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Quarantine Revision and the Model State Emergency Health Powers Act: Laws for the Common Good

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I. INTRODUCTION

In June 2001, The Johns Hopkins Center for Civilian Biodefense Studies hosted an indoor war game entitled DARK WINTER. It was structured as a series of mock meetings of the National Security Council to evaluate the response of senior officials to a bioterrorist-induced national security crisis. The participants were twelve former government officials, five representatives from the media, and fifty individuals with policy or operational responsibilities related to biological weapons. The two-day exercise simulated a period of two weeks, during which an outbreak of smallpox in an American city spread to twenty-five states and fifteen other countries. By the end of the simulated two weeks, the number of smallpox cases had risen to 16,000 in twenty-five states, with 1,000 deaths in the U.S. alone. Key lessons learned from the DARK WINTER exercise included:

1. Leaders are unfamiliar with the character of bioterrorist attacks, available policy options and their consequences


† B.S., Biology, University of California, San Diego, 1998; J.D. Candidate, Santa Clara University School of Law, 2002. The author would very much like to thank Gerry Elman, of this Journal’s Board of Advisors, for his suggestion of this topic as one that would be timely and appropriate, for his assistance in researching this issue, and for his review of early drafts of this Case Note.


3. O'Toole, supra note 1.

4. JOHNS HOPKINS DARK WINTER REPORT, supra note 2.

5. O'Toole, supra note 1.
2. Following a bioterrorist attack, leaders’ key decisions would depend on data and expertise from medical and public health sectors.

3. The lack of sufficient vaccine or drugs to prevent the spread of disease severely limited management options.

4. The U.S. health care system lacks the surge capacity to deal with mass casualties.

5. To end a disease outbreak after a bioterrorist attack, decision-makers will require ongoing expert advice from senior public health and medical leaders.

6. Federal and state priorities may be unclear, differ or conflict, authorities may be uncertain, and constitutional issues may arise.

7. The individual actions of US citizens will be critical in ending the spread of contagious disease—leaders must gain the trust and sustained cooperation of the American people.6

The DARK WINTER exercise was a hypothetical example of a public health emergency. It highlighted the precarious nature of an adequate emergency response. The United States government faces numerous deficiencies regarding national security. Those learning its lessons realize that current public health models must be reevaluated to establish concrete standards of efficient response to a medical health crisis. Furthermore, since the events of September 11, 2001, bioterrorism has been more than a hypothetical danger; it is a realistic threat, not only to the United States, but also to the entire world.

In response to growing fears of a bioterrorist attack, federal health officials and state legislatures across the country have proposed new laws. Taking the lead, the Centers for Disease Control and Prevention (“CDC”) in Atlanta has drafted a model act,7 premised on the idea that existing state laws are inadequate to confront a bioterrorism event, and should be supplemented with a more comprehensive plan that will avoid conflicts with state laws. That act, The Model State Emergency Health Powers Act (“MSEHPA” or the “Model Act”),8 clarifies a government’s responsibility to protect its citizens from the threat of bioterrorism.

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6. Id.

7. A model act is one to which state legislatures refer, and from which they draw, in drafting and adopting their own legislative provisions.

Formulation of the MSEHPA has been a cooperative effort between the Center for Law and the Public’s Health, at Georgetown and Johns Hopkins Universities, and the CDC. For assistance in the initial brainstorming effort, these organizations also turned to 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.

The Model Act provides an inclusive plan that would concentrate power in state health officials, in cooperation with state governors. The Act seeks to deal with the issue of bioterrorism in the context of a public health emergency. It takes into account various dangers, "including emergent and resurgent infectious diseases and incidents of civilian mass casualties."9 As proposed, the MSEHPA would permit a governor to declare a state of emergency if there is imminent threat of epidemic, or any illness as a result of biological warfare.

Although the MSEHPA seeks to ensure a "strong, effective, and timely response to public health emergencies, while fostering respect for individuals from all groups and backgrounds,"10 many state political leaders and health officials criticize aspects of the Model Act for placing excessive restraints on individual freedoms, which would result from the sweeping government control it would grant to state officials. One area of concern, in particular, is the provision regarding isolation and quarantine of individuals or groups of individuals.11 Although quarantines have been applied on occasion in limited circumstances,12 broad quarantines have never been used in the United States; they raise political and ethical questions in a mobile society.13 Furthermore, current state quarantine powers "mostly predate new findings in the public health sciences and constitutional law and civil liberties, so that they likely would be challenged (in court)," said Lawrence Gostin, a law professor at Georgetown University Law Center in Washington and an expert in public health

10. Id.
11. Id. art. VI, § 604.
law." Professor Gostin, who worked on drafting the Model Act, claims that the current laws use language that is too general and is not specific as to protecting the health of those who are quarantined. "I think it would be a recipe for chaos. It needs to be much better planned, and the powers need to be well-tailored to modern health threats," Gostin said. This is exactly what Professor Gostin attempted to do when drafting the MSEHPA. Whether his vision is realized in the form of workable legislation remains to be seen.

