the public health¹⁵¹ and, further, destroy any material posing such a danger.¹⁵² Moreover, facilities and materials, including real estate, could be condemned, leased, or distributed in response to the threat.¹⁵³ Specifically, private healthcare facilities could be transferred to the authority of the PHA during the course of the danger.¹⁵⁴ The PHA could also “[i]nspect, control, restrict, and regulate by rationing and using quotas . . . the use [or] sale of . . . commodities, as may be reasonable and necessary to respond to the public health emer-

142. *Id.* § 130432.

143. *Id.* § 130434.

144. Issues related to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) are too broad to cover here. For information on such issues, see Julie Bruce, *Bioterrorism Meets Privacy: An Analysis of the Model State Emergency Health Powers Act and the HIPAA Privacy Rule*, 12 ANNALS HEALTH L. 75 (2003).

145. *See* Assemb. B. 1763 §§ 130380-130392.

146. *Id.* § 130382.

147. *Id.* § 130386.

148. *Id.* § 130384-13086.

149. *Id.* §§ 130390-130392.

150. *Id.* §§ 130440-130472.

151. *Id.* § 130440.

152. *Id.* § 130440(b).

153. *Id.* § 130442(a).

154. *Id.* § 130442(b).

gency.”¹⁵⁵ Finally, the PHA would have the power to control the movement of people from afflicted or threatened areas.¹⁵⁶

The EHPA also details the special powers related to the “Protection of Persons”¹⁵⁷ and declares the PHA “shall use every available means to prevent the transmission of infectious disease.”¹⁵⁸ For instance, the PHA could “perform medical examinations . . . as necessary” and quarantine citizens refusing to submit to examination.¹⁵⁹ More intrusively, the PHA could order the vaccination,¹⁶⁰ treatment,¹⁶¹ isolation, or quarantine¹⁶² of any individual necessary to prevent or halt the spread of the danger.

Consequently, the lives of ordinary Californians would be drastically impacted under the proposed 2002 EHPA during a public health emergency. Californians must recall, however, that any measures enacted based on the EHPA would be temporary, and, despite their criticisms, the measures are designed to be invoked in rare occurrences when the security of the state and the interests of the population are in jeopardy.

155. *Id.* § 130442(c).

156. *Id.* § 130442(e) (discussing the control of the movement of people into and out of any stricken area or threatened public area).

157. *Id.* §§ 130480-130506.

158. *Id.* § 130480.

159. *Id.* § 130482.

160. *Id.* § 130484. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (providing the legal basis for allowing forced vaccination holding compulsory smallpox vaccinations had a substantial relation to the protection of public health and safety of the state). For a discussion on the uses of *Jacobson*, see Joseph, *supra* note 89.

161. Assemb. B. 1763 § 130486.

162. *Id.* §§ 130490-130504. The proposed EHPA defines “isolation” as “the physical separation and confinement of an individual or group of individuals who are infected or reasonably believed to be infected with a contagious disease or possibly contagious disease from nonisolated individuals, to prevent or limit the transmission of the disease to nonisolated individuals.” *Id.* § 130356(c). The proposed EHPA defines “quarantine” as

the physical separation and confinement of an individual or group of individuals who are or may have been exposed to a contagious or possibly contagious disease from nonquarantined individuals and who do not show signs or symptoms of the contagious disease, to prevent or limit the transmission of the disease to nonquarantined individuals.

Id. § 130364. For a discussion on the use of quarantine, see Amir Zarrinpar, *Quarantine*, 290 MED. STUDENT J. AM. MED. ASS’N 2872, 2872 (2003). However, quarantine can be used to discriminate against certain parts of society. For example, in 1900, the San Francisco Board of Health quarantine power was used to quarantine Chinatown during an outbreak of the plague. See Paul J. Edelson, *Quarantine and Social Inequality*, 290 MED. STUDENT J. AM. MED. ASS’N 2874, 2874 (2003). Further, all Chinese and Japanese people were ordered quarantined under the notion Asians were more susceptible to the disease because they ate rice rather than animal protein. *Id.*

C. Criticism of *The Emergency Health Powers Act*

Considerable criticism was levied in response to California's attempt to enact the 2002 legislation.¹⁶³ As such, the 2002 EHPA was never enacted. As previously noted, however, legislation proposed in February 2006 aimed to rectify certain criticisms of the 2002 EHPA by drafting vague, less empowering legislation calling for the creation of a *comprehensive plan* to respond to a public health emergency. However, the *comprehensive plan* called for in the 2006 legislation would likely be largely based on the proposed 2002 EHPA.

