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N. Pieter M. O'Leary

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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

N. PIETER M. O’LEARY*

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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³ See Serrano et al., supra note 1.
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


\(^{6}\) For a definition of bioterror, see THE MODEL STATE EMERGENCY HEALTH POWERS ACT art. I, § 104 (a) (Cir. for Law & the Pub.'s Health, Draft for Discussion 2001), available at http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf.


\(^{8}\) 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.

\(^{9}\) MATTHEW E. BROWN, RECONSIDERING THE MODEL STATE EMERGENCY HEALTH POWERS ACT: TOWARD STATE REGIONALIZATION IN BIOTERRORISM RESPONSE, 14 ANNALS HEALTH L. 95, 96 (2005).

the globe.\textsuperscript{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.\textsuperscript{11} While not the pandemic many government and medical officials feared, the SARS experience represented a global threat due to its virility,\textsuperscript{12} speed of dispersion,\textsuperscript{13} and impact on medical care around the world.\textsuperscript{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.\textsuperscript{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.\textsuperscript{16} With floodwaters contaminated by sewage and decaying dead bodies, the threat of mosquito-borne disease,\textsuperscript{17} as well as cholera, dysentery, and other infections, posed a fundamental risk to security and the cleanup process.\textsuperscript{18} Although the federal government eventually appeared to

\textsuperscript{11} Id.
\textsuperscript{12} The overall death rate for SARS was approximately nine percent globally. Arshagouni, \textit{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. \textit{Id}.
\textsuperscript{14} See Abraham, \textit{supra} note 9, at 135-36.
\textsuperscript{15} James Gerstenzang, \textit{Katrina’s Rising Toll: Bush Calls for Massive, Coordinated Recovery}, \textbf{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 inappropiate.
\textsuperscript{16} Id.
\textsuperscript{17} The two primary mosquito-borne threats are the West Nile and Easter Equine Encephalitis viruses. Jessica Heslam, \textit{Katrina’s Wrath: Health Crisis Looms in Bayou}, \textbf{BOSTON HERALD}, Sept. 1, 2005, at 2.
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 state 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.
24. Reich, supra note 9, at 381.
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-
eas.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,

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

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

Despite these two examples and the October 2001 anthrax attacks, there are no recent cases of a major bioterrorist attack. 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. For example, the influenza outbreak of 1918-1919 is considered by some historians and epidemiologists to be the most


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.

devastating outbreak of infectious disease in history. While estimates vary, some believe over one billion people were infected and nearly fifty million people died during an outbreak that lasted approximately one year. In comparison, today in the United States about five to twenty percent of the population contracts the flu each year. 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.

Currently, international attention is focused on the spread of avian influenza among poultry and humans in Asia and Europe. The threat from the current H5N1 strain of avian influenza raises concern be-

41. Garrett, supra note 39, at 158.
44. Id.
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.\textsuperscript{47} Further, signs of animal-to-human as well as sporadic human-to-human transmission raise great concern.\textsuperscript{48} As of May 5, 2006, there have been 206 human cases of avian influenza with 114 deaths reported since December 2003.\textsuperscript{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.\textsuperscript{50} Estimates indicate an outbreak of pandemic avian influenza would last between twelve and thirty-six months.\textsuperscript{51} Further, global mortality rates from such an outbreak are estimated at between 180 and 360 million people.\textsuperscript{52} As one expert noted, the declaration that a pandemic was underway "would change the world overnight."\textsuperscript{53}

Avian influenza currently represents the type of naturally occurring infectious disease\textsuperscript{54} 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.\textsuperscript{55} This concern was significantly

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


\textsuperscript{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.

\textsuperscript{50} See Stöhr, supra note 45.

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

\textsuperscript{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.

\textsuperscript{53} Id.


\textsuperscript{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, the actions of Aum Shinrikyo in Japan, and the collapse of the Soviet Union with its large stores of bio-weapons, American officials seemed to have believed the true threat lay in a bioterror attack. Accordingly, state and federal government officials conducted two primary simulations of a bioterror attack in the United States: Operation TOPOFF and operation Dark Winter. 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. TOPOFF was a "national-level, multi-agency, multi-jurisdictional, 'real-time,' limited-notice WMD [weapons of mass destruction] response exercise." During the course of the exercise, participants learned that plague had been released in the city three days earlier. 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.
59. See Fidler, supra note 4, at 83.
62. U.S. Dep't of State, supra note 61.
63. Childress, supra note 60, at 90.
public health system went into action. 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. The result demonstrated "serious weakness" in the nation's "public health system." Efforts to contain the spread of the simulated attack and treat more than 4,000 cases were slowed by individuals who fled the city. 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. 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.

Since the original May 2000 TOPOFF exercise, TOPOFF 2 and TOPOFF 3 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.