In analyzing the quarantine provisions of the MSEHPA, this Case Note first reviews the text of the entire proposal, starting with the purpose and the legislative intent. From there, the Note looks at the specifics of article VI: Special Powers During State of Public Health Emergency: Protection of Persons. Finally, the balance of this Note assesses how the principles presented in the Model Act would square with basic constitutional law. There is strong and resonant opposition to the Model Act for reasons of public concern. Americans want their health to be protected, but will not permit their civil liberties to be compromised. Is this a realistic goal? Does the Model Act appropriately account for restrictions on freedom? As Thomas Jefferson said, "[l]aws abridging the natural right of the citizen should be restrained by rigorous constructions within their narrowest limits." It remains to be seen how narrow those limits can remain at the start of the twenty-first century, in the aftermath of September 11, in a world threatened by terror.

II. THE MODEL STATE EMERGENCY HEALTH POWERS ACT:
AN OVERVIEW

The MSEHPA is a proposal that addresses emergency health threats, including those caused by terrorism. Its first draft was the work of Lawrence Gostin, initiated at the request of the CDC during the anthrax scare that followed the September 11 attacks. The proposal was distributed to states in late October with the support of

15. See id.  
16. Id.  
Tommy G. Thompson, secretary of the U.S. Health and Human Services Department, who said at the time, "We need not only a strong health infrastructure and a full stockpile of medical resources, but also the legal and emergency tools to help our citizens quickly."\textsuperscript{19}

The Model Act addresses a "renewed focus on the prevention, detection, management, and containment of public health emergencies,"\textsuperscript{20} and is a direct response to the events of September 11. The possibility of a bioterrorist attack using a deadly and contagious disease—such as smallpox—is no longer a hypothetical threat, but a realistic eventuality. In response, public health officials want the power to take measures to ensure public safety.

A basic overview of the Model Act finds that it would give an adopting state the responsibility for safeguarding its public health and security, requiring it to respond quickly and efficiently to any "public health emergency."\textsuperscript{21} The MSEHPA lists the duties and powers to be delegated to state officials responsible for gathering intelligence and meeting threats to public health\textsuperscript{22} and also provides limits on those powers to prevent the violation of civil liberties.\textsuperscript{23} Of course, it is expected that the Model Act may be modified and amended by individual state legislatures in the course of adoption.

\textit{A. Declaration of Emergency}

The MSEHPA provides state and local officials with the power to detect, prevent and control any emergency health threats by developing a plan to provide an appropriate response to these health situations.\textsuperscript{24} For example, "[d]uring a public health emergency, state and local officials are authorized to use and appropriate property as necessary for the care, treatment, and housing of patients, and to destroy contaminated facilities or materials. They are also empowered to provide care, testing and treatment, and vaccination to persons who are ill or who have been exposed to a contagious disease, and to separate affected individuals from the population at large to interrupt disease transmission."\textsuperscript{25} The Model Act defines a "public health emergency" as:

\begin{enumerate}
\item \textit{Id.}
\item \textit{MODEL STATE EMERGENCY HEALTH POWERS ACT pmbl. (Tentative Draft No. 2, 2001).}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
An occurrence or imminent threat of an illness or health condition that:

1. is believed to be caused by any of the following:
   - bioterrorism;
   - the appearance of a novel or previously controlled or eradicated infections agent or biological toxin;
   - [a natural disaster;]
   - [a chemical attack or accidental release; or]
   - [a nuclear attack or accident]; and
2. poses a high probability of any of the following harms:
   - a large number of deaths in the affected population;
   - a large number of serious or long-term disabilities in the affected population; or
   - widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

The Model Act would give extraordinary powers to the governor in the case of a public health emergency. Under the proposal, “when the situation calls for prompt and timely action,” a governor has the discretionary power to declare a state of public health emergency without consulting public health officials. The state’s public health authority “and other affected agencies shall have the power to enforce the provisions of [the] Act through the imposition of fines and penalties, the issuance of orders, and such other remedies as are provided by law.” The language of the Model Act seems to give unabridged police power to a state's executive branch, including its public health authority, not only to declare a state of emergency, but also to enforce any provisions listed via any means deemed necessary. These expansive powers have raised concerns. Not only are they broad, but also they are ambiguous. Although the term is defined, there is no precise articulation of what would constitute a public health emergency. The proposed language is too broad and uses speculative terms such as “it is believed” as well as “significant” and “substantial,” which are dependent on subjective evaluation. In addition, the Act provides for its enforcement by “other affected agencies” without defining those agencies or the scope of their

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27. Id. art. IV, § 401.
28. See id. art. VIII, § 802.
enforcement power.\textsuperscript{29} It would be wise if states, when adopting the MSEHPA in whole or in part, define "public health emergency" and "other affected agencies" using objective criteria.