Critics of the 2002 EHPA argued existing law already accomplished much of what the EHPA proposed to do in the event of a threat.¹⁶⁴ The Governor already had the power to declare an emergency and take public property.¹⁶⁵ Moreover, California public health officials were already empowered to "quarantine [the sick], vaccinate and isolate people."¹⁶⁶ The proposed state legislation, however, went further than existing legislation by calling for the state Department of Health Services (DHS) to be designated as the governmental agency having "principal responsibility to protect the public's health" in an emergency.¹⁶⁷ The state DHS would be responsible for "coordinating all matters pertaining to the public health emergency response . . . dur-

163. Treasurefield, *supra* note 93; Aurelio Rojas, *Sweeping Bioterrorism Measure Gutted*, SACRAMENTO BEE, Apr. 17, 2002, at A3; Marilyn Chase, *Civil-Liberties Issues Check Plans to Fight Bioterrorism*, WALL ST. J., May 17, 2002, at B1. Various groups opposed the bill for various reasons. As Chase specifically noted, the American Civil Liberties Union opposed the act for "having too broad a definition of bioterror emergency, and too narrow a set of safeguards for due process, medical privacy, and religious objections to procedures like cremation." *Id.* The American Legislative Exchange Council also opposed the act because it "constituted an unwarranted expansion of state public-health powers and warned it would lead to declarations of quarantine 'on the vague definition of a biological threat.'" *Id.* Assemblyman Richman, in a telephone interview, recalled several angry citizens telephoning his office arguing that his proposed 2002 legislation placed far too much unchecked power in the hands of the state government. Telephone Interview with Keith Richman, *supra* note 94. He believed the criticism was unwarranted, and it was necessary to educate the public about these criticisms and the devastating impact a public health emergency would have if not responded to quickly. *Id.*

164. Treasurefield, *supra* note 93; Compare CAL. HEALTH AND SAFETY CODE §§ 120125-120150 with Assemb. B. 1763 § 130490. Therefore, the similarity seems to dispel Model Act creator Lawrence Gostin's central premise that the Model Act would "clarify ambiguity" and modernize the existing public health laws in the various states. Parmet, *supra* note 23, at 104.

165. CAL. GOV'T CODE § 8625. See generally Wing, *supra* note 22, at 72.

166. Treasurefield, *supra* note 93.

167. Assemb. B. 1763, 2001-2002 Leg., Reg. Sess., Legislative Counsel's Digest (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020108_introduced.pdf.

ing a state of public health emergency.”¹⁶⁸ Critics alleged this would result in a loss of local control during an emergency.¹⁶⁹ Considering California’s large size, public health officials believed it was important for local authorities to declare an emergency.¹⁷⁰

Many of the most contentious articles of the Model Act, however, were based on previously enacted California Health and Safety Code provisions.¹⁷¹ Consequently, critics argued California did not need further measures, such as the Model Act, when the Model Act itself was based on California legislation.¹⁷² By going beyond preexisting legislation, critics alleged the 2002 EHPA posed an even greater risk to civil liberties.¹⁷³

1. Reporting, Tracking, and Sharing Health Information

Gathering and communicating private medical information raises two issues: first, the feasibility of reporting and sharing information during a major health crisis and, second, the constitutional issues raised by reporting private health information to other branches of government or outside agencies.

With respect to the first issue, the feasibility of reporting, tracking, and sharing private health information during a major public health emergency, information gathered by healthcare workers may not be as important as other pressing issues, such as security. For instance, the declaration of a public health emergency in the Gulf region¹⁷⁴ after Hurricane Katrina was imposed to prevent the possible outbreak of disease.¹⁷⁵ However, empowering the reporting, tracking, and sharing of private health information is highly questionable in a lawless society unable to establish basic security on the streets.¹⁷⁶

168. *Id.*

169. Treasurefield, *supra* note 93.

170. *Id.* It is commonly recognized that local authorities and health care providers would be the first to identify either an outbreak of infectious disease or the consequences of a bioterror attack. Cmons, *supra* note 78.

171. *See supra* note 92.

172. Treasurefield, *supra* note 93.

173. *Id.*

174. *See supra* note 19, discussing the territorial issues involved in the federal government declaring a state of public health emergency.

175. Susan B. Glasser & Michael Grunwald, *The Steady Buildup to a City's Chaos*, WASH. POST, Sept. 11, 2005, at A1.

176. *See* Donald R. Winslow, *Photojournalists Covering Katrina Fall Victim to Growing Violence, Chaos*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, Sept. 8, 2005, http://www.nppa.org/news_and_events/news/2005/09/hurricane2.html; *see also* SIMON, *supra* note 30, at 359 (discussing the crisis atmosphere resulting from a bioterror attack in the

Second, the constitutional issues raised by reporting and communicating private health information, traditionally protected by the patient-doctor privilege, are of great concern to many opponents.¹⁷⁷ Case law, however, permits the collection of private health information under *Whalen v. Roe*.¹⁷⁸ *Whalen* is a 1977 case permitting a state health authority to maintain computerized files of patients receiving specific prescriptions.¹⁷⁹ The basis for the Court's determination was that the computerized lists could only be accessed by a limited number of people who have a legitimate interest in the information.¹⁸⁰ Critics contend, however, that computer technology advances in the last thirty years, the advent of the internet, and the ease with which even the most secure government databases can be hacked,¹⁸¹ pose a danger to an individual's right to privacy.

Accordingly, under the 2002 proposed EHPA, healthcare workers and state authorities would have the legal ability to gather, track, and share private health information during a public health emergency.¹⁸²

2. Quarantine, Isolation, Vaccination: The Case Law

Critics also allege the protection of persons provisions under the Model Act or the 2002 EHPA impinge upon the basic constitutional rights of individuals, such as the freedom of movement.¹⁸³ However, considering the severity of the emergency under which the EHPA would be used, the security of the state and the nation may be threatened, thereby warranting such impingement.¹⁸⁴ Individuals, therefore, must forgo some of their constitutional rights during this type of emergency with the understanding the rights will be restored once the

United States).

