

PRESERVING LIBERTY AND PROTECTING PUBLIC HEALTH: EXAMINING THE CONSTITUTIONALITY OF QUARANTINE AND ISOLATION PLANS IN HAWAI'I

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As the international community grows increasingly interconnected through trade, commerce, travel, economics, politics, science, and technology, the question becomes not if another global pandemic will happen, but when the next one will occur. From the ancient scourge of the Bubonic plague, to the “Spanish” Influenza pandemic of 1918, to modern diseases such as SARS, Anthrax, and H5N1 “Avian” Influenza, pandemics have generated public fear and apprehension on a massive scale. With the goal of maintaining order and preserving the public health in the event of a pandemic, the United States government recently funded research directed towards proposed legislation to ensure that states have a viable way to deal with an outbreak. In Hawai'i, the hasty drafting of public health law amendments after 9/11 resulted in fundamental concerns about personal and civil liberty being inadequately addressed.

INTRODUCTION

Global pandemics are utterly and totally terrifying. While very few people alive today were alive during the last pandemic that rapidly killed a large percentage of the population,¹ just the specter of a global pandemic has in recent years induced widespread panic and fear.² This fear of the next global pandemic fuels an ongoing debate in the United

1 *See infra* discussion of the 1918 “Spanish” Influenza pandemic, Section I.

2 *See* Sean Hao, *Isle Security Tight for Deadly Viruses*, THE HONOLULU ADVERTISER, April 22, 2007,

States between public health officials who argue that “while the Constitution protects against invasions of individual rights, it is not a suicide pact,”³ and Constitutional activists who proclaim “give me liberty or give me death!”⁴

States must be prepared to deal with a wide variety of pandemics using various prevention strategies because no single strategy will suffice in all circumstances. It is impossible to inoculate the entire population against every current pandemic, just as it is impossible to predict future disease mutations or whether current medications would be effective in treating these future pandemics. Thus, when a pandemic does in fact happen, there must be a post-infection governmental reaction in order to limit the spread of the pandemic, protect those who are not yet infected, and ensure treatment for those who are infected.

available at <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20070422/NEWS01/704220362> (detailing the fact that Hawai'i state viral researchers had imported strains of avian flu, dengue virus, West Nile virus, and several hantavirus strains into Hawai'i, and that importation of the SARS virus “has been approved, but not yet imported.” Also noting that the state “has given permission to import three unidentified microorganisms, including two human pathogens, that remain secret because they are seen as potential bioterrorist threats,” and that all these efforts have “raised concerns about increased risks to the health of Hawai'i residents.” State Senator Gordon Trimble later noted that importation of the viruses “truly is frightening.”). *Id.* See generally Consumer Project on Technology, *Talking points on Cipro patent dispute*, available at <http://www.cptech.org/ip/health/cl/cipro/talkingpoints.html> (After the September 11, 2001 attacks, the subsequent Anthrax scare created sufficient public outcry that lawmakers were forced to entirely rethink American foreign policy on pharmaceutical patents and access to medication. Bayer, a German pharmaceutical company, holds the patent for Ciprofloxacin, the only known effective treatment for Anthrax. The United States, contrary to every international patent law stance they had taken previously, had stated that if required, they would issue a compulsory license to produce Ciprofloxacin in the United States in the event of an Anthrax outbreak. This eventually would lead to relaxed compulsory licensure procedures in the TRIPS agreement of the WTO.).

3 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

4 Patrick Henry, Speech delivered on March 23, 1775 (transcript available at <http://www.law.ou.edu/ushistory/henry.shtml>). See also Thomas Jefferson, Quotes (available at <http://www.brainyquote.com/quotes/quotes/t/thomasjeff118441.html>) (“Liberty is to the collective body, what health is to every individual body. Without health no pleasure can be tasted by man; without liberty, no happiness can be enjoyed by society.”).

It is important to set firm guidelines before we are stricken with a pandemic, while we have the time for rational forethought and opportunity to debate the benefits and costs of preparedness plans. Reaching the conclusion that the separation of the healthy and those who are afflicted with a contagious pandemic is a necessity, the question remaining is not whether or not quarantine and isolation procedures are Constitutional in general, but to what degree they must be limited and carefully regulated in order to preserve the most individual and civil liberty while still protecting the public health.

This article argues that although recent national efforts promoting pandemic preparedness through legislation as well as health law amendments in Hawai'i provide a good starting point for discussion, further amendments are required to address the practical concerns and constitutionally protected personal and civil liberties that limit the effectiveness of current quarantine and isolation laws. Part I introduces global pandemics, emphasizing the horrific consequences of widespread disease outbreak, and examining competing tensions between preserving the public health and ensuring personal and civil liberty. Because this article focuses on public health law in Hawai'i, Part II provides an in depth history of quarantine and isolation procedures carried out in Hawai'i in response to both leprosy and the plague. Part III examines seminal cases in American public health law, identifying the police power as the source of state's power to legislate for public health and safety, and demonstrating the development of quarantine and isolation doctrine within a modern constitutional framework. In Part IV, this article critiques the strengths and weaknesses of quarantine provisions from two model public health acts, the Model State Emergency Health Powers Act and the Turning Point Model State Public Health Act. Part V reviews existing

public health law in Hawai'i, engaging in an analysis of recent legislative amendments, and utilizing the legal framework from Part III as well as statutory interpretation from Hawai'i Department of Health officials to illustrate the need for further amendments to Hawai'i quarantine law. This article concludes in Part VI by suggesting specific improvements to Hawai'i law that would better protect public health while still preserving constitutional and civil liberties.

I. BACKGROUND

The term 'global pandemic' was thrust into popular vernacular with the identification of the H5N1 avian flu as posing a potential pandemic reach in 2005.⁵ The term pandemic is academically defined as “occurring over a wide geographic area and affecting an exceptionally high proportion of the population,”⁶ and is used in reference to maladies. The way the term has come to be used, however, reflects the nature of today's globalized world. The Department of Homeland Security defines a pandemic as a “a global disease outbreak. . . likely to be a prolonged and widespread outbreak that could require temporary changes in many areas of society.”⁷

Global pandemics are diseases or infections that affect the world on a massive scale, not just in terms of widespread infection, transmission, and mortality rates, but socially and

5 WebMD, *Special Report: Bird Flu*, available at <http://www.webmd.com/solutions/sc/bird-flu/global-pandemic> (Noting that “Merriam-Webster reports that 'pandemic' is the seventh most frequently looked-up word in its online dictionary [in 2005].”).

6 Merriam-Webster's Online Dictionary, *Pandemic*, available at <http://209.161.33.50/dictionary/pandemic>.

7 Department of Homeland Security, *Ready America, Influenza Pandemic*, available at <http://www.ready.gov/america/beinformed/influenza.html>.

economically as well.⁸ Pandemics drastically curb trade and commerce by strictly limiting contact between persons and countries, in addition to injuring or killing the labor workforce vital to global agriculture.⁹ Pandemics in the past have caused some of the most sensational episodes in the annals of mankind, in terms of hardship suffered by the populace, numbers and percentages of fatalities, and long-lasting social and economic effects felt by the world.¹⁰ Pandemics have also lead several afflicted societies to impose some of history's greatest restrictions on what we today consider our rights to civil and Constitutional liberties.¹¹

The first spectacular, and still statistically most deadly pandemic was the 'Black Death' Bubonic Plague of the middle ages, with the major global outbreak during the mid-fourteenth century.¹² Plague is an infection caused by the bacteria *Yersinia pestis*, and most commonly involves transmission through a bite from a rodent-borne flea infected with the

8 See Milan Brahmhatt, Senior Economist at the World Bank, *Avian and Human Pandemic Influenza – Economic and Social Impacts*, Remarks delivered at WHO Headquarters, Geneva (Nov. 7-9, 2005) (transcript available at http://www.who.int/mediacentre/events/2005/World_Bank_Milan_Brahmbhattv2.pdf) (“The more obvious part of the answer [to the question about the social and economic impact of potential human pandemics] is of course that the illness and death caused by these diseases will have economic and social costs.”) *Id.* at 1.

9 *Id.* at 5.

[A] serious global flu pandemic could also entail a sizeable loss of potential world output through a reduction in the size and productivity of the world labor force due to illness and death. The effect of disease on the size of the labor force would depend on the virulence and spread of the disease and on how it affected different age groups, among other factors. There would also be a general decline in labor productivity due to illness among the labor force at large, as well as costs of hospitalization and medical treatment.

Id.