It should also be noted that the Model Act does not contain provisions for immediate judicial or legislative review of an emergency declaration.\textsuperscript{30} While there exists automatic termination after 30 days unless renewed by the Governor, the State Legislature can only terminate a declaration by a majority vote in both chambers; this is contingent upon finding that the "occurrence of an illness or health condition that caused the emergency does not or no longer poses a high probability of a large number of deaths in the affected population."\textsuperscript{31}

\textbf{B. Civil Liberties}

It is also the responsibility of the MSEHPA to provide for individual civil liberties. While the Model Act is designed to promote the common good through the exercise of emergency powers, it must nonetheless be guided by the principles of dignity and respect of the rights of persons. It is an ambitious task to balance the modernization of public health laws in the anticipation of a public health emergency with the seminal constitutional covenant of civil liberties. Accordingly, the Model Act provides that, "in the event of the exercise of emergency powers, the civil rights, liberties, and needs of infected or exposed persons will be protected to the fullest extent possible consistent with the primary goal of controlling serious health threats."\textsuperscript{32} What exactly, though, do these qualitative terms mean? For example, who determines the extent of possibility for protection?

In addition, there are various groups within the population whose members have religious beliefs that prohibit them to take medication, including, but not limited to, vaccination. Under the Model Act, the only alternative to vaccination is quarantine.\textsuperscript{33} States looking to incorporate the MSEHPA should consider offering other alternatives to mandatory vaccinations or quarantine; failure to do so would be to ignore these individuals' assertion of their fundamental rights.

\textsuperscript{29} See \textit{supra} note 28 and accompanying text.
\textsuperscript{30} Id.
\textsuperscript{31} MODEL STATE EMERGENCY HEALTH POWERS ACT art. IV, § 405(a) (Tentative Draft No. 2, 2001).
\textsuperscript{32} Id. pmbl. (emphasis added).
\textsuperscript{33} See id. art. VI, § 603(a)(3).
To protect civil liberties, the MSEHPA attempts to place certain limits on state emergency powers using broad procedural safeguards, including a requirement that authorities present evidence and obtain court orders before instituting most mandatory measures, such as long-term quarantine with notice.\textsuperscript{34} Owners whose facilities or materials were taken would be entitled to compensation in some circumstances, but not in all.\textsuperscript{35} In addition, these powers would only be used in case of an emergency that threatened the lives of a large number of Americans. The scenario cited is an outbreak of smallpox, which, if uncontrolled, could kill a third of the world’s population.\textsuperscript{36}

III. ARTICLE VI: SPECIAL POWERS DURING A STATE OF PUBLIC HEALTH EMERGENCY: PROTECTION OF PERSONS

While these provisions may appear to be a protection of liberties, section 605(a)(1) of article VI, which as whole merits further scrutiny, grants authorization to the public health authority to “temporarily isolate or quarantine an individual or groups of individuals through written directive if delay in imposing the isolation or quarantine would significantly jeopardize the public health authority’s ability to prevent or limit the transmission of a contagious or possibly contagious disease to others.”\textsuperscript{37} The procedures for isolation and quarantine are broad, and while they do offer certain protections, they appear to favor the complete discretion of the subjective judgment of the public health authority.

Section 601 states that “[d]uring a state of public health emergency, the public health authority shall use every available means to prevent the transmission of infectious disease and to ensure that all cases of contagious disease are subject to proper control and treatment.”\textsuperscript{38} This extends to powers delegated to the public health authority to isolate and quarantine an individual or groups of individuals who have not been “vaccinated, treated, tested, or examined pursuant to Sections 602 and 603.”\textsuperscript{39} The purpose behind the isolation and quarantine provisions is to prevent the spread of

\begin{itemize}
\item \textsuperscript{34} See id. art. VI, §§ 604–605.
\item \textsuperscript{35} See id. art. V, § 506.
\item \textsuperscript{36} See Gillis, supra note 18.
\item \textsuperscript{37} See MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 605(a)(1) (Tentative Draft No. 2, 2001).
\item \textsuperscript{38} Id. art. VI, § 601 (text of the section adapted from CAL. HEALTH & SAFETY CODE § 120575 (West 1996)).
\item \textsuperscript{39} Id. art. VI, § 604(a).
\end{itemize}
contagious or possibly contagious disease. If individuals are not willing to cooperate with these provisions they shall be liable for a misdemeanor.\textsuperscript{40} Is the common good served when citizens are facing criminal penalties and state police or the National Guard is enforcing measures at gunpoint, if necessary?