177. See generally May, *supra* note 25, at 161.

178. *Whalen v. Roe*, 429 U.S. 589 (1977) (upholding a New York statute granting the state's health authority the power to maintain computer files containing the names and addresses of people obtaining controlled substances with a physician's prescription).

179. *Id.* at 591.

180. *Id.* at 606 (Brennan, J., concurring).

181. *Cyber Security and the US Economy: Hearing Before the J. Economic Comm.*, 107th Cong., (2001) (statement of Lawrence K. Gershwin, National Intelligence Officer, Science and Technology, National Intelligence Council, Central Intelligence Agency), available at <http://www.house.gov/jec/hearings/gershwin.pdf>.

182. See generally Assemb. B. 1763, 2001-2002 Leg., Reg. Sess., §§ 130370-130388 (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020108_introduced.pdf.

183. See Matei, *supra* note 74, at 443-44.

184. "If somebody had small pox and insisted on congregating, it would be insane not to quarantine." *Id.* at 447 (quoting Lawrence Gostin).

threat has passed. To ensure the survival of those rights, they may have to be relinquished temporarily while combating a large-scale health emergency.

Once the Governor declares a public health emergency, critics argue citizens, sick or not, may suffer the abuses of their government in the name of security.¹⁸⁵ Questions about the extent to which authorities would go to enforce the measures to *protect persons* abound.¹⁸⁶ For example, would armed guards be used to enforce a quarantine? Could they use live ammunition, or even deadly force, to protect the rest of society?¹⁸⁷ Again, considering the scope of the Hurricane Katrina and the clear inability of law enforcement personnel to cope with the initial lawlessness,¹⁸⁸ would use of force in the event of a public health emergency be warranted? Moreover, with respect to receiving medical treatment, individuals have “a constitutional right to refuse treatment based on the concept of bodily integrity.”¹⁸⁹

Once a declaration of public health emergency has been made, the PHA would have broad power to exercise authority over the private property of an individual or business, as well as power to restrict the freedom of movement of infected and uninfected people alike.¹⁹⁰ The basis for many of the most controversial articles of the Model Act, however, is the California Health and Safety Code.¹⁹¹ Furthermore, measures, such as quarantine, isolation, and vaccination, have been upheld as valid exercises of a state’s public health powers during a public health emergency.¹⁹²

Several federal and California cases address the lengths to which officials may go, under both state and federal constitutions, during a public health emergency. In the realm of vaccinations, the Court in *Jacobson v. Massachusetts* addressed the issue of compulsory vaccination.¹⁹³ The Court held that, with respect to smallpox (and pre-

185. *Id.* at 442-44.

186. See Warren Vieth, *President Cites Flu Epidemic Risk, Suggests Role for Troops*, L.A. TIMES, Oct. 5, 2005, at A10; Matei, *supra* note 74, at 442.

187. See Vieth, *supra* note 186 (discussing the military and National Guard’s role during a pandemic).

188. Winslow, *supra* note 176.

189. Reich, *supra* note 9, at 402.

190. See Matei, *supra* note 74, at 438, 442-43, 447.

191. For example, see the legislative history portion of THE MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, §§ 604-05 (Ctr. for Law & the Pub.’s Health, Draft for Discussion 2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>

192. See Joseph, *supra* note 89.

193. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

sumably other contagious infections), a state had the right to order its citizens to be compulsorily vaccinated.¹⁹⁴

In the area of quarantine, a California appellate court in *In re Martin* struggled with the issue of what constituted reasonable cause to quarantine a person suspected of being ill, and thereby justifying a deprivation of an individual's personal liberty.¹⁹⁵ *Martin* involved petitioners who were arrested and subsequently had bail fixed.¹⁹⁶ Their release was refused, however, when the local health officer ordered them quarantined based on the reputation of the rooming house where petitioners were arrested as a house of prostitution and a suspicion that petitioners may have been infected with a venereal disease.¹⁹⁷

The court noted health officers had the duty to "take all measures necessary to prevent the transmission of venereal disease and . . . [were] vested with full power of quarantine."¹⁹⁸ Moreover, the court noted, "whether or not a quarantine order is justified depends upon the facts of each individual case."¹⁹⁹ Thus, looking at the facts, the court noted the health officer knew the premises were regarded as a house of prostitution; the rooming house contained paraphernalia associated with prostitution; there were reports that venereal disease had been contracted on the premises; arrests for prostitution had been made at the address; and, despite the fact petitioners were not originally arrested on prostitution charges, they claimed to have engaged in the practice in the past.²⁰⁰ The court, therefore, concluded there was reasonable cause to quarantine petitioners based on their association with the house, the history of infection originating there, and their statements they had engaged in high-risk behavior.²⁰¹

Additionally, despite petitioners' argument that reasonable cause to continue the quarantine no longer existed, the court held a person may be detained for a period of time to determine if there was actual infection.²⁰² Here, the court noted medication or the use of local disinfectants may have temporarily masked the outbreak of infection.²⁰³

194. *Id.* at 39; Joseph, *supra* note 89.