10 See *infra* discussion of the 'Black Death' Bubonic Plague and 1918 “Spanish” Influenza, Section I.

11 See *infra* discussion of the 'Black Death' Bubonic Plague, Section I.

12 See CDC World Health Organization Collaborating Center, *Plague*, available at http://www.cdc.gov/ncidod/dvbid/plague/who_cc/index.htm.

bacteria.¹³ The plague is an especially terrifying disease because of the horrific symptoms suffered by the afflicted and the virtual death sentence that it guarantees.¹⁴ Although the plague persists in the contemporary world, large outbreaks are no longer commonly documented.¹⁵ Though the same bacteria that killed an estimated half of Europe's population in the fourteenth century continues to infect people with plague today, the still-fatal infection is now effectively treatable through antibiotics.¹⁶

The Black Death was not the first time the world had experienced the plague, and outbreaks of the bubonic plague had been reported even in biblical times. A major pandemic also struck Constantinople in the mid-6th century.¹⁷ However, the Black Death pandemic of the mid-fourteenth century was notable because the plague strain was so severe that it killed an estimated seventy-five million people, or somewhere between thirty and seventy percent

13 See CDC Division of Vector-Borne Infectious Diseases, *CDC Plague Home Page*, available at <http://www.cdc.gov/ncidod/dvbid/plague/index.htm>.

14 See BBC Radio 4, *This Sceptered Isle – The Black Death*, available at http://www.bbc.co.uk/radio4/history/sceptred_isle/page/36.shtml.

With its frightful symptoms, the swift onset, the blotches, the hardening of the glands under the armpit or in the groin, these swellings which no poultice could resolve, these tumours which when lanced, gave no relief, the horde of virulent carbuncles which followed the dread harbingers of death, the delirium, the insanity which attended its triumph, the blank spaces which opened on all sides in human society, stunned and for a time destroyed the life and faith of the world.

Id.

15 CDC Division of Vector-Borne Infectious Diseases, *CDC Plague Home Page*, available at <http://www.cdc.gov/ncidod/dvbid/plague/index.htm> (noting that “[i]n the United States, the last urban plague epidemic occurred in Los Angeles in 1924-25,” and that “[g]lobally, the World Health Organization reports 1,000 to 3,000 cases of plague every year.”).

16 See World Health Organization, *Plague Factsheet*, available at <http://www.who.int/mediacentre/factsheets/fs267/en/> (noting that a plague infection, if untreated, has a “case-fatality ratio of 30%-60%,” and that “[e]ffective treatment methods enable almost all plague patients to be cured if diagnosed in time. These methods include the administration of antibiotics and supportive therapy.”). *Id.*

17 See Public Broadcasting System, NOVA, *History of Quarantine*, program overview available at <http://www.pbs.org/wgbh/nova/typhoid/quarantine.html>.

of Europe's population.¹⁸ The death toll was so great that the pre-outbreak population of Europe was not restored until the sixteenth century, some one-hundred and fifty years later.¹⁹ Plague, or the threat of the plague, was used as a military weapon,²⁰ and infections spread rapidly through the urban centers of Europe largely due to problems of overcrowding and poor sanitation.²¹

In addition to the chaos, panic, and fear generated by the rapid and violent deaths of so many people in such a short timespan, the Black Death had enormous socio-economic consequences as well.²² The pandemic was so severe that the ongoing “100 Years War” between England and France was actually put on hiatus until the plague had dissipated.²³ Because of the extreme shortage of labor without decreased demand, serfs previously tied to the land gained mobility, and fluidity of class was observed for perhaps the first time.²⁴ The

18 See generally The Middle Ages, Medieval Resource, *The Black Death: Bubonic Plague*, available at <http://www.themiddleages.net/plague.html>.

19 See Encyclopaedia Britannica Online, *Black Death*, available at <http://www.britannica.com/eb/article-9015473/Black-Death>.

20 *Id.* (noting that “a Kipchak army, besieging a Genoese trading post in the Crimea, catapulted plague-infested corpses into the town.”)

21 See BBC History, *Black Death, Plague Reaches London*, available at http://www.bbc.co.uk/history/british/middle_ages/black_04.shtml.

22 See BBC History, *Black Death: Political and Social Changes*, available at http://www.bbc.co.uk/history/british/middle_ages/blacksocial_01.shtml (“The Black Death had a devastating impact on local communities.”).

23 See BBC Radio 4, *This Sceptered Isle – The Black Death*, available at http://www.bbc.co.uk/radio4/history/sceptred_isle/page/36.shtml (noting the initial start of the 100 Years War in 1337, and the renewal of the War in 1355 when the plague had abated.).

24 See The Middle Ages, Medieval Resource, *The Black Death: Bubonic Plague*, available at <http://www.themiddleages.net/plague.html> (noting that “Medieval society never recovered from the results of the plague. So many people had died that there were serious labor shortages all over Europe. This led workers to demand higher wages, but landlords refused those demands. By the end of the 1300s peasant revolts broke out in England, France, Belgium and Italy.”). See also BBC History, *Black Death: Political*

Black Death also led to the extreme persecution of religious minorities, in particular the Jewish people,²⁵ as well as people afflicted with leprosy, as possible causes of the disease.²⁶ A lasting social consequence of the Black Death and subsequent attack on Jewish people was the mass exodus of European Jews to Poland and Russia.²⁷

Global pandemics are not ancient history by any means, and the modern era has witnessed several epic disease outbreaks. The largest and most wide-reaching modern outbreak was the H1N1 Influenza pandemic, dubbed the 'Spanish' Flu, that killed between fifty and one hundred million people from 1918 to 1920.²⁸ The Spanish flu was exceptionally lethal for an influenza strain, and victims often suffered from “high-grade fever and rigors, severe headache... and signs consistent with hemorrhagic pneumonia,” before

and Social Changes, available at http://www.bbc.co.uk/history/british/middle_ages/blacksocial_01.shtml (noting that English Parliament enacted the Statute of Labourers in 1351 “limiting the freedom of peasants to move around in search of the most lucrative work,” in an effort to preserve the established feudal system.).

25 See Jewish History Sourcebook, *The Black Death and the Jews 1348-1349 CE*, available at <http://www.fordham.edu/halsall/jewish/1348-jewsblackdeath.html>.

By authority of Amadeus VI, Count of Savoy, a number of the Jews who lived on the shores of Lake Geneva, having been arrested and put to the torture, naturally confessed anything their inquisitors suggested. These Jews, under torture, incriminated others. Records of their confessions were sent from one town to another in Switzerland and down the Rhine River into Germany, and as a result, thousands of Jews, in at least two hundred towns and hamlets, were butchered and burnt. The sheer loss of numbers, the disappearance of their wealth, and the growing hatred of the Christians brought German Jewry to a catastrophic downfall. It now began to decline and did not again play an important part in German life till the seventeenth century.

Id.

26 See generally PHILIP ZIEGLER, *BLACK DEATH* (Harper and Row 1971).

27 See generally Dr. Neil Betten, *Migration Patterns of European Jewry*, available at <http://tfn.net/holocaust/present/betten1.html#anchor40248>.

28 See Federation of American Scientists, *Biological Agent Fact Sheet – 1918 (H1N1) Influenza A*, available at <http://www.fas.org/resource/10062005170217.pdf> (The H1N1 Influenza outbreak was called the “Spanish Flu” because although it most likely originated outside of Spain, “Spanish newspapers published many reports of the pandemic while publications from nations involved in the World War I refrained.”). See generally Stanford Virology Dept., *The 1918 Influenza Pandemic*, available at <http://virus.stanford.edu/uda/>.

they died within sometimes as little as a few hours after exhibiting symptoms.²⁹ The first documented cases in the United States occurred in soldiers returning from World War I at the Fort Riley, Kansas, army base,³⁰ but the epidemic was soon gripping the country. Nationally, so many people died so quickly that “[t]he production of coffins could not keep up with the number of deaths occurring each day, in each city.”³¹ The Spanish Flu created enormous fear because it was easily transmitted, had the capability of killing very rapidly, and as opposed to most other known strains of influenza, readily killed younger adults and other healthy individuals, not just the very young and very old.³²

Like the Black Death, the Spanish Influenza pandemic of 1918 was not without enormous social consequences. While the world had evolved greatly since the time of the Black Death and the morbidity rate of the Spanish Flu was substantially smaller than that of the Black Death,³³ one commentator, after noting that a shortage of coffins and gravediggers was causing bodies to pile up, opined that “[t]he conditions in 1918 were not so far removed

29 See Monica Schoch-Spana, *Implications of Pandemic Influenza for Bioterrorism Response*, 31 CLINICAL INFECTIOUS DISEASES 6 at 1410 (2000), available at <http://www.journals.uchicago.edu/CID/journal/issues/v31n6/000949/000949.web.pdf>.