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] 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.\textsuperscript{72}

The second simulated exercise of note was Dark Winter, which took place in 2001.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{76}

Based on these simulated exercises, officials realized a clear line of authority needed to be established.\textsuperscript{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,\textsuperscript{78} legislation had to be drafted to empower states to handle a local outbreak while also protecting national security.

\section*{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


\textsuperscript{73} Childress, \textit{ supra} note 60, at 90-91.


\textsuperscript{75} See \textit{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. \textit{Id.}; Nat'l Mem'l Inst. for the Prevention of Terrorism, Dark Winter, http://www.mipt.org/ darkwinter06222001.asp (last visited Aug. 29, 2005).

\textsuperscript{76} See Nat'l Mem'l Inst. for the Prevention of Terrorism, \textit{ supra} note 75; Childress, \textit{ supra} note 60, at 91.

\textsuperscript{77} May, \textit{ supra} note 25, at 160.

\textsuperscript{78} Marlene Cimons, \textit{Doctors Warned on Bioterrorism}, L.A. TIMES, Apr. 24, 2000, at A17.
attack.\textsuperscript{79} The Model Act was designed to "grant state officials the authority necessary to coordinate an effective response to biological terror"\textsuperscript{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,\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{84}

The Model Act represents the method individual states may choose to control major outbreaks of disease or the consequences of a bioterrorist attack.\textsuperscript{85} To act quickly, government officials must have broad powers to collect information, treat the infected, and restrict the spread of a contagion.\textsuperscript{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.\textsuperscript{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.\textsuperscript{88}

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

\begin{itemize}
  \item May, supra note 25, at 159-60.
  \item Id. at 159.
  \item See supra note 6 and accompanying text.
  \item Brown, supra note 8, at 98.
  \item Matei, supra note 74, at 435.
  \item Brown, supra note 8, at 98.
  \item See id. at 96-97; May, supra note 25, at 159.
  \item Brown, supra note 8, at 99-100.
  \item Reich, supra note 9, at 382-83.
  \item 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.
\end{itemize}
to abuse. 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. Additionally, in light of the scare regarding the flu vaccination shortage of 2004-2005, 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. Consequently, some in California questioned why the state would need further measures when the Model Act largely mirrors pre-existing California legislation. 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. 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.


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 (Ct. for Law & the Pub.'s Health, Draft for Discussion 2001), available at http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf.


IV. THE MODEL ACT AND CALIFORNIA

California has long been identified as a primary target for terrorist attacks,\(^5\) and there have been serious questions as to whether the state is prepared for a statewide health threat.\(^6\) Having the largest population and largest economy in the nation, as well as being a major port of entry for goods and travelers,\(^7\) California is particularly susceptible to both naturally occurring infectious disease and biological agents for intentional release.\(^8\) Following the September 11, 2001 terrorist attacks, California legislators sought to enable the state to better respond to the threats.\(^9\) Accordingly, despite some criticism, California Assemblyman Keith Richman\(^10\) introduced what would have been the state’s version of the Model Act.\(^10^1\) California’s proposed 2002 Emergency Health Powers Act (EHPA) and the Model Act were iden-


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).

tical in nearly every way. However, California’s 2002 legislation, despite two amendments, was never adopted. 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.

A. California’s Exercises in Preparedness

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


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).


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-
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.
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).


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

As previously noted, the EHPA would have empowered the Governor of California to declare a “state of public health emergency.” 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,” (2) utilizing state resources “reasonably necessary to respond to the public health emergency,” (3) transferring state government functions and personnel as needed, (4) mobilizing the state militia, (5) coordinating responsive action with other states, and (6) seeking federal aid.

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 authority may request assistance in enforcing [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.” 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.”

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. 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.

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 information the PHA could implement to detect and track the emergency. Healthcare providers, including pharmacists and veterinarians, 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. 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.

The EHPA also outlines the "Special Powers During a State of Public Health Emergency" with respect to "[c]ontrol of [p]roperty." The PHA could close, evacuate, or decontaminate any facility posing a danger to the public health and, further, destroy any material posing such a danger. Moreover, facilities and materials, including real estate, could be condemned, leased, or distributed in response to the threat. Specifically, private healthcare facilities could be transferred to the authority of the PHA during the course of the danger. 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-

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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 quarantine 162 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.
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(e). 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.\textsuperscript{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 EPHA argued existing law already accomplished much of what the EHPA proposed to do in the event of a threat.\textsuperscript{164} The Governor already had the power to declare an emergency and take public property.\textsuperscript{165} Moreover, California public health officials were already empowered to "quarantine [the sick], vaccinate and isolate people."\textsuperscript{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.\textsuperscript{167} The state DHS would be responsible for "coordinating all matters pertaining to the public health emergency response . . . dur-

\textsuperscript{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." \textit{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.'" \textit{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. \textit{Id.}

\textsuperscript{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.

\textsuperscript{165} CAL. GOV'T CODE § 8625. \textit{See generally} Wing, supra note 22, at 72.

\textsuperscript{166} Treasurefield, supra note 93.