195. *In re Martin*, 188 P.2d 287, 289-90 (Cal. 1948). See generally Krista Maglen, *Politics of Quarantine in the 19th Century*, 290 J. AM. MED. ASS'N 2873 (2003).

196. *Martin*, 188 P.2d at 289.

197. *Id.* 289-90.

198. *Id.* at 289.

199. *Id.* at 290.

200. *Id.*

201. *Id.* at 290-91.

202. See *id.*

203. *Id.* at 291.

Thus deprived of medication or sexual contact through quarantine, it could be determined if petitioners were infected or not.²⁰⁴

In his dissent, Presiding Justice Adams wrote that only one person, the arresting officer, was aware of the house's reputation, which was not enough to base the court's finding of reasonable cause to quarantine.²⁰⁵ He also noted the reports of individuals contracting infection at the house was "hearsay of the rankest kind," and, further, the men involved were not quarantined.²⁰⁶ He concluded, "Even a prostitute is entitled to the protection" of the right to liberty and there was no showing of reasonable cause to believe petitioners were infected and thus subject to quarantine.²⁰⁷

In re Halko is another California appellate decision addressing quarantine and isolation.²⁰⁸ In *Halko*, the petitioner was diagnosed with tuberculosis, and, after being served with an order isolating him at Mira Loma Hospital, he fled the institution.²⁰⁹ The petitioner "was subsequently arrested, tried, and convicted" of a misdemeanor.²¹⁰ "Prior to serving the jail sentence the petitioner was served with another order of isolation . . ."²¹¹ He was ordered back to the hospital where he was subsequently served with four consecutive isolation orders.²¹² The petitioner later sought a writ of habeas corpus "contend[ing] the right of the health officer to issue [four] consecutive certificates of quarantine and isolation for periods of six months each, 'without means of questioning and judicially determining' the conclusion of the health officer, results in 'continually depriving one of his liberty.'"²¹³ However, the *Halko* court disagreed.²¹⁴

Using similar language as *Martin*, the *Halko* court noted health officers may "use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stage . . . and to ascertain the sources of such infection."²¹⁵ Further, health officers can make isolation or quarantine orders when they determine it is necessary to protect the pub-

204. *Id.* at 290-91.

205. *Id.* at 294 (Adams, P.J., dissenting).

206. *Id.*

207. *Id.* at 298.

208. *In re Halko*, 54 Cal. Rptr. 661 (1966).

209. *Id.* at 662.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

lic.²¹⁶ The order is to be written, giving the name of the person, the time or duration of the order, “the place of isolation or quarantine, and such other terms and conditions as may be necessary to protect the public health.”²¹⁷ Moreover, the *Halko* court, quoting the California Supreme Court, declared it was “well-recognized” that “one of the first duties of a state” is to protect “the health and comfort of its” citizens.²¹⁸ Further, the state may act using its police power to take action through “drastic measures” to “eliminat[e] . . . disease, whether in human beings,” animals, or crops.²¹⁹ The court presumed, however, “the legislature has carefully investigated and has properly determined that the interests of the public require legislation that will insure the public safety and the public health against threatened danger from” disease.²²⁰ Thus, in *Halko*, the court determined the health officer was empowered to issue consecutive orders for quarantine “so long as any person continues to be infected with [a disease] and on reasonable grounds is believed by the health officer to be dangerous to the public health.”²²¹

A more recent example of the court’s deference to the legislature comes from *Love v. the Superior Court of San Francisco*, where the court was asked to determine the constitutionality of AIDS testing.²²² The petitioners were arrested for soliciting an act of prostitution and ordered to undergo AIDS testing.²²³ They argued that the testing, based on the California Penal Code “violate[d] their Fourth Amendment right to be free from unreasonable searches” and seizures.²²⁴

In addressing the petitioner’s Fourth Amendment challenge, the court noted compulsory blood testing was a “search[] subject to the Fourth Amendment.”²²⁵ However, it was “undisputed that the control of a communicable disease is a valid exercise of the state’s police power.”²²⁶ Thus, where the state exercises its police power to test for the protection of the public health, the court balances the “special

216. *Id.* at 662-63.

217. *Id.*

218. *Id.* (quoting *Patrick v. Riley*, 287 P. 455, 456 (Cal. 1930)).

219. *Id.* (quoting *Patrick*, 287 P. at 456).

220. *Id.* (quoting *Patrick*, 287 P. at 456).

221. *Id.* at 664.

222. *Love v. Superior Court of San Francisco*, 276 Cal. Rptr. 660, 661-62 (App. Ct. 1990).

223. *Id.*

224. *Love*, 276 Cal. Rptr. at 662 (discussing CAL. PENAL CODE § 1202.6).

225. *Id.* (quoting *Johnetta J. v. Municipal Court*, 267 Cal. Rptr. 666, 675 (1990) and *Skinner v. Railway Labor Exec. Ass’n.*, 489 U.S. 602 (1989)).