Although the Model Act does provide a form of due process in that the health authority may first obtain a written, ex parte order from a state court authorizing an action of isolation and quarantine,\textsuperscript{41} the public health authority may proceed with the quarantine if any delay in the procedure would pose an immediate threat to the public health.\textsuperscript{42} Under the Model Act, a quarantined or isolated person also has the right to a court hearing in order to contest the order. The court shall grant the petition only if “by a preponderance of the evidence, isolation or quarantine is shown to be reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others.”\textsuperscript{43}

Although the Model Act directs state officials to use the “least restrictive means necessary”\textsuperscript{44} to control a germ from spreading, there are numerous logistical and ethical questions that arise as a result of these broad powers. Health officials say there is a positive shift in the purpose of quarantine, by focusing on the care of quarantined individuals rather than on isolating them from the general population.\textsuperscript{45} The provisions of the MSEHPA are specific in dealing with the treatment of isolated individuals. Section 604 specifies, “[t]he health status of isolated and quarantined individuals must be monitored regularly to determine if they require isolation and quarantine.”\textsuperscript{46} Furthermore, “[i]solated and quarantined individuals must be immediately released when they pose no substantial risk of transmitting a contagious or possibly contagious disease to others.”\textsuperscript{47}

More important, “[t]he needs of persons isolated and quarantined shall be addressed in a systematic and competent fashion, including

\begin{itemize}
  \item \textsuperscript{40} Id. art. VI, § 604(c).
  \item \textsuperscript{41} Id. art. VI, § 605(b).
  \item \textsuperscript{42} Id.
  \item \textsuperscript{43} MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 605(b)(5) (Tentative Draft No. 2, 2001).
  \item \textsuperscript{44} Id. art. VI, § 604(b)(1).
  \item \textsuperscript{46} See MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 604(b)(3) (Tentative Draft No. 2, 2001).
  \item \textsuperscript{47} Id. art. VI, § 604(b)(5).
\end{itemize}
but not limited to, providing adequate food, clothing, shelter, means of communication with those in isolation or quarantine and outside settings, medication, and competent medical care.\textsuperscript{48}

While this appears to be a reasonable means of controlling an infected population, there remains uncertainty and ambiguity regarding quarantine. For example, how far would officials go to keep people out of the quarantined area? What means would they use? Would armed guards have to be posted outside, ready to use live ammunition to prevent trespassing? Could parents be kept from their children? How would the medical personnel and armed guards be protected from becoming ill themselves? How would the provisions of section 604 (i.e., food, clothing, etc.) be enforced without exposing others to germs? What is the most efficient/economical way to treat these individuals? These are just some of the concerns not addressed by the MSEHPA, but very real to those who may be potentially affected by the new quarantine laws.

Additionally, should a protest be brought before a court, the justice system appears ill prepared to handle the situation. "We’ve never done it in modern times, so nobody knows," said Douglas Laycock, a law professor at the University of Texas and a nationally recognized expert in constitutional law.\textsuperscript{49} "Anyone who tells you they know what the courts would say about this is blowing smoke."\textsuperscript{50} Laycock says it is likely the courts would defer to medical opinion in questions regarding quarantine.\textsuperscript{51} "If the medical testimony is that (an area quarantine) will really work, this will save a lot of lives in the rest of the city, and there’s no other way to do that, then I think courts probably should uphold it," he said.\textsuperscript{52}

In addition to concerns over judicial procedures, there is the practical aspect of quarantines. Will they really work? Will large-scale quarantines ever be needed? What will happen if a germ is released into the air? Infected individuals will still need to be isolated, but the logistics of isolations need to be worked out. It is one thing to isolate an area, but a different thing altogether to impose quarantines on people. According to the MSEHPA, individuals need not even be sick to be quarantined.\textsuperscript{53} It is enough that health officials

\begin{footnotes}
\item[48] Id. art. VI, § 604(b)(6).
\item[49] Hight, supra note 14.
\item[50] Id.
\item[51] Id.
\item[52] Id. (alteration in original).
\item[53] See MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 604(b) (Tentative Draft No. 2, 2001).
\end{footnotes}
have "reasonable cause to believe that an individual is ill with, has been exposed to, or is the carrier of a communicable disease."54 This is an open-ended proposal to isolate a large number of individuals based upon the mere speculation that there has been exposure to a contagion. Certainly Americans will not accept being herded into quarantine en masse.