30 See Illinois Trails, *The 1918 Spanish Flu Epidemic*, available at <http://www.iltrails.org/flu1918.htm>.

31 *Id.*

32 See Stanford Virology Dept., *The 1918 Influenza Pandemic*, available at <http://virus.stanford.edu/uda/> (noting that “the flu was most deadly for people ages 20 to 40.”).

33 Compare Monica Schoch-Spana, *Implications of Pandemic Influenza for Bioterrorism Response*, 31 CLINICAL INFECTIOUS DISEASES 6 at 1411 (2000), available at <http://www.journals.uchicago.edu/CID/journal/issues/v31n6/000949/000949.web.pdf> (noting that the “case-fatality rate associated with Spanish flu has been estimated at 2.5%.”), with World Health Organization, *Plague Factsheet*, available at <http://www.who.int/mediacentre/factsheets/fs267/en/> (noting that a plague infection, if untreated, has a “case-fatality ratio of 30%-60%.”).

from the Black Death in the era of the bubonic plague of the Middle Ages.”³⁴ Over twenty-five percent of the United States and twenty percent of the entire world would eventually contract the Spanish Flu, including President Woodrow Wilson in 1919 while he was negotiating the Treaty of Versailles, which ended World War I.³⁵

To combat the influenza pandemic, public health laws and local ordinances were enacted across the United States in an attempt to contain the spread of the infection.³⁶ The committee for the American Public Health Association (APHA) demanded legislation limiting coughing and sneezing, and rules regarding the “careless disposal of nasal discharges.”³⁷ Schools were closed in many places, patients found to be infected with the flu were not allowed to leave the quarantine confines of their treatment area until they had been symptom free for 48 hours, and in some cities like San Francisco and San Diego, local ordinances required people to wear gauze masks at all times.³⁸ Public health authorities “were not prepared for an event of this magnitude, lacking the organization and infrastructure

34 Stanford Virology Dept., *The 1918 Influenza Pandemic*, available at <http://virus.stanford.edu/uda/>.

35 *Id.*

36 See Richard J. Hatchett, Carter E. Mecher, Marc Lipsitch, Proceedings of the National Academy of Sciences of the United States of America, *Public Health Interventions and Epidemic Intensity During the 1918 Influenza Pandemic* at 1, available at <http://www.pnas.org/cgi/reprint/0610941104v1> (Recent research indicates that nonpharmaceutical interventions “intended to reduce infectious contacts between persons” during the Spanish Flu pandemic resulted in death rates approximately fifty percent lower in “cities in which multiple interventions were implemented at an early phase of the epidemic.”). *Id.*

37 Stanford Virology Dept., *The 1918 Influenza Pandemic: Response*, available at <http://virus.stanford.edu/uda/fluresponse.html>.

38 *Id.* See also Illinois Trails, *The 1918 Spanish Flu Epidemic*, available at <http://www.iltrails.org/flu1918.htm> (“Social clubs cancelled meetings until further notice; town meetings and even political campaigns were put on hold. City streets were hosed down each day. People venturing out into the cities were required to wear a protective mask. Mass panic and mass destruction of this nation's citizens was occurring throughout most states in the union.”).

. . . Yet, [they found it] necessary to usher in these authoritative responses and losses of liberty.³⁹

The modern era has experienced several more pandemics beyond the Spanish Flu, and the world will inevitably experience global pandemics in the future. Although more recent global scourges such as smallpox and polio have been successfully treated with vaccines and today no longer pose a major threat,⁴⁰ other diseases and bacterial infections with the capability of becoming a global pandemic persist. The fears associated with the pandemics of old are the same fears that would manifest if a pandemic would befall today's society,⁴¹ and private concerns of individual and family health still present major obstacles to implementing public health legislation for the greater good.⁴² With the natural tendency to

39 Stanford Virology Dept., *The 1918 Influenza Pandemic: Response*, available at <http://virus.stanford.edu/uda/fluresponse.html>.

40 See CDC, *CDC Smallpox Vaccine Overview*, available at <http://www.bt.cdc.gov/agent/smallpox/vaccination/facts.asp> (Smallpox vaccination was stopped in the United States in 1972 after it was all but eradicated in the country. However, with recent terrorism concerns, the United States government has revamped their smallpox vaccination readiness, because the vaccine can be very successfully administered up to three days after exposure to the virus.).

41 See CDC, *Emergency Preparedness & Response: Pandemic Influenza Course Objectives*, available at <http://www.bt.cdc.gov/erc/panflu/objectives.asp> (The Center for Disease Control (CDC) warns in it's course for teaching emergency preparedness and responses that there is a particular psychology associated with a severe pandemic, and that stigmatization is all but inevitable.).

42 See generally GIOVANNI BOCCACCIO, *DECAMERON, FIRST DAY: INTRODUCTION*, available at Brown University's Decameron Web, <http://www.stg.brown.edu/projects/decameron/engDecShowText.php?myID=d01intro&expand=day01>.

Tedious were it to recount, how citizen avoided citizen, how among neighbours was scarce found any that shewed fellow-feeling for another, how kinsfolk held aloof, and never met, or but rarely; enough that this sore affliction entered so deep into the minds of men and women, that in the horror thereof brother was forsaken by brother, nephew by uncle, brother by sister, and oftentimes husband by wife; nay, what is more, and scarcely to be believed, fathers and mothers were found to abandon their own children, untended, unvisited, to their fate, as if they had been strangers. Wherefore the sick of both sexes, whose number could not be estimated, were left without resource but in the charity of friends (and few such there were), or the interest of servants, who were hardly to be had at high rates and on unseemly terms, and being, moreover, one and all, men and women of gross understanding, and for the most part unused to such offices, concerned themselves no further than to supply the immediate and

act in self-preservation, it is easier to see how public health officials during past pandemics resorted to curtailing patient's Constitutional and civil rights.⁴³ Global history and the history of Hawai'i serve to emphasize the need for an adequate preparedness plan and preemptive legislation to avoid making the same pandemic treatment and quarantine mistakes in the future as were made in the past.

II. LEPROSY & PLAGUE IN HAWAI'I

Quarantine and isolation have rich histories entwined with the fabric of Hawai'i. The Leper colony at Kalaupapa and great Chinatown fire serve as reminders of past failures of quarantine and isolation procedures dealing with medical emergencies in Hawai'i.⁴⁴ While Kalaupapa demonstrates the insensitivity and stigmatization that can arise from a prolonged outbreak, the Chinatown fire shows how a sudden pandemic can create panic and result in overreaction by the government, ending with far worse consequences than had no

expressed wants of the sick, and to watch them die; in which service they themselves not seldom perished with their gains. In consequence of which dearth of servants and dereliction of the sick by neighbours, kinsfolk and friends, it came to pass--a thing, perhaps, never before heard of--that no woman, however dainty, fair or well-born she might be, shrank, when stricken with the disease, from the ministrations of a man, no matter whether he were young or no, or scrupled to expose to him every part of her body, with no more shame than if he had been a woman, submitting of necessity to that which her malady required; wherefrom, perchance, there resulted in after time some loss of modesty in such as recovered. Besides which many succumbed, who with proper attendance, would, perhaps, have escaped death; so that, what with the virulence of the plague and the lack of due tendance of the sick, the multitude of the deaths, that daily and nightly took place in the city, was such that those who heard the tale--not to say witnessed the fact--were struck dumb with amazement. Whereby, practices contrary to the former habits of the citizens could hardly fail to grow up among the survivors.

Id.

43 See *infra* discussion of the Kalaupapa Leper Colony and the Honolulu Chinatown fire, Section II.

44 See *infra* discussion of the Kalaupapa Leper Colony and the Honolulu Chinatown fire, Section II.

government action been taken. Both of the situations affirmatively show that Hawai'i must be prepared for when the next pandemic strikes the Islands, so that the government and people of Hawai'i can be prepared instead of being taken by surprise. This need for preparedness is emphasized by the fact that the Center for Disease Control is planning to establish a Hawaiian field station "forward base' to fight infectious diseases and other public health threats,"⁴⁵ which puts Hawai'i squarely "at the forefront of a disease war."⁴⁶ It is only through careful planning that extreme measures similar to those that happened in the past can be avoided as we attempt to minimize the liberty price that is the cost for protecting public health.

King Kamehameha III established the first Hawai'i Board of Health in 1850, with the goal of preventing and treating the diseases that were beginning to ravage the Hawaiian Islands after the arrival of the Western world.⁴⁷ Shortly thereafter in 1865, under King Kamehameha V, the "Act to Prevent the Spread of Leprosy" was passed,⁴⁸ which allowed for the quarantine and isolation of people afflicted with leprosy.⁴⁹ Leprosy is a disease with a very long incubation time, caused by the bacteria *Mycobacterium Leprae*.⁵⁰ The infection

45 Helen Altonn, *CDC Picks Isles as Epidemic Outpost*, HONOLULU STAR BULLETIN, April 20, 2007, available at <http://starbulletin.com/2007/04/20/news/story02.html>.