226. *Id.*

governmental needs, beyond the normal need for law enforcement," against "the individual's privacy expectations . . . to determine whether it is impractical to require a warrant or some level of individualized suspicion."²²⁷

Thus, the court examined the statute requiring the AIDS testing and determined that, despite a failure of the statute section to specifically declare a purpose, the purpose could nonetheless be gleaned from "the provisions of the act, the legislative history of the act and recent findings of the Legislature regarding AIDS and AIDS testing."²²⁸ In looking to the legislative history, the court noted that "[i]n 1986, the Legislature declared that '[t]he rapidly spreading AIDS epidemic poses an unprecedented major public health crisis in California, and threatens, in one way or another, the life and health of every Californian.'"²²⁹ In looking at the petitioner's privacy expectations, the court noted drawing blood was a minimal intrusion.²³⁰ Therefore, when balanced with the state's desire to stem the spread of AIDS, the court upheld the testing requirement.²³¹

As applied today, in the areas of quarantine, isolation, and vaccination, courts have upheld the state's power to exercise drastic measures during a public health emergency to protect the public.²³² With respect to vaccination, if a public health emergency were declared in the event of an avian influenza outbreak, presumably once a vaccine was developed, the state could order the vaccination of the entire population.²³³ Further, with respect to quarantine, an individual can be quarantined based on his or her association with a particular location, a home or apartment, or, presumably, a condominium or business, if that location is reputed to be a source of infection.²³⁴ The quarantined

227. *Id.* at 662-63 (quoting *Treasury Employees v. Van Raab*, 489 U.S. 656, 665-66 (1989)). The special needs doctrine originated when the Court upheld mandatory blood, urine, and breath testing of railroad employees for alcohol and drugs. *Skinner*, 489 U.S. at 606, 620, 633. In California, the *Johnetta J.* court upheld an AIDS test of a suspect who bit a police officer, though there was no probable cause or individualized suspicion to believe the suspect had AIDS. *Johnetta J.*, 267 Cal. Rptr. at 685.

228. *Love*, 276 Cal. Rptr. at 663.

229. *Id.* (alteration in original) (quoting CAL. HEALTH AND SAFETY CODE § 199.45 (West 1988)).

230. *Id.* at 664-65 (citing *Skinner*, 489 U.S. at 602; *Breithaupt v. Abram*, 352 U.S. 432 (1957)). The court noted that blood tests were minimally intrusive, commonplace, required only a small amount of blood to be extracted, involved no risk, trauma, or pain, and had become basically routine in everyday life. *Id.*

231. *Id.* at 666.

232. *See id.* at 662.

233. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

234. *See In re Matrin*, 188 P.2d 287, 291 (Cal. 1948).

person may also be held for a period long enough for symptoms to present themselves.²³⁵ Thus, the state's police power to restrict a person's liberty and freedom of movement is well established in the case of a public health emergency. Further, with respect to testing for infection, an individual would be required to submit to testing.²³⁶ Again, using avian influenza as an example, a blood test could determine the presence of the H5N1 virus in a person suspected of having the virus. Similar to AIDS testing, testing for H5N1 would presumably be upheld, given the potential magnitude of the outbreak. Therefore, based on earlier precedent, Californians would experience restrictions of their civil liberties during either a large-scale bioterrorist attack or outbreak of naturally occurring infectious disease.

Consequently, the measures contained in the 2002 EHPA would likely be upheld in both state and federal courts. Therefore, the best way to protect drastic encroachment upon civil liberties is to pass a revised version of the EHPA, which contains specific, enumerated protections. However, due to criticisms and fear, the California Assembly is now considering a new, vague, and less comprehensive proposal devoid of all but the most general protections of civil liberties.

V. FEBRUARY 23, 2006: THE PUBLIC HEALTH PREPAREDNESS ACT

On February 23, 2006, Assemblyman Keith Richman, author of the 2002 EHPA, proposed a new measure designed to protect Californians during a public health emergency. The proposed bill, entitled the Public Health Preparedness Act (PHPA), calls for the creation of a *comprehensive plan* and speaks generally about "ensure[ing] that the needs of infected or exposed persons are properly addressed" and that state and local officials have the "ability to prevent, detect, and manage health threats."²³⁷ The new proposal, however, is far shorter and less detailed than the 2002 EHPA. The reason being; the shorter, less detailed 2006 proposal is clearly designed to pass the Assembly and as such, gently nudge Californians into accepting the more comprehensive measures outlined in the 2002 EHPA. Moreover, the 2006 proposal, like the 2002 EHPA, also lacks clear, enumerated protections for civil rights.

235. *Id.* at 289-90.

236. See *Love*, 276 Cal. Rptr. at 666 (requiring AIDS testing).

237. Assemb. B. 2451, 2005-2006 Leg., Reg. Sess., § 130505(a)-(c) (Cal. 2006), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_2451-2500/ab_2451_bill_20060223_introduced.pdf.