There are alternatives to the camp-like quarantines envisioned in the MSEHPA. Rather than mass isolation, a more useful method of prevention would be community education, which would teach people when they should stay home or seek medical assistance.55 In addition, there should be a trend toward more training of emergency personnel, who would be able to treat an infected population on site, rather than setting up a quarantine camp.56

Many health activists fear that the resurrection of quarantines raises serious concerns about civil liberties. They point to past uses, or rather misuses, of quarantines, which have not been used on a large scale in the U.S. in more than eighty years.57 In the past there has been an uneven application of quarantine provisions. For example, when a cholera outbreak was reported in 1892 on a ship in New York Harbor, the Port Authority isolated only poor immigrants in unsanitary conditions; fifty-eight died.58 In 1900, a quarantine in San Francisco, triggered by the bubonic plague, applied only to Chinese businesses and homes.59 Granted we live in the year 2002, not 1892, but there is still the potential for abuse regarding the new law. "It is a recipe for discriminatory application," says Donna Lieberman, executive director of the New York Civil Liberties Union.60 Lieberman refers in particular to the section of the proposed law that allows a broad quarantine of "individuals or groups" who have not been vaccinated, treated, or tested. "We are concerned that the emergency powers will be used to target minority groups, whether

56. See id.
58. Lerner, supra note 57.
59. Id.
60. Id.
they be gays or people of color or those perceived to be most at risk of infection.”

The MSEHPA has been criticized not only by civil libertarians, but also by the drafter himself. “It is probable that a population exposed to a biological weapon will have dispersed well beyond any easily definable geographic boundaries before the infection becomes manifest and any disease containment measures can be initiated,” Gostin stated in a recent issue of the *Journal of the American Medical Association.*

Regardless of the criticisms and concerns, the MSEHPA appears to have strong support, including the backing of the Bush Administration. It has been distributed to all states and has been given careful scrutiny by governors around the country. Several states are trying to consider the new legislative proposal in the context of their existing laws. “It’s a very useful road map. It addresses all the issues,” said Maryland State Senator Brian E. Frosh. “I’m not sure yet that it’s the right [plan] for Maryland.” Frosh shares the concerns of many others regarding the impact on individual civil liberties. “We want to make sure we’re not running roughshod over people’s individual rights,” said Frosh. His response and concerns echo those of most state representatives. While there is a great need to revise current emergency health laws, the MSEHPA is not designed to be implemented without debate, scrutiny, and potential revision. “This [model bill] is meant for state legislators, governors and others to use as a tool, as an ideal piece of legislation – which we think it might be,” said Lisa Speissegger, a public health adviser to the National Conference for Legislatures, a partner in developing the model legislation. “Our intent was for them to look at it and say, ‘OK, what things don’t we have in our law?’”

61. *Id.*
62. *Id.*
65. *Id.* (alteration in original).
66. *Id.*
67. *See id.*
68. *Id.* (alteration in original).
69. *Id.*
In particular, this is an excellent opportunity for states to revise current quarantine tactics. Sobered by the events of September 11, and the subsequent anthrax alarm, state officials are now in a position to revisit existing legislation. Does it still serve the public effectively in a climate of bioterrorism? Health leaders need to evaluate the potential of a widespread emergency, such as smallpox, and the response that such an emergency would, and should, trigger.

IV. THE FUTURE OF THE MODEL STATE EMERGENCY HEALTH POWERS ACT

It is safe to say that most people support the overall objective of ensuring the protection of public health. Following the events of September 11, our nation's health officials have rightly turned their attention to achieving this goal. Responding to the situation surrounding the terrorist attacks and the discovery of anthrax, the Center for Disease Control released the MSEHPA as a guide to help states adopt laws to adequately respond to potential bioterrorist attacks such as smallpox.

However, there remains a significant amount of controversy surrounding the proposed Act. Many oppose the sweeping powers the Model Act delegates to state governors. The model law "puts the lives of an entire state in the hands of one person who may or may not rise to the occasion," says Jonathan Turley, a law professor at George Washington University.70 "A state may be cursed with some dimwit."71

Some argue that there is no need for the governor to have the level of emergency powers contemplated by the proposal. Governors already have sufficient powers to operate effectively in a state of emergency. Furthermore, time has shown that under extraordinary circumstances governors have "bent the law" in response.72 As Dr. Glueck and Dr. Cihak explain, "We're not against a little creative

71. Id.
interpretation, should a compelling need arise. What we’re against is ‘stockpiling’ of excessive law and regulation.”

In addition, the question of liability should be addressed since section 804 of the Model Act declares, “neither the State, its political subdivisions, nor except in cases of gross negligence or willful misconduct, the Governor, the public health authority, or any other State or local official referenced in this Act, is liable for the death of or any injury to persons . . . as a result of complying with or attempting to comply with this Act . . . .” While the Model Act delegates substantial powers to state officials, it does not appear to provide for the accountability of those individuals. “Gross negligence” and “willful misconduct” are high thresholds, which appear to be legal protections for the actions of any officials promulgating the regulations of the Model Act. This is clearly another provision that should be given careful scrutiny before adoption.