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

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

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 region after Hurricane Katrina was imposed to prevent the possible outbreak of disease. 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.

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. Cimons, 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.
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_eventsnews/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. Case law, however, permits the collection of private health information under *Whalen v. Roe*. *Whalen* is a 1977 case permitting a state health authority to maintain computerized files of patients receiving specific prescriptions. 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. 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, 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.

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. 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. Individuals, therefore, must forgo some of their constitutional rights during this type of emergency with the understanding the rights will be restored once the

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).
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. Questions about the extent to which authorities would go to enforce the measures to protect persons abound. 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? Again, considering the scope of the Hurricane Katrina and the clear inability of law enforcement personnel to cope with the initial lawlessness, 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."

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. The basis for many of the most controversial articles of the Model Act, however, is the California Health and Safety Code. 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.

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. The Court held that, with respect to smallpox (and pre-

185. Id. at 442-44.
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.publichealthelect.net/MSEHPA/MSEHPA2.pdf
192. See Joseph, supra note 89.
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{207}

\textit{In re Halko} is another California appellate decision addressing quarantine and isolation.\textsuperscript{208} In \textit{Halko}, the petitioner was diagnosed with tuberculosis, and, after being served with an order isolating him at Mira Loma Hospital, he fled the institution.\textsuperscript{209} The petitioner “was subsequently arrested, tried, and convicted” of a misdemeanor.\textsuperscript{210} “Prior to serving the jail sentence the petitioner was served with another order of isolation . . . .”\textsuperscript{211} He was ordered back to the hospital where he was subsequently served with four consecutive isolation orders.\textsuperscript{212} The petitioner later sought a writ of habeas corpus “con- tend[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.’”\textsuperscript{213} However, the \textit{Halko} court disagreed.\textsuperscript{214}

Using similar language as \textit{Martin}, the \textit{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.”\textsuperscript{215} Further, health officers can make isolation or quarantine orders when they determine it is necessary to protect the pub-
lic.\textsuperscript{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."\textsuperscript{217} Moreover, the \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{220} Thus, in \textit{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."\textsuperscript{221}

A more recent example of the court's deference to the legislature comes from \textit{Love v. the Superior Court of San Francisco}, where the court was asked to determine the constitutionality of AIDS testing.\textsuperscript{222} The petitioners were arrested for soliciting an act of prostitution and ordered to undergo AIDS testing.\textsuperscript{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.\textsuperscript{224} In addressing the petitioner's Fourth Amendment challenge, the court noted compulsory blood testing was a "search[] subject to the Fourth Amendment."\textsuperscript{225} However, it was "undisputed that the control of a communicable disease is a valid exercise of the state's police power."\textsuperscript{226} Thus, where the state exercises its police power to test for the protection of the public health, the court balances the "special

\textsuperscript{216} Id. at 662-63.
\textsuperscript{217} Id.
\textsuperscript{218} Id. (quoting Patrick v. Riley, 287 P. 455, 456 (Cal. 1930)).
\textsuperscript{219} Id. (quoting Patrick, 287 P. at 456).
\textsuperscript{220} Id. (quoting Patrick, 287 P. at 456).
\textsuperscript{221} Id. at 664.
\textsuperscript{223} Id.
\textsuperscript{224} Love, 276 Cal. Rptr. at 662 (discussing CAL. PENAL CODE § 1202.6).
\textsuperscript{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)).
\textsuperscript{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.”

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.” 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.’” In looking at the petitioner’s privacy expectations, the court noted drawing blood was a minimal intrusion. Therefore, when balanced with the state’s desire to stem the spread of AIDS, the court upheld the testing requirement.

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. 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. 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. 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.


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).
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 EPHA, 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.\textsuperscript{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,\textsuperscript{246} the single best way to implement these recommendations is to enact legislation based on the Model Act.

\section*{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-

\textsuperscript{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 Starnard, supra note 126.

\textsuperscript{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. Cimons, 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, 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. 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 Judges

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, judges should prepare themselves for unconventional hearings. Judges or their personnel


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 Cr.
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

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.\textsuperscript{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.\textsuperscript{254} This rate was much higher than in affected Asian countries or in Canada.\textsuperscript{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.\textsuperscript{256} Therefore, the state must broadcast information using all types of media.\textsuperscript{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.\textsuperscript{258} Essentially, the state

\begin{itemize}
\item \textsuperscript{253} Rothstein, supra note 251, at 190.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id. Rothstein describes the United States as a nation of "Lone Rangers," steeped in individualism, self-reliance, and non-conformity. \textit{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. \textit{See id.}
\item \textsuperscript{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, \textit{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. \textit{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. \textit{Id.} at 546.
\item \textsuperscript{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. \textit{See NEUSTADT & FINEBERG, supra} note 13, at 127-29.
\item \textsuperscript{258} \textit{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., \textit{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

259. Childress, supra note 60, at 89.
260. See supra Part IV.A.
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.


⁶⁵ 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.