The 2006 PHPA casually proclaims that “government should do more to protect the health, safety, and general well-being of [Californians],”²³⁸ enumerating in general terms the means by which to accomplish this goal. For instance, the Secretary of California Health and Human Services shall prepare a plan addressing procedures for notifying and communicating with the public during a public health emergency;²³⁹ procedures for the “central coordination of resources, personal, and services”;²⁴⁰ “[a] process for effective reporting, tracking, and surveillance of diseases”;²⁴¹ a procedure for “efficient evacuation” of people;²⁴² and a process for vaccinating people during a public health emergency.²⁴³

The only reference in the PHPA to civil liberties declares that “[t]he rights of the people to liberty, bodily integrity, and privacy during a public health emergency should be respected to the fullest extent possible, consistent with maintaining and preserving the public’s health and security.”²⁴⁴ Like the 2002 EHPA, the 2006 PHPA lacks the specific language necessary to give the public confidence in the legislation by enumerating specific protections of their civil liberties.

As such, the PHPA merely calls for government officials to formulate procedures, compile lists, and identify methods to combat an emergency. The language is uncontroversial and noncommittal. Once enacted, however, state health officials will be required to draft a comprehensive plan designed to protect the state during an emergency. That plan will likely be based on the detailed, more controversial language found in the 2002 California EHPA or even the Model Act itself. Consequently, the 2006 PHPA is merely a means to secure the same ends as the 2002 EHPA, namely a clear, detailed piece of legislation with the purpose of protecting the health of all Californians.

VI. RECOMMENDATIONS

California must do more to ensure it is better prepared to cope with a bioterror attack or the widespread outbreak of an infectious dis-

238. *Id.* § 1(a)

239. *Id.* § 130510(a)(1).

240. *Id.* § 130510(a)(3).

241. *Id.* § 130510(a)(6).

242. *Id.* § 130510(a)(8).

243. *Id.* § 130510(a)(10).

244. *Id.* § 1(f).

ease, such as avian influenza, or risk social chaos.²⁴⁵ California authorities must also work to ensure that, despite any subsequent social unrest, civil liberties are protected during a major public health emergency. The best way to protect these liberties is to enshrine the public's rights and the procedures to protect those rights in the legislation drafted to respond to a statewide public health emergency. While there are a number of areas where the state can improve its level of preparedness for a major crisis, while protecting the rights of its citizens,²⁴⁶ the single best way to implement these recommendations is to enact legislation based on the Model Act.

A. Enact Specific Constitutional Protections

To protect Californians faced with either a bioterror attack or infectious disease outbreak, California simply must enact legislation similar to the Model Act. However, there are many areas within the Model Act that require substantial improvement, particularly in the area protecting of civil liberties. While Assemblyman Richman attempted to have legislation passed in 2002 to protect Californians dur-

245. As an example of the social and political impact an outbreak of infectious disease could have on the government of California, some have argued that the most severe social and political crisis the Chinese government faced since the 1989 Tiananmen Square massacre was in 2003 during the SARS outbreak. Osterholm, *supra* note 51, at 24-29. More than likely, the intentional release of a biological agent could have the same impact, depending upon the success of releasing the agent and the length of time it has to spread among the population of a large city like Los Angeles, California, before being recognized and contained. See Standard, *supra* note 126.

246. For example, the state needs to better train local healthcare providers and other first responders in identifying unusual health threats. Local doctors, nurses, paramedics, and police officers are most likely to be the first witnesses to either a bioterror attack or the initial stages of an outbreak of infectious disease. Cimon, *supra* note 78. As the California DHS noted, anthrax, plague, smallpox, viral hemorrhagic fevers, and brucella pose the most likely bioterror threat. CAL. DEP'T OF HEALTH SERV., *supra* note 95, at 5. Thus, training in identifying these agents, their symptoms in humans, and methods of containing any outbreak must be implemented on a greater scale. Moreover, increasing hospital surge capacity is paramount. During the SARS outbreak in Toronto in 2003, for example, one infected person could have contact with up to one hundred people, all of whom then needed a medical evaluation. Weinstein, *supra* note 10, at 2334. Thus, hospitals were inundated with potential cases of SARS, leaving medical staff overwhelmed and playing catch-up. See *id.* Further, as an example in California, a 1998 outbreak of influenza revealed the healthcare system in California was unable to cope with the increase in cases stemming from an outbreak. Khan & Ashford, *supra* note 4, at 288. This outbreak, part of the yearly, predictable influenza outbreak, highlighted the shortcomings in funding, beds, and staffing. *Id.*; see Bustillo, *supra* note 96. Finally, better communication between and among medical personal and state and local authorities is needed to better coordinate a response during an event. See Nancy Vogel, *California Vulnerable to Outbreak*, L.A. TIMES, Mar. 22, 2003, at B1. For a detailed analysis of California's strengths and weaknesses with respect to public health threats, see generally Little Hoover Commission, *supra* note 108.

ing a major public health emergency,²⁴⁷ future legislation must go beyond enumerating the authority granted to the state and contain specific protections for civil rights, rather than merely mentioning civil liberties.²⁴⁸ Legislation outlining the reasons for isolation or vaccination, for example, must be included. The procedure for issuing isolation or quarantine orders, measures for appealing those orders, and the length of time those orders are to remain in effect should be provided. Moreover, mechanisms for reviewing complaints or abuses must be included.

The general nature of the 2006 PHPA currently under consideration moves in the wrong direction. Its provisions are far too general, and, again, it contains no enumerated protections for civil liberties.