A recent conference at the University of Minnesota addressed some of the recent concerns that have been expressed regarding the MSEHPA. Lawrence Gostin defended the model law and spoke about the ailing public health system. He emphasized the fear of a potential biological attack and the importance of an effective emergency response. He called last fall’s anthrax attacks “a very tragic dry run,” in which bioterrorists used “an incredibly effective bullet . . . [but] a very ineffective gun.” “Make no mistake about it, it will happen again,” said bioterrorism expert Michael T. Osterholm, Ph.D. Gostin further emphasizes the need for a renewed public health infrastructure. Our current systems are not only ill equipped to deal with a massive public health emergency, but they are also inconsistent. The laws differ from state to state. “In some cases the

73. Id.
74. See MODEL STATE EMERGENCY HEALTH POWERS ACT art. VIII, § 804(a) (Tentative Draft No. 2, 2001).
77. Id. Dr. Osterholm is the director of the University of Minnesota’s Center for Infectious Disease Research & Policy.
78. See id.
power is too draconian, in other cases the power doesn't exist," he said. The MSEHPA seeks uniformity and offers a proposal to achieve it.

In defense of the criticized provisions of the Model Act, Gostin offers a response, in particular to the section titled "Protection of Persons." Gostin acknowledges that the idea of required vaccination, isolation, and quarantine is controversial. However, he does not foresee the necessity of the use of force, nor a large-scale resistance to the proposed procedures. "We do anticipate that the use of coercion would be minimal, because most people would want to cooperate for the sake of their health." He contends that the power of quarantine would be used lightly, but stresses that "nobody could doubt that the public health authority needs the power to quarantine. If somebody had smallpox and insisted on congregating, it would be insane not to quarantine."

Furthermore, the lessons of DARK WINTER still resonate. The fictional scenario was a proverbial wake-up call to our nation's leaders. The U.S. is not prepared to deal with a large-scale outbreak; existing response plans are inadequate for a biological warfare event. Some highlights of the exercise were focal points in the reevaluation of current emergency response plans. DARK WINTER emphasized the fact that a biological warfare attack could potentially cripple the country. America currently lacks the stockpiles necessary for an appropriate response. More important, forcible constraint may be the only means available when vaccine stocks are depleted. These key issues are only compounded by the reality that the Government lacks coherent decision-making processes and protocols. This is a severe handicap to national security, and one that must be addressed and ameliorated. The MSEHPA proposes to do just that.

Despite the criticism, the model legislation has been introduced for consideration in most states. Thirty-four states, including

79. Id.
80. See id.
81. Id.
82. Roos, supra note 76.
83. JOHNS HOPKINS DARK WINTER REPORT, supra note 2. This includes vaccines, antibiotics and an effective means of distribution.
84. Id.
85. Id.
California, have already introduced legislation based upon the Model Act. In addition, legislative and executive branch officials in six more states are reviewing the MSEHPA and considering their responses to it.

Will The Model State Emergency Health Powers Act become law? Numerous questions arise, the answers to which are not readily available. The MSEHPA does not address the diversity of state government structure as well as state constitutional law. State law, rather than federal law, has traditionally governed public health. This includes state constitutions, court precedent, and the individual political environment of each respective state. If the MSEHPA were enacted without amendment, there would in many instances be significant conflict with current state provisions. The reality is that something like the MSEHPA is called for in our current political and social circumstances. Each individual state, though, should develop its own plan based upon the principles enunciated by the Model Act. The MSEHPA should be used as an introduction to the issues and a template for states to compare existing authority with the proposals presented. If used appropriately, the Model Act may be an excellent vehicle to state law reform. Nevertheless, it is essential that state legislatures avoid taking the Model Act “as is” and push it through without regard for the conflicts inherently present, as well as the strong concerns that have been voiced by members of the American public.

Although few states will adopt the model, as is, without considering amendments to the draft, preliminary analysis shows that states are in support of the proposal. Regardless of the variations being considered, state lawmakers will be forced to face the issue of balancing civil liberties and emergency health powers. The Model Act itself tries to reach this balance, making it a declared goal. It quotes Justice Harlan in the Supreme Court case of Jacobson v. Massachusetts, who wrote, “the whole people covenants with each

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88. Id.