46 *Id.*

47 See LINDA W. GREENE, NATIONAL HISTORICAL PARK: KALAUPAPA, CHRONICLE OF IMPORTANT EVENTS at 2 (1985), available at http://www.cr.nps.gov/history/online_books/kala/ [Hereinafter KALAUPAPA].

48 An Act To Prevent the Spread of Leprosy, available at <http://www.nps.gov/archive/kala/docs/1865.htm>.

49 KALAUPAPA, CHRONICLE OF IMPORTANT EVENTS at 3.

50 See World Health Organization, *Leprosy*, available at <http://www.who.int/mediacentre/factsheets/fs101/en/> (noting that the bacteria causing the disease has an incubation time of "about five years" and that "[s]ymptoms can take as long as 20 years to appear." Also noting that "[l]eprosy is not highly infectious.").
Id.

affects the nervous system, “particularly the nerves of the hands, feet, and face,”⁵¹ and results in a painful condition that if untreated “can leave sufferers deformed and crippled.”⁵²

Although it has been documented since 600 B.C., “[t]hroughout history, the afflicted have often been ostracized by their communities and families.”⁵³ The social stigmatization associated with the disease is such that the WHO has recognized that to the current day it “remains an obstacle to self-reporting and early treatment,” and that “[t]he image of leprosy has to be changed at the global, national and local levels.”⁵⁴

Hawai'i was no exception to the nearly universal condemnation of leprosy patients.⁵⁵ Shortly after the Act to Prevent the Spread of Leprosy was passed by Kamehameha V, the King's government purchased the land on Moloka'i that would eventually become the leper colony Kalaupapa.⁵⁶ The Act required every person, including doctors, with knowledge of a

51 BBC News, *Health: Medical Notes – Leprosy*, available at http://news.bbc.co.uk/2/hi/health/medical_notes/166163.stm.

52 *Id.*

53 *Id.*

54 *Id.*

55 KALAUPAPA, LEPROSY IN HAWAI'I at 1 (Stigmatization of Hansen's disease occurred long before official action by the Board of Health, as locals in Hawai'i referred to it as “Ma'i-Pake,” or the “Chinese sickness.”). *Id.* See also Kalaupapa National Historical Park, *In Their Own Words*, available at <http://www.nps.gov/kala/historyculture/words.htm>.

I remained in Kalaupapa for thirty years. I was finally paroled in 1966. My mother was still alive, so I wrote to her and told her I was finally cured. I could come home. After a long while, her letter came. She said, ‘Don’t come home. You stay at Kalaupapa.’ I wrote her back and said I wanted to just visit, to see the place where I was born. Again, she wrote back. This time she said, ‘No, you stay there.’ You see, my mother had many friends and I think she felt shame before them. I was disfigured, even though I was cured. So, she told me, her daughter, ‘Don’t come home.’ She said, ‘You stay right where you are. Stay there, and leave your bones at Kalaupapa.’

Id.

56 KALAUPAPA, CHRONICLE OF IMPORTANT EVENTS at 3.

case of leprosy to report it to health officials.⁵⁷ The law also provided that police were required to arrest alleged lepers and deliver them to the Board of Health for an inspection.⁵⁸ Because leprosy was at the time largely untreatable,⁵⁹ this resulted in the summary isolation and removal to Kalaupapa on Moloka'i of most patients so diagnosed by the Board of Health.⁶⁰ By the time Hawai'i was annexed by the United States in 1898, most of the leprosy patients in the Islands had been isolated at the Moloka'i peninsula colony.⁶¹ Despite many advances in medical science in the early twentieth century, including treatment drugs⁶² and the identification of the bacteria that causes Hansen's Disease (leprosy), the state Board of Health did not officially end the isolation of leprosy patients until 1969.⁶³

The Hawaiian court in 1884, interpreting the current Hawaiian Constitution, held that “[t]he State has the authority inherent in itself to enact laws to secure the health, welfare and

57 KALAUPAPA, LEPROSY IN HAWAI'I at 3.

58 KALAUPAPA, LEPROSY IN HAWAI'I at 3 (“The law also required all police and district justices, when requested, to arrest and deliver to the Board of Health any person alleged to have leprosy so that he could be medically inspected and thereafter removed to a place of treatment, or isolation if required.”).

59 *Id.* at 1 (“As early as 1823 missionaries were noting 'remediless and disgusting cases.'”).

60 *Id.* For a good first-hand account by Kalaupapa patients, see Kalaupapa National Historical Park, *In Their Own Words*, available at <http://www.nps.gov/kala/historyculture/words.htm>.

Like the other patients, they caught me at school. It was on the Big Island. I was twelve then. I cried like the dickens for my mother and for my family. But the Board of Health didn't waste no time in those days. They sent me to Honolulu, to Kalihi Receiving Station, real fast. Then they sent me to Kalaupapa. That's where they sent most of us. Most came to die.

Id.

61 KALAUPAPA, LEPROSY IN HAWAI'I at 6.

62 See World Health Organization, *Leprosy*, available at <http://www.who.int/mediacentre/factsheets/fs101/en/> (“The first breakthrough occurred in the 1940s with the development of the drug dapsone, which arrested the disease.”).

63 KALAUPAPA, LEPROSY IN HAWAI'I at 8.

safety of the individual.”⁶⁴ Furthermore, the court justified the use of police power to segregate leprosy patients by deeming the Act to Prevent the Spread of Leprosy a “law of overruling necessity,” in concluding that the State could not exist and continue to function without its quarantine laws.⁶⁵

The quarantine and isolation procedures justified by the court to exile nearly 9,000 people⁶⁶ were not very effective in treating leprosy in Hawai'i.⁶⁷ The procedure of complete isolation and forced segregation was “completely alien to the fundamentals of Hawaiian society.”⁶⁸ Many Hawaiian people correctly did not believe leprosy to be contagious, so they protested the forced segregation and violation of their inherent rights even more vehemently, but to no avail.⁶⁹ This imposition of quarantine was so antiethical to the Hawaiian way of life that it led people to flee to remote countryside areas and to violently fight back against the police seeking to arrest them.⁷⁰ Thus, the official quarantine and isolation procedures

64 Segregation of Lepers, 5 Haw. 162, 166 (1884).

65 *Id.*

66 Hawaii Reporter, *Audit of Kalaupapa Settlement Operations and Expenditures*, available at <http://www.hawaiireporter.com/story.aspx?0d2bef9b-d5ba-45bd-b653-d35135562ea4> (“Over the years, nearly 9,000 people have been quarantined.”).

67 KALAUPAPA, LEPROSY IN HAWAI'I at 12 (“Fully aware of the trauma it was causing in society at large, the government nonetheless fully expected that isolating sources of the contamination on a distant island would cause the disease to die out among the general population. *Such was not to be the case*, primarily because it was impossible through the years to isolate all those who had the disease.” (emphasis added)).

68 *Id.* at 6.

69 See Walter M. Gibson, president of the Board of Health, *The Lepers and Their Home On Molokai*, NUHOU_ (Honolulu), March 14, 1873 (“The horror of this living death has no terror for Hawaiians, and therefore they have need more than any other people of a coercive segregation of those having contagious diseases. Some people consider this enforced isolation as a violence to personal rights. It is so, no doubt, but a violence in behalf of human welfare.”).

70 KALAUPAPA, LEPROSY IN HAWAI'I at 10 (“Parents refused to let their children go, husbands and wives resisted separation, and old people implored to live out their days where they had spent their lives. Many

prevented the treatment of many people afflicted with leprosy and failed to achieve the desired goal of separating the sick from the healthy.⁷¹ Shortly after the isolation procedures began, the Hawaiian language developed new terms to describe leprosy, “Ma'i-ho'oka'awale” and “Ma'i-ho'oka'awale 'ohana,” respectively meaning “Disease of Exile” and “Disease-that-tears-families-apart.”⁷²

When the official policy of compulsory quarantine for leprosy patients ended in 1969, many residents of Kalaupapa chose to remain there, often because they had nowhere else to go.⁷³ After promising treatment to all leprosy patients, the State closed the leprosarium at Hale Mohalu outside of Honolulu, despite the protests of the patients that obtained treatment there.⁷⁴ This, in effect, forced dependence of the leprosy patients on Kalaupapa. Although Kalaupapa remains physically and socially isolated from the rest of Hawai'i and even the rest of Moloka'i, the site was in recent years dedicated as a national park.⁷⁵ The legacy of the Kalaupapa colony, however, is not one of triumph and celebration about the successful

took refuge in the countryside in ravines and caves or homes of friends.”). *Id.* See also Kalaupapa National Historical Park, *In Their Own Words*, available at <http://www.nps.gov/kala/historyculture/words.htm>.