B. Train Judges²⁴⁹

All California judges should be informed that in the event of a biological attack or infectious disease outbreak, they will likely be called upon to make swift decisions regarding fundamental constitutional rights. Consequently, they should note the current law with respect to vaccinating the public, isolating the ill, and quarantining suspected cases. Moreover, given the special circumstances that may exist during the public health emergency,²⁵⁰ judges should prepare themselves for unconventional hearings.²⁵¹ Judges or their personnel

247. See generally Assemblyman Keith Richman, *The Bioterrorism Fiasco: One Year After Anthrax Mailings, the State Has Done Little to Prepare for Attacks* (October 2002), <http://republican.assembly.ca.gov/members/index.asp?Dist=38&Lang=1&Body=OpinionEditorials&RefID=451>.

248. Assemb. B. 1763, 2001-2002 Leg., Reg. Sess. pmbl. § 2(a)(9) (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020108_introduced.pdf (noting "the rights of people to liberty, bodily integrity, and privacy must be respected to the fullest extent possible, consistent with maintaining and preserving the public's health and security").

249. Assemblyman Keith Richman included a provision in his proposed 2002 EHPA legislation calling for attorneys, licensed to practice law in California, to be trained as special judges to handle isolation and quarantine issues during a public health emergency. Assemb. B. 1763 § 130372(a)(7) (as amended Apr. 3, 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020403_amended_asm.html. In the 2006 PHPA, as amended on April 18, 2006, this provision was eliminated. Assemb. B. 2451, 2005-2006 Leg., Reg. Sess., § 130510(a)(7) (Cal. 2006), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_2451-2500/ab_2451_bill_20060223_introduced.pdf.

250. For example, during the 1918-1919 influenza outbreak, some California courts held sessions outside to reduce the potential for infection. See ALFRED W. CROSBY, *AMERICA'S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918*, 111 (1999).

251. During the SARS outbreak in Toronto in 2003, police detained one man suspected of being infected with SARS and transported him to a hospital quarantine facility. Ian B. Cowan, *The Day SARS Came to Town: The Court's Role in Preventing Epidemics*, 39 *Ct.*

should identify alternative locations for holding court and consider measures to restrict the spread of any contagion, such as limiting the number of public observers or requiring all admittees to wear masks and wash their hands before and after attending court.

Consequently, a select few judges from each county should be designated special health "emergency judges" to address issues of forced quarantine or vaccinations.²⁵² These judges would take the lead and inform their colleagues of what to expect during a large-scale public health emergency. They should also be ready for immediate, prolonged duty during this period. Measures for training judges and selecting health emergency judges should, therefore, be included in future public health emergency legislation.

C. *Establish an Advisory Council During an Emergency*

Once a public health emergency has been declared, preselected advisors should also convene to advise the Governor and other state authorities. While not empowered to counter the Governor's response to the emergency, the advisors would operate as a check on egregious misuse of authority during an emergency and also as an outlet for public concerns. Advisors should be selected from prominent legal positions throughout the state and have a background in public health, medicine, and constitutional law. Their purpose would be solely to address issues of civil liberties during the declaration of an emergency and to ensure public concerns about restrictions are heard and conveyed to the Governor. The method by which advisors are selected, the number of advisors, and their specific role during an emergency should be written into any future public health emergency legislation.

Moreover, once the emergency is over and the Governor's authority under the emergency health legislation is terminated, there should be an immediate state level investigation into the response and the restrictions on civil liberties. Additionally, there should be a focus on voluntary citizen compliance with the measures enacted during the

REV. 4 (2003). Later, the lawyers and judge conducted a telephone hearing. *Id.* The case, however, became moot because the medical officer later withdrew his quarantine order after determining the individual had not been exposed to SARS. *Id.* The quarantined man, nonetheless, had been subject to forcible confinement for three days. *Id.* Such prolonged, forcible confinement must be prevented during an extended emergency, because voluntary public compliance with quarantine and isolation measures is unlikely to continue when they perceive a threat to their freedom or property. See also Mark A. Rothstein, *Are Traditional Public Health Strategies Consistent with Contemporary American Values?*, 77 TEMP. L. REV. 175, 192 (2004).

252. Treasurefield, *supra* note 93.

emergency to ensure greater compliance in a future emergency. This investigation or review procedure should also be included in future public health emergency legislation.

D. Voluntary Compliance by the Public

After the SARS outbreak, polls were conducted in the United States to forecast voluntary compliance with quarantine measures.²⁵³ The polls indicated that between eight and twenty-five percent of the American population would not voluntarily comply with the quarantine orders during a SARS-like outbreak.²⁵⁴ This rate was much higher than in affected Asian countries or in Canada.²⁵⁵ Consequently, something must be done to ensure greater voluntary civilian compliance with measures implemented to combat a public health emergency.