89. See Appendix, infra.

90. See Gillis, supra note 18.

citizen, and each citizen with the whole people, that shall be governed by certain laws for the common good.”92

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APPENDIX

In the following table, “Status of the MSEHPA” refers to the progress of the Model Act in the specified states.93

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<th>State</th>
<th>Status of the MSEHPA</th>
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<tr>
<td>Arizona</td>
<td>Senate Bill 1400; 04/03/2002 Having passed the Senate, referred to House Committees on Health, Human Services, and Rules</td>
</tr>
<tr>
<td>California</td>
<td>Assembly Bill 1763; 04/22/2002 Having been amended, passed to Committee on Appropriations</td>
</tr>
<tr>
<td>Connecticut</td>
<td>House Bill 5286; 04/17/2002 Having been reported favorably by the Joint Committee on Public Health, and having been reported out of the Legislative Commissioner’s Office, to the Joint Committee on Public Safety</td>
</tr>
<tr>
<td>Delaware</td>
<td>House Bill 377; 03/26/2002 Having been reported without recommendation by the House Committee on Health &amp; Human Development, to House Committee on Appropriations</td>
</tr>
<tr>
<td>Florida</td>
<td>House Bill 1579; 03/22/2002 Having been withdrawn from the House Committee on Judicial Oversight, died in Council for Healthy Communities Senate Bill 1262; 03/22/2002 Having passed the Senate and the House, to enrollment Senate Bill 1264; 03/22/2002 Having passed the Senate, died on calendar</td>
</tr>
<tr>
<td>Georgia</td>
<td>Senate Bill 385; 04/12/2002 Having passed the Senate, and then the House, Senate concurred in House amendments</td>
</tr>
<tr>
<td>Hawaii</td>
<td>House Bill 2521; 04/15/2002 Having passed the House, and then the Senate, House disagreed to Senate amendments; to Conference Committee. Senate Bill 2779; 03/18/2002 Having passed the Senate, amended in the House by the House Committee on Health and passed to House Committee on Judiciary and Hawaiian Affairs</td>
</tr>
<tr>
<td>Idaho</td>
<td>House Bill 517; 03/15/2002 Having passed the House, adjourned by Senate Committee on State Affairs; no carryover</td>
</tr>
<tr>
<td>Illinois</td>
<td>House Bill 3809; 04/05/2002 Rereferred to House Committee on Rules Senate Bill 1529; 11/13/2001 To Senate Committee on Rules</td>
</tr>
</tbody>
</table>