One of the worst things about this illness is what was done to me as a young boy. First, I was sent away from my family. That was hard. I was so sad to go to Kalaupapa. They told me right out that I would die here; that I would never see my family again. I heard them say this phrase, something I will never forget. They said, ‘This is your last place. This is where you are going to stay, and die.’ That’s what they told me. I was a thirteen-year-old kid.

Id.

71 See *supra* note 67.

72 KALAUPAPA, LEPROSY IN HAWAI'I at 12.

73 KALAUPAPA, KALAUPAPA NATIONAL HISTORICAL PARK at 1.

74 See *Punikaia v. Clark*, 720 F. 2d 564 (9th Cir. 1983) (holding that leprosy patient petitioners had no legitimate entitlement claim to continued medical care and residence facilities at Hale Mohalu, and that due process did not require that the state grant a pre-closure hearing to the patients.).

75 *Id.* at 3.

treatment of a horrible disease, but instead of ineffective forced isolation of patients with a non-contagious disease and the terrible personal and family price those isolated individuals had to pay.⁷⁶

Leprosy was not the only epidemic that faced Hawai'i and forced the Board of Health to make public health decisions after the United States began occupation of the Islands. In the winter of 1899, there was an outbreak of the bubonic plague in Honolulu.⁷⁷ The first confirmed death by plague in Honolulu immediately sent the entire community into a panic.⁷⁸ The Board of Health immediately ordered the quarantine of all incoming passengers, closed all schools, and quarantined and isolated all of Chinatown.⁷⁹ Demonstrating the fear generated by the epidemic, when numerous Japanese doctors volunteered to help the Board of Health, it was seen as a sign that “the Japanese community had already known about the

76 See generally Kalaupapa National Historical Park, *In Their Own Words*, available at <http://www.nps.gov/kala/historyculture/words.htm>. See also generally Kalaupapa National Historical Park, *Isolation of Hansen's Disease*, available at http://www.nps.gov/kala/historyculture/kalaupapa_settlement.htm (“Kalaupapa serves as a reminder of a nation in crisis, when Hawaiian people were dying from introduced diseases for which they had no immunities. Options for preventing the spread of contagious diseases were few. Isolation for leprosy seemed like the best solution, but it came at a high personal cost.”).

77 See Hawaii Reporter, *Roosters and Chickens in Residential Communities Could Spell Disaster in Bird Flu Outbreak*, available at <http://hawaiireporter.com/story.aspx?5559e747-042d-474b-9a77-9a2874b1b1b8> (noting that “[t]he 1900 Bubonic Plague outbreak is considered the greatest public safety disaster in Hawaiian History.”). For a short summary of the governmental response to the Plague, as well as historical photographs, see Department of Land and Natural Resources, State Historic Preservation Division, *Honolulu Responds to the Plague*, available at http://www.hawaii.gov/dlnr/hpd/centennial/cf_1.htm.

78 See Burl Burlingame, *Plague on Our Shores: Dark Days*, HONOLULU STAR-BULLETIN, January 24, 2000, available at <http://starbulletin.com/2000/01/24/features/story1.html> (“Passage of the disease through the body is fierce and fast. Within three days of first feeling unwell, [the patient] died as scumming blood burst from his mouth and other orifices. The horrified doctors who examined his body at Wing Wo Tai's grocery had no doubt the most feared disease in human history was established in Honolulu.”).

79 *Id.*

outbreak,” rather than the gesture being appreciated as aid efforts.⁸⁰ Health officials forbid people from boarding or leaving boats, and banned the transfer of cargo.⁸¹ Following the Board of Health ordered isolation, Chinatown rapidly devolved into a state of semi-lawlessness, with price-gouging businesses and black markets taking advantage of the confined citizens.⁸²

Early false-positive estimates that the plague outbreak had died down led to a premature lifting of the Chinatown quarantine,⁸³ and there was a great increased rush of infection in the next three weeks.⁸⁴ Public health officials could not come up with a workable solution to stop the spread of both the plague as well as the general panic that ensued following a plague diagnosis, so the Board of Health decreed that “any structure holding contagion should be automatically condemned on the spot, a legal notice posted and the structure burned promptly, including any belongings or furnishings that could not be easily moved.”⁸⁵ Public health officials could not anticipate that the outbreak would worsen further.

80 *Id.*

81 See Burl Burlingame, *Plague on Our Shores: False Hope*, HONOLULU STAR-BULLETIN, January 25, 2000, available at <http://starbulletin.com/2000/01/25/features/story1.html> (“There was a general rush on steamship offices by people anxious to book passage away from the islands. Board of Health president Henry Cooper issued an edict to ship captains; no one is allowed to board or leave the ship, nor can cargo be taken on or off -- particularly Asian cargo -- and any illness on board must be reported to the authorities.”).

82 *Id.*

83 *Id.* (noting that although a person was diagnosed with symptoms similar to the plague immediately before the quarantine was lifted, “doctors were dubious that it could be caught by a white girl who lived outside the quarantined area.” Further noting that quarantine on Chinatown was lifted on December 19.)

84 *Id.*

85 *Id.*

As epidemic infection rates increased, martial law was all but formally declared, and soldiers from the National Guard were made to “ignore the rules of civil law during the medical emergency that gripped Honolulu.”⁸⁶ Bodies of deceased plague victims were burned on 'Quarantine Island,' against the wishes of the Chinese people who believed that their bones must return to China if they died overseas.⁸⁷ Quarantine efforts and subsequent burnings intended to preserve public health were hindered as many infected people were hid by their family and friends to preserve long-standing cultural values.⁸⁸ The decision was finalized by the Board of Health to burn down all buildings where there was a concentration of plague deaths, with the fire department carefully setting alight buildings nearly every day during January of 1900.⁸⁹ However, on the morning of January 20, 1900, the ‘controlled’ fire burned out of hand and “flaming embers, carried on a sudden wind, [flew] unchecked onto the wooden buildings of Chinatown.”⁹⁰ Soon, all of Chinatown was ablaze.

There was no time for people to remove their property, and in some cases,

86 See Burl Burlingame, *Plague on Our Shores: City At War*, HONOLULU STAR-BULLETIN, January 31, 2000, available at <http://starbulletin.com/2000/01/31/features/story1.html>.

87 See Burl Burlingame, *Plague on Our Shores: False Hope*, HONOLULU STAR-BULLETIN, January 25, 2000, available at <http://starbulletin.com/2000/01/25/features/story1.html> (“With no crematory in Honolulu, the bodies of the Dec. 12, 1899, plague victims were burned in a spare furnace at Honolulu Iron Works. Within a few days, Iron Works employees constructed a crematorium on 'Quarantine Island' for disposing of the dead. Now known as Sand Island, the quarantine was at the time a reeking sand bar surrounded by stagnant salt-water flats, a 'wide swamp, filled with every kind of objectionable refuse, including the decaying bodies of animals.'”). See also Burl Burlingame, *Plague on Our Shores: City At War*, HONOLULU STAR-BULLETIN, January 31, 2000, available at <http://starbulletin.com/2000/01/31/features/story1.html> (“Chinese immigrants believed if they died overseas, their bones must be returned to China. The Board of Health's solution to plague deaths – quick cremation – left no remains for shipping.”).

88 *Id.* (“Horrified Chinese began to hide their ill friends and relatives from authorities. This practice not only exacerbated contagion, but likely obscured the true numbers of plague victims.”).

89 *Id.*

90 *Id.*

themselves. People tried to save their belongings, but they were prevented by the police, military, or by the fire itself.⁹¹ Some Chinatown residents were so frightened that they “refused to leave their homes even as the buildings caught fire.”⁹² All of Chinatown burned to the ground.⁹³ In their haste to contain the plague outbreak, public health officials granted themselves overwhelming power to call in the military and enforce whatever regulations they deemed necessary. Although the measures taken by health officials were moderately successful in preventing the spread of the plague,⁹⁴ the situation that they created by burning down Chinatown was just as bad, if not worse of an emergency than the plague outbreak was alone. As one newspaper, the Hawaiian Star, published at the time, “In its suddenness, its violence, in its ramifications and widespread danger, in the number of emergencies it created, in the energies it called forth, and in the number of people it affected to point of loss of life or property, there has never been anything equaled to today's fire in Honolulu, and perhaps seldom anywhere else.”⁹⁵

III. THE FOUNDATION AND DEVELOPMENT OF QUARANTINE AND ISOLATION LAW

Quarantine and isolation procedures have been used for over a thousand years, well

91 See Burl Burlingame, *Plague on Our Shores: The Great Chinatown Fire*, HONOLULU STAR-BULLETIN, February 1, 2000, available at <http://starbulletin.com/2000/02/01/features/story1.html> (“Screaming mobs of residents charged the quarantine lines and were beaten back by hastily formed ranks of police, military and vigilantes armed with axe handles seized from hardware stores.”).

92 *Id.*

93 *Id.*

94 *Id.* (“As the city struggled to cope with the huge numbers of homeless refugees on the evening of Jan. 20, 1900, there was a largely overlooked footnote; only one new case of plague had been reported that day.”).

95 *Id.*

before the founding of the United States,⁹⁶ so it is not surprising that early rudimentary statutes in the United States empowered state health officials to exclude people from entering their state. In 1902, the United States Supreme Court upheld a statute that allowed the Louisiana Board of Health to, “in its discretion, prohibit the introduction into any infected portion of the State, persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease.”⁹⁷ Although this was not exactly quarantine because it limited travel into a location, prohibiting entry is a similar restriction on liberty, and the case served to set the stage for the leading American case on both quarantine and mandatory vaccination.

In 1905, the Supreme Court expressly recognized in *Jacobson v. Massachusetts* that the states have the inherent authority to enact public health laws and quarantine laws, and “such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”⁹⁸ Jacobson, who objected to the scientific basis for vaccinations,⁹⁹ challenged a Massachusetts state law that enabled health authorities to require mandatory vaccinations of citizens for smallpox. The Court held that, notwithstanding the

96 See Public Broadcasting System, NOVA, *History of Quarantine*, program overview available at <http://www.pbs.org/wgbh/nova/typhoid/quarantine.html> (noting that in A.D. 549, “In the wake of one of history’s most devastating epidemics of bubonic plague, the Byzantine emperor Justinian enacts a law meant to hinder and isolate people arriving from plague-infested regions .”).

97 *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, 186 U.S. 380, 385 (1902).

98 *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

99 See LSU Law Center’s Medical and Public Health Law Site, *Historic Public Health Cases*, available at http://biotech.law.lsu.edu/cases/vaccines/Jacobson_v_Massachusetts_brief.htm (“Mr. Jacobson believed that the scientific basis for vaccination was unsound and that he would suffer if he was vaccinated.”).

lack of scientific proof of the effectiveness of vaccines,¹⁰⁰ public health officials could force an individual to be vaccinated against his will, without treading upon those individuals due process rights unnecessarily.¹⁰¹

The *Jacobson* Court specifically identified the police power, as reserved to the states by the Constitution,¹⁰² as enabling the state to enact compulsory vaccination laws, as well as other public health laws including quarantine.¹⁰³ However, the Court did not give infinite discretion to the States exercise of the police power, requiring statutes enacted to protect

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

The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.

Id. at 35.

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

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, then a like privilege would belong to each individual in the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.

Id. at 37-38.

102 *Id.* at 24-25 (“The authority of the State to enact this statute is referred to what is commonly called the police power – a power which the State did not surrender when becoming a member of the Union under the Constitution.”).

103 *Id.* at 25 (“Although this court has refrained from any attempt to define the limits of [the police] power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description.’”). See also Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 485 (“In particular, the police power was typically construed to empower states to protect not only the 'health and safety' of the general public, but its 'morals' as well. For example, in the 1887 case of *Mugler v. Kansas*, Justice Harlan rejected a Fourteenth Amendment challenge to the prohibition of manufacturing and selling alcohol on the ground that 'it cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.’” (quoting *Mugler v. Kansas*, 123 U.S. 623, 664 (1887))).

public health, public morals, or public safety to have a “real or substantial relation to those subjects.”¹⁰⁴ The Supreme Court recognized that any use of state police power to ensure public health must still avoid contravening the Constitution, and must yield if a conflict with the Constitution arises.¹⁰⁵ Even though the Court ultimately concluded the Massachusetts statute was constitutional,¹⁰⁶ they cautioned about extension of the police power to instances that would lead to “injustice, oppression, or absurd consequences.”¹⁰⁷

Modern cases interpreting *Jacobson* and evaluating the validity of public health laws have helped shape the doctrine as it exists today. In *Moore v. Draper*, the Supreme Court of Florida evaluated a petition for writ of habeas corpus by a tuberculosis patient who was quarantined subsequent to Florida state law.¹⁰⁸ The *Moore v. Draper* court concluded that in matters of public health, great deference was owed to the determinations of the legislature.¹⁰⁹ However, this deference was not without bounds, and “the constitutional guarantees of

104 *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

105 *Id.* (“The mode or manner in which those results [to safeguard the public health and the public safety] are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument.”).

106 *See id.* at 32-33 (The Court reasoned that vaccination had been implemented in many other states, was supported by scientific research, and had a real and substantial relation to the protection of public safety and public health.).

107 *Id.* at 38.

108 *Moore v. Draper*, 57 So. 2d 648 (Fl. 1952).

109 *Id.* at 650 (“Generally speaking, rules and regulations necessary to protect the public health are legislative questions, and appropriate methods intended and calculated to accomplish these ends will not be disturbed by the courts. All reasonable presumptions should be indulged in favor of the validity of the action of the legislature and the duly constituted health authorities.”).

personal liberty and private property cannot be unreasonably and arbitrarily invaded.”¹¹⁰ The Court, in interpreting *Jacobson*, held that “constitutional guarantees of life, liberty and property, *of which a person cannot be deprived without due process of law*, do not limit the exercise of the police power of the State to preserve the public health so long as that power is reasonably and fairly exercise and not abused.”¹¹¹ Because the petitioner in *Moore v. Draper* attacked the Florida statute on the grounds of religious discrimination and not on substantive illness, categorization, or treatment challenges, the Court never fully established the reasonable limit of police power at which quarantined patients were entitled to due process.¹¹²

More recent courts have helped to define when what the reasonable limits of police power are regarding civil commitment. The United States Supreme Court reviewed a Texas civil commitment law in *Addington v. Texas*, emphasizing that “[t]his Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation that requires due process protection.”¹¹³ Because the Texas civil commitment law only required proof by a preponderance of the evidence, the Court struck down the law as constitutionally

110 *Id.* (Also noting that “courts have the right to inquire into any alleged unconstitutional exercise or abuse of the police powers of the legislature, or of the health authorities in the enactment of statutes or regulations, or the abuse or misuse by the Boards of Health or their officers and agents of such authority as may be lawfully vested in them by such statutes or regulations.”). *Id.*

111 *Id.* (emphasis added).

112 *Id.* (“Religious freedom cannot be used as a cloak for any person with a contagious or infectious disease to spread such disease because of his religion.” Further noting that “[w]hen the Petitioner feels that he has been cured or that his disease has been so arrested that he is not and will not be dangerous to others, the Courts of the State will be open to him and he should be afforded ample opportunity to obtain his release, if an examination, scientific tests and other evidence justifies it.”). *Id.*

113 *Addington v. Texas*, 441 U.S. 418, 425 (1979).

inadequate.¹¹⁴ *Addington* was later applied in New York to the involuntary commitment of a tuberculosis patient,¹¹⁵ though the court determined that the patient's commitment was appropriate because the petitioner received adequate due process.¹¹⁶

Applying United States Supreme Court case law from *Addington* and *Jacobson*, the West Virginia Supreme Court in *Greene v. Edwards* evaluated a petition for writ of habeas corpus for a patient confined under the West Virginia Tuberculosis Control Act.¹¹⁷ The Court examined the state Tuberculosis Control Act¹¹⁸ in the same way as the West Virginia statute for commitment of the mentally ill, because the two statutes “have like rationales, and

114 *Id.* (“To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.” Later noting that the “clear, unequivocal and convincing” standard applied by the trial court in Texas was “constitutionally adequate.”). *Id.* at 432-433.

115 *Best v. St. Vincents Hosp.*, 2003 U.S. Dist. LEXIS 11354, *33, *37 (noting that “written notice must be given forthwith to the patient. . . who may demand a judicial hearing on the question of mental illness and the need for involuntary hospitalization.” Further holding that because of *Addington v. Texas*, “to meet due process demands in a civil commitment proceeding the standard of proof used must be greater than a preponderance of the evidence.”).

116 *Id.* at *33.

117 *Greene v. Edwards*, 164 W. Va. 326 (1980). *See also* *City of Newark v. J.S.*, 279 N.J. Super. 178, 193-195 (1993) (where the logic and legal framework from the *Greene v. Edwards* court was followed extensively by the New Jersey Superior court in granting a commitment order for a tuberculosis patient.).

118 *Greene v. Edwards*, 164 W. Va. 326 (1980).

If it shall find that any such person's physical condition is a health menace to others, the department of health shall petition the circuit court of the county in which such person resides, or the judge thereof in vacation, alleging that such person is afflicted with communicable tuberculosis and that such person's physical condition is a health menace to others, and requesting an order of the court committing such person to one of the state tuberculosis institutions. Upon receiving the petition, the court shall fix a date for hearing thereof and notice of such petition and the time and place for hearing thereof shall be served personally, at least seven days before the hearing, upon the person who is afflicted with tuberculosis and alleged to be dangerous to the health of others. If, upon such hearing, it shall appear that the complaint of the department of health is well founded, that such person is afflicted with communicable tuberculosis, and that such person is a source of danger to others, the court shall commit the individual to an institution maintained for the care and treatment of persons afflicted with tuberculosis .

Id. at 327.

because involuntary commitment for having communicable tuberculosis impinges upon the right to 'liberty, full and complete liberty' no less than involuntary commitment for being mentally ill.”¹¹⁹ The Court concluded that the petitioner was entitled to due process entailing adequate written notice on why the state was seeking to confine him, the right to counsel, the right to be present, cross-examine, and confront witnesses against him, the right to a transcript for purposes of appeal, and that the standard of proof to warrant commitment was to be by “*clear, cogent and convincing evidence.*”¹²⁰ Because Greene was not appointed counsel until after his commitment hearing commenced, the Court granted the petitioner's writ and accorded him a new hearing.¹²¹

Notwithstanding the development of public law through case law in the twentieth century, states still differ as to exactly what process quarantine patients are due, and some states afford their respective Boards of Health significantly more deference than others. In evaluating a petition for writ of habeas corpus by a quarantined tuberculosis patient, a California Appellate Court held that the level of evidence required to quarantine and forcibly restrain a tuberculosis patient merely required health authorities to find a “reasonable ground [] to support the belief that the person is afflicted as claimed.”¹²² Furthermore, the court concluded that quarantine procedures could continue indefinitely, as long as public health officials had “reasonable grounds” to believe that an infected person could pose a danger to

119 *Id.* at 329.

120 *Id.* at 329 (emphasis added).

121 *Id.* (reasoning that “[u]nder the circumstances, counsel could not have been properly prepared to defend Mr. Greene.”).

122 *In re Halko*, 246 Cal. App. 2d 553, 558 (1966).

the public health.¹²³

Although the California case is from 1966, the relevant California tuberculosis control law still does not explicitly provide for a pre-quarantine evidentiary determination using the clear and convincing evidence standard.¹²⁴ However, though the “clear and convincing evidence” standard is not present, the California health code now requires that the tuberculosis patients first “refuse treatment or [] do not comply with an ordered treatment program”¹²⁵ before they are detained, and provides that a person challenging their confinement is guaranteed the right to counsel and a court review within sixty days of detainment, and every ninety days thereafter.¹²⁶

Despite a moderately developed Supreme Court case portfolio and modern trend exemplified by the *Greene v. Edwards* court, it is still unsettled exactly what constitutional limits are placed on states police power in the realm of public health legislation. A pre-confinement evidentiary hearing with counsel present and where state health officials must prove danger to the public health by clear and convincing evidence is one end of the

123 *Id.*

124 *See* California Tuberculosis Control, Cal Health & Saf Code § 121365 (2007) (stating in part, “If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer may issue any orders he or she deems necessary to protect the public health or the health of any other person, and may make application to a court for enforcement of the orders.” Later providing for a variety of orders that the health officer may issue that result in the isolation or quarantine of the tuberculosis patient, with none of the orders requiring an evidentiary hearing.).

125 *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115, 1118 (2002) (noting patients must also later be found contagious or infectious to be detained and holding that the California Tuberculosis control guidelines did not allow health officials to detain tuberculosis patients in county jail.).

126 *Id.* at 1122.

spectrum, as evidenced in both West Virginia and New Jersey.¹²⁷ While this position affords the most due process to potential quarantine patients, it is time consuming and would be impractical in the event of a full-blown pandemic affecting a large percentage of the population.¹²⁸

The other end of the spectrum would be to allow Department of Health officials to summarily detain and quarantine whoever they deemed may be a threat to public health without any process whatsoever.¹²⁹ On this same side of the due process balance are states like California which allow for quarantine of patients subsequent to a determination of reasonable grounds that a person is contagious and may pose a threat to public health.¹³⁰ These quarantine procedures seem to fall short of the requirements laid out by the United States Supreme Court, and preserve little or no civil liberties for quarantine patients.

Hawai'i law leaves the state somewhere in the middle of these two opposite spectra.¹³¹ As the wide range of state-implemented public health laws demonstrate, there is no single answer as to what pandemic preparedness and quarantine laws should require. Instead, there is a range of factors, from the Constitution and the due process clause, to practical concerns

127 *See supra* discussion of Greene, Section III.

128 *See generally* CDC, *Policy Review: Nonpharmaceutical Interventions for Pandemic Influenza, National and Community Measures*, available at <http://www.cdc.gov/Ncidod/EID/vol12no01/05-1371.htm> (noting that in a severe pandemic, “forced isolation and quarantine are ineffective and impractical.”), Cerro Gordo County, Iowa, Isolation Quarantine Ordinance 47 at 6.5.2, available at <http://www.co.cerro-gordo.ia.us/Supervisors/Ordinances/No.%2047%20-%20%20Isolation%20Quarantine%20Ordinance.pdf> (“If the [quarantine] order applies to a group or groups of individuals and it is impractical to provide individual copies, the order may be posted in a conspicuous place in the isolation or quarantine premises.”).

129 *See supra* discussion of Kalaupapa Leper Colony, section II.

130 *See supra* discussion of Halko, section III.

131 *See infra* discussion of Hawai'i quarantine law, section V.

of overburdening the court system and other public policy considerations that influence public health legislation. While it would be pleasant to never require utilization of public health statutes, the events of 9/11/2001 and the subsequent anthrax attacks helped demonstrate to lawmakers in Hawai'i and nationally the pressing need to reform public health laws to fit the modern world.¹³²

IV. MODEL STATUTES ANALYZED

The Model State Emergency Health Powers Act (MSEHPA) was proposed in December of 2001 as a model statute in the aftermath of the events of 9/11 and anthrax scare, by the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities at the request of the CDC.¹³³ Its drafting was premised on the notion “that existing state laws are wholly inadequate to confront a bioterrorism event and should be superseded by a comprehensive act which will override any conflicting state laws.”¹³⁴ While some commentators were quick to point out that the police power is something traditionally reserved to the States and thus not subject to a comprehensive federal act,¹³⁵ this federalism

132 See *infra* discussion of model statutes, section IV.

133 See The Model State Emergency Health Powers Act at 1, available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>. [Hereinafter MS Act]. See also Model State Emergency Health Powers Act Commentary at 3, available at <http://www.publichealthlaw.net/MSEHPA/Center%20MSEHPA%20Commentary.pdf>.

134 Edward Richards, *Legislative Alternatives to the Model State Emergency Health Powers Act (MSEHPA)*, available at http://biotech.law.lsu.edu/blaw/bt/MSEHPA_review.htm.

135 *Id.*

The most serious flaw in the Model State Emergency Health Powers Act is that it ignores the diversity of state government structures and state constitutional law. It also assumes that the states have no emergency preparedness laws or procedures. . . These laws give the states both the necessary powers and the organization to carry them out, but in a legally responsible way. Rather than overriding existing state laws, the emergency preparedness laws attempt to co-

concern does not impact the analysis on how the MSEHPA attempted to address quarantine and isolation procedures.

The MSEHPA defines isolation as the “physical separation and confinement of an individual or groups of individuals who are infected or reasonably believed to be infected with a contagious or possibly contagious disease from non-isolated individuals, to prevent or limit the transmission of the disease to non-isolated individuals.”¹³⁶ This is differentiated from quarantine, which the act defines as the same physical separation but of patients “who are or may have been exposed to a contagious or possibly contagious disease and who do not show signs or symptoms of a contagious disease.”¹³⁷ A contagious disease is defined as any “infectious disease that can be transmitted from person to person,”¹³⁸ which in conjunction with the act's definition of infectious disease, includes every disease “caused by a living organism, or other pathogen, including a fungus bacteria, parasite, protozoan, or virus.”¹³⁹

Although the act contemplates quarantine and isolation procedures for virtually every potential disease¹⁴⁰ transmittable between humans, the procedures are only to be used after

exist with them. This is critical because public health law, more than any other area of law, is a creature of individual state history, state constitutional provisions, court precedent, and the state's physical and political environment. It is seldom codified in a single place, but usually is spread through many different parts of the state law and constitution.

Id.

136 MS Act § 104(h) at 10.

137 MS Act § 104(o) at 11.

138 MS Act § 104(c) at 9.

139 MS Act § 104(f) at 10.

140 The MSEHPA does not define “disease” itself.

the governor has declared a public health emergency.¹⁴¹ The governor can declare a public health emergency, defined by the act as an “occurrence or imminent threat of an illness or health condition” that presents a high probability of large numbers of deaths, serious or long-term disabilities, or substantial future harm,¹⁴² after consulting public health officials and experts, or unilaterally if the situation necessitates immediate action.¹⁴³ In addition, the declared public health emergency declaration must be confined to a limited area and is strictly limited to a maximum of thirty days,¹⁴⁴ at which time it is either automatically terminated or must be renewed by the Governor.¹⁴⁵ A public health emergency can also be terminated by the executive order of the Governor, or by a majority vote of both chambers of the state legislature, upon finding that the reasons for the emergency no longer exist.¹⁴⁶ Although the Governor may have broad discretion in the initial declaration of a public health emergency, thus enabling the MSEHPA's quarantine and isolation procedures, there are sufficient checks and balances preventing an arbitrary or unnecessary declaration.

During a public health emergency, the MSEHPA allows a health official to isolate or quarantine any person or group of persons, even those “who have not been vaccinated,

141 MS Act § 604(a) at 27 (“During the public health emergency, the public health authority may isolate. . . or quarantine. . . an individual or groups of individuals.”).

142 MS Act § 104(m) at 11.

143 *See* MS Act § 401 at 18.

144 *See* MS Act § 402 at 18.

145 *See* MS Act § 405(b) at 20.

146 *See* MS Act § 405(a), MS Act § 405(c) at 20.

treated, tested, or examined.”¹⁴⁷ The same provision permits officials to decide where the quarantine would take place, set the rules for that quarantine, and makes failure to obey by the rules as set forth a punishable misdemeanor.¹⁴⁸ In addition, entry into quarantined or isolation areas is strictly limited to people expressly authorized by the public health authority, thus not even physicians or health care workers may enter into a quarantined premises without first receiving authorization, regardless of the reasons.¹⁴⁹

In case of an emergency where any delay may “significantly jeopardize” the ability to contain or treat a contagious disease, the MSEHPA allows the public health authority to isolate or quarantine any individuals through written directive for up to ten days, which may be extended at a later time.¹⁵⁰ Individuals so quarantined or isolated do not receive notice, nor are they allowed to challenge the written directive. The law only provides that patients receive a copy of the written directive that tells them why and where they are detained.¹⁵¹ The public health official authorizing the written directive is required to file a petition for a court order authorizing continued quarantine within ten days of the directive, which initiates the same notice proceedings the public health authority must proceed by if conditions do not meet “significant jeopardy” required for a written directive.¹⁵²

Absent a written directive or within ten days of issuing a written directive, the

147 MS Act § 604(a) at 27.

148 *Id.*

149 MS Act § 604(d)(1-2) at 28.

150 MS Act § 605(a) at 28-29.

151 *See* MS Act § 605(a) (2-3) at 29.

152 MS Act § 605(a) (4) at 29.

MSEHPA requires health officials to file a written petition for a court order to authorize quarantine or isolation.¹⁵³ Affected individuals must receive notice of the petition and are entitled to a court appointed counsel,¹⁵⁴ but only a twenty-four hour warning is required.¹⁵⁵ The trial court is ordered to grant a health officials petition for starting or continuing isolation procedures if it believes “*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.*”¹⁵⁶ The period of isolation or quarantine cannot exceed thirty days, but the public health authority can initiate a motion identical to the original petition to continue quarantine while a patient is still in their current thirty-day confinement period.¹⁵⁷

The MSEHPA was drafted to allow each state to “safeguard[] the health, security, and well being of its people,”¹⁵⁸ but drafters kept in mind that even while a state reacted to a public health emergency, it “must respect the dignity and rights of persons.”¹⁵⁹ Drafters asserted that the MSEHPA ensured 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

153 See MS Act § 605(a) (4), MS Act § 605(b) (1) at 29.

154 MS Act § 605(e)(1) at 31.

155 See MS Act § 605(b) (3) at 29.

156 MS Act § 605(b)(5) at 30 (emphasis added).

157 MS Act § 605(b) (5) (b) at 30.

158 MS Act Preamble, at 6.

159 *Id.*

threats.”¹⁶⁰ To achieve this goal, the MSEHPA required that in carrying out quarantine and isolation procedures, public health authorities use the “least restrictive means necessary”¹⁶¹ to limit the spread of the outbreak, which includes an emphasis, but not a requirement that cultural and religious beliefs be factored into the quarantine location.¹⁶² In addition, individuals posing “no substantial risk of transmitting a contagious or possibly contagious disease”¹⁶³ should be released immediately, and the MSEHPA allows quarantined patients to “apply to the trial court for an order to show cause why [they] should not be released,” which the court must process within two days of its filing.¹⁶⁴

The MSEHPA was also proposed to “facilitate and encourage communications. . . about the complex issues pertaining to the use of state emergency health powers.”¹⁶⁵ In the discussion that followed the presentation of the model act, Professor Edward P. Richards, an influential public health law scholar,¹⁶⁶ authored a critical review of the MSEHPA in April of

160 *Id.*

161 MS Act § 604(a)(1) at 27.

162 *See* MS Act § 604(b) (8) at 28.

163 MS Act § 604(b) (5) at 28.

164 MS Act § 605(c) (1) at 30. However, also note that proceedings for an order to show cause why a patient should not be released from quarantine, “in extraordinary circumstances and for good cause shown the public health authority may move the court to extend the time for a hearing, which extension the court in its discretion may grant.” MS Act § 605(c) (3) at 30-31.

165 MS Act note 1 at 1.

166 *See* Edward P. Richards, *Brief Biography*, available at <http://www.law.lsu.edu/index.cfm?geaux=profiles.showbio&personnelCode=1000000053> (noting that “Professor Richards has specialized in health and public health law for more than 25 years. . . [and] has acted as a consultant to the Centers for Disease Control and Prevention and other federal agencies, and has authored more than 100 articles and books on medical and public health law.”).

2003, in which he identified several major shortfalls of the Act.¹⁶⁷ He initially identifies the impetus of 9/11 as creating a “do something’ mentality which [encouraged] legislatures to pass laws without a clear understanding of their implications for individual liberty or national security.”¹⁶⁸ Richards viewed the MSEHPA as an attempt to create overarching federal legislation, abolishing the “long term checks and balances developed by state courts and political institutions that serve to keep public health agencies from abusing their broad powers.”¹⁶⁹ Richards concluded that the MSEHPA was unnecessary and should not be adopted by any state,¹⁷⁰ and he was not alone in this criticism of the Act.¹⁷¹

Professor Lawrence Gostin,¹⁷² a major contributing author of the MSEHPA,¹⁷³ wrote

167 See Edward Richards, *Legislative Alternatives to the Model State Emergency Health Powers Act (MSEHPA)*, available at http://biotech.law.lsu.edu/blaw/bt/MSEHPA_review.htm.

168 *Id.* See also George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 N. ENGL. J. MED. 1337, 1341 (April 25, 2002) (also available at <http://content.nejm.org/cgi/reprint/346/17/1337.pdf>) (stating “the protection of civil liberties is a core ingredient in a successful response to a bioterrorist attack,” and criticizing the standards for quarantine and isolation in the MSEHPA as being “no standard at all,” and later as “mak[ing] no sense.”) *Id.* at 1340-1341.

169 Edward Richards, *Legislative Alternatives to the Model State Emergency Health Powers Act (MSEHPA)*, available at http://biotech.law.lsu.edu/blaw/bt/MSEHPA_review.htm.

170 *Id.* (“There is no need for any state to enact the Model State Emergency Health Powers Act. It is critical to avoid overreaction and the passing of ill-conceived legislation during a time of crisis.”).

171 See, e.g., George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 N. ENGL. J. MED. 1337 (April 25, 2002).

All sorts of proposals were floated in the wake of the September 11 attacks — some potentially useful, such as irradiation of mail at the facilities that had been targeted, and some potentially dangerous, such as the use of secret military tribunals and measures that would erode lawyer–client confidentiality, undermine our constitutional values, and make us less able to criticize authoritarian countries for similar behavior. I think the Model State Emergency Health Powers Act is one of the dangerous proposals.
Id. at 1341.

172 See Lawrence Gostin, *General Profile*, available at <http://explore.georgetown.edu/people/gostin/> (Lawrence Gostin is an Associate Dean and Professor of Law at Georgetown University, and is “an internationally recognized scholar in law and public health.”).

173 See MS Act at 1 (Lawrence Gostin is listed as the principle author and contact for the Model State

an influential article published