One of the best ways to ensure broad voluntary compliance is to inform the public of the danger.²⁵⁶ Therefore, the state must broadcast information using all types of media,²⁵⁷ establish toll-free numbers state residents can contact to receive current information in their area, and include public opinion—in the form of the advisory committee to the Governor—in the response to the threat.²⁵⁸ Essentially, the state

253. Rothstein, *supra* note 251, at 190.

254. *Id.*

255. *Id.* Rothstein describes the United States as a nation of “Lone Rangers,” steeped in individualism, self-reliance, and non-conformity. *Id.* at 190. He contrasts an American response to a SARS-like outbreak with the Asian response in that, generally, Asian cultures emphasize family unity and frown upon individualism and non-conformity. *See id.*

256. The public must have a sense of control and they must be kept informed. Large-scale terrorist attacks, like those that may compel a declaration of a public health emergency in California, may exact a psychiatric toll on a large portion of the general population. *See* Lynne Lamberg, *Terrorism Assails Nation’s Psyche*, 294 J. AM. MED. ASS’N. 544, 544-45 (2005). Often, post-traumatic stress lingers after witnessing or experiencing such an attack. *Id.* One can only imagine the stress associated with being informed a large-scale bioterror attack occurred in a large metropolitan city, like Los Angeles, California, coupled with measures preventing movement from one region of the state to another, quarantine, or even forced vaccination. Such stress may prompt some individuals to act out of extreme anxiety. Thus, communicating the potential risk and the necessity of abiding by precautionary measures is imperative in giving people sense of control. *Id.* at 546.

257. As noted with the Swine Flu threat, the role of the media is vital. During the threat, the media was instrumental in undermining public support for the vaccination program with exaggerations of side effects of the vaccination. *See* NEUSTADT & FINEBERG, *supra* note 13, at 127-29.

258. *See generally* Childress, *supra* note 60, at 88-89. During the SARS outbreak in Toronto, for example, there was confusion in the way information was presented. C. David Naylor et al., *Learning from SARS in Hong Kong and Toronto*, 291 J. AM. MED. ASS’N. 2483, 2484-85 (2004). Due to overlapping authority and confused lines of communication, press briefings had three to four different spokespersons, resulting in a major criticism of Toronto’s

must treat the public as a partner in the fight against the emergency rather than as a non-participant or as an obstacle.²⁵⁹ Additionally, the public must be reminded the authority granted to the governor and state officials is temporary and there are clearly enumerated methods of checking and terminating that authority.

Furthermore, as was made evident in the December 2004 tabletop exercise in San Diego²⁶⁰ and to a certain degree during the SARS outbreak in Canada,²⁶¹ certain members of the public will shun the quarantine orders. Accordingly, any future public health emergency legislation must include tax breaks and other incentives for people not to return to work during a major, protracted public health emergency. People should not be drawn together in large numbers conducive to the spread of any contagion during such an emergency; thus, emphasis on internet commerce, telecommuting, and other methods of working at home must be strongly encouraged. The public should also be reminded that going to work puts them, their families, and their coworkers at risk of infection.

Encouraging the public to take these actions and informing them prior to the declaration of a public health emergency will likely result in greater compliance and continued respect for government authority, rather than forcing these measures on an unwilling, untrusting public.²⁶²

VII. CONCLUSION

With the continuing threat of bioterrorism in the post-September 11 world, the spread of avian influenza to Europe, and the realization that the federal government is unable to handle a large-scale natural disaster, California authorities must implement legislation similar to the 2002 EHPA. Additionally, in light of the initial devastation, the subsequent violence and looting, the threat of disease, and the uncoordinated recovery efforts after Hurricane Katrina, California authorities must rethink the state's own level of preparedness for a public health emergency.²⁶³ However, greater protections must be included in the

efforts to convey information to the public. *Id.*

259. Childress, *supra* note 60, at 89.

260. See *supra* Part IV.A.

261. Rajiv Sekhri, *Ontario Asks Residents to Obey SARS Quarantine*, SAN DIEGO UNION-TRIB., June 3, 2003, at A11.

262. See Clayton L. Thomason, *It's a Small World After All: Global Health and the Ethical Lessons of SARS*, 12 MICH. ST. J. INT'L L. 313, 319 (2004).

263. "Hurricane Katrina showed us many things and there was a real lack of prepared-

legislation to protect the public's civil liberties. Rather than the cursory references to civil liberties and antidiscrimination in the 2002 EHPA proposal,²⁶⁴ strong language must be included in a new act to protect individual privacy and property rights. Specific measures to guide authorities in protecting these basic rights will encourage the public to comply with enacted legislation in a public health emergency. Moreover, with clear guidelines, authorities will be better prepared to handle the legal, and possibly violent, challenges to state authority, specifically if the duration of the public health emergency is prolonged.²⁶⁵ Unfortunately, the 2006 PHPA does not contain the specific provisions necessary to guide authorities during a public health emergency, nor the language to insure the protection of civil liberties.

ness on the part of the Federal government. Look at the placement of supplies, management systems, chain-of-command issues between federal and state officials. Overall there was a real lack of preparation." Telephone Interview with Keith Richman, *supra* note 94.

264. Assemb. B. 1763, 2001-2002 Leg., Reg. Sess., pmbl. § 2(a)(8) (Cal. 2002), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1763_bill_20020108_introduced.pdf.

265. Again, estimates on the possible duration of a pandemic of avian influenza are between twelve to thirty-six months. Osterholm, *supra* note 51, at 24-26. Consequently, California must be prepared for initial social acceptance of the restrictions accompanying the declaration of a public health emergency. However, after six to eight months, the public may be less willing to abide by state authority and continued restrictions. *See generally* Thomason, *supra* note 262, at 319.