93. See TRACKING OF MEPHA, supra note 87 (following MSEHPA-related activities in the states).
<table>
<thead>
<tr>
<th>State</th>
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<tbody>
<tr>
<td>Kansas</td>
<td><strong>Senate Bill 597; 02/14/2002</strong> To Senate Committee on Judiciary</td>
</tr>
<tr>
<td>Kentucky</td>
<td><strong>House Bill 370; 01/17/2002</strong> To House Committee on State Government</td>
</tr>
<tr>
<td>Maine</td>
<td><strong>House Paper 1656; 04/11/2002</strong> Having been amended by Joint Committee on Judiciary, and having passed the House and the Senate, signed by Governor</td>
</tr>
<tr>
<td>Maryland</td>
<td><strong>House Bill 296; 04/05/2002</strong> Having passed the House and the Senate, eligible for Governor’s desk</td>
</tr>
<tr>
<td></td>
<td><strong>House Bill 303; 04/09/2002</strong> Having passed the House and the Senate, signed by Governor</td>
</tr>
<tr>
<td></td>
<td><strong>Senate Bill 234; 04/09/2002</strong> Having passed the Senate and the House, signed by Governor</td>
</tr>
<tr>
<td></td>
<td><strong>Senate Bill 235; 03/29/2002</strong> Having passed the Senate, passed the House</td>
</tr>
<tr>
<td>Massachusetts</td>
<td><strong>Senate Bill 2194; 11/26/2001</strong> To Senate Committee on Ways and Means</td>
</tr>
<tr>
<td>Minnesota</td>
<td><strong>House File 2619; 01/29/2002</strong> To House Committee on Health and Human Services Policy</td>
</tr>
<tr>
<td></td>
<td><strong>House File 3031; 04/03/2002</strong> Having passed the House, and having passed the Senate with amendments, House refused to concur in Senate amendments; to Conference Committee</td>
</tr>
<tr>
<td></td>
<td><strong>Senate File 2669; 03/26/2002</strong> Substituted with House File 3031 on General Orders</td>
</tr>
<tr>
<td>Mississippi</td>
<td><strong>Senate Bill 2737; 03/05/2002</strong> Having passed the Senate, and having been referred to the House Committee on Appropriations, died in committee</td>
</tr>
<tr>
<td></td>
<td><strong>House Bill 1348; 01/21/2002</strong> To House Committee on Appropriations</td>
</tr>
<tr>
<td>Missouri</td>
<td><strong>House Bill 1771; 02/14/2002</strong> To House Committee on Children, Families and Health</td>
</tr>
<tr>
<td></td>
<td><strong>Senate Bill 712; 02/20/2002</strong> Having passed the Senate, to the House</td>
</tr>
<tr>
<td></td>
<td><strong>Senate Bill 1000; 01/28/2002</strong> To Senate Committee on Public Health and Welfare</td>
</tr>
<tr>
<td>Nebraska</td>
<td><strong>Legislative Bill 1224; 04/19/2002</strong> A hearing having been held on 02/13/2002, Indefinitely Postponed when Legislature adjourned until 01/08/2003</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td><strong>Bill Draft; 03/19/2002</strong> The Interim Legislative Committee on Health Care met to discuss possible enactment of the Draft State Emergency Health Powers Act</td>
</tr>
<tr>
<td>New Hampshire</td>
<td><strong>House Bill 1478; 04/16/2002</strong> Having passed the House, and having passed with the Senate with amendment, to the House for concurrence</td>
</tr>
<tr>
<td>New Jersey</td>
<td><strong>Assembly Bill 4060; 12/20/2001</strong> To Assembly Committee on Appropriations</td>
</tr>
</tbody>
</table>
| New Mexico        | **House Joint Memorial 34; 02/14/2002** Having passed the House, passed Senate  
                      **House Joint Memorial 38; 02/14/2002** Withdrawn from Senate Committee on Rules  
                      **House Joint Memorial 62; 02/13/2002** Having passed the Senate, passed the House |
| New York          | **Assembly Bill 9508; 03/05/2002** Amended in Assembly Committee on Health  
                      **Senate Bill 5841; 03/04/2002** Amended in Senate Committee on Health             |
| Oklahoma          | **House Bill 2765; 04/08/2002** Having passed the House, amended and reported by Senate Committee on Appropriations; enacting clause stricken |
| Pennsylvania      | **House Bill 2261; 01/02/2002** To House Committee on Veterans Affairs and Emergency Preparedness  
                      **Senate Bill 1338; 03/11/2002** Introduced and to Senate Committee on Public Health and Welfare |
| Rhode Island      | **House Bill 7305; 04/04/2002** House Committee on Health, Education and Welfare recommended measure be held for further study  
                      **House Bill 7357; 04/03/2002** House Committee on Health, Education and Welfare recommended measure be held for further study  
                      **House Bill 7563; 04/10/2002** Scheduled for hearing and/or consideration  
                      **Senate Bill 2304; 01/29/2002** To Senate Committee on Health, Education and Welfare  
                      **Senate Bill 2865; 04/03/2002** Continued by Senate Committee on Health, Education and Welfare |
| South Dakota      | **House Bill 1303; 02/27/2002** Having passed the House, and having passed the Senate with amendment, and the House having concurred in Senate amendments, signed by Governor |
As demonstrated, various states have incorporated parts of the proposal and have introduced their respective legislation as a response. Each state has expressed its individual intent to enact legislation that authorizes respective state departments to respond to a public health emergency. To see the individual proposals and suggested amendments to the MSEHPA please review the proposed measures. They do not reflect the adoption of the MSEHPA as a whole, but rather the integration of the ideals introduced by the Model Act.

<table>
<thead>
<tr>
<th>State</th>
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</thead>
</table>
| Tennessee   | **House Bill 2271; 04/10/2002** Substituted on House floor by Senate Bill 2392  
**Senate Bill 2392; 04/17/2002** Having passed the Senate, and having passed the House with amendment, the Senate concurred in House amendment numbers 1 & 3 |
| Utah        | **House Bill 231; 03/18/2002** Having passed the House and the Senate, signed by Governor                                                                                                                                 |
| Vermont     | **Senate Bill 298; 04/18/2002** Having passed the Senate, to the House Committee on Judiciary                                                                                                                                 |
| Virginia    | **House Bill 882; 02/08/2002** In House Committee on Appropriations: If by Dec. 20 the committee has not taken action on this bill, it will not be considered in 2003 session                                                                 |
| Washington  | **House Bill 2854; 03/14/2002** Having passed the House, and having been passed by the Senate Committee on Health and Long Term Care, and having been returned to the House Rules Committee, adjourned; no carryover |
| Wisconsin   | **Assembly Bill 849; 03/26/2002** Failed to pass in Assembly Committee on Public Health pursuant to Senate Joint Resolution 1  
**Assembly Bill 850; 03/20/2002** Having passed the Assembly, failed to pass in Senate Committee on Health, Utilities, Veterans and Military Affairs pursuant to Senate Joint Resolution 1 |
| Wyoming     | **Senate Bill 67; 03/13/2002** Having passed the Senate, adjourned by House Committee on Minerals, Business and Economic Development; no carryover                                                                                                                                 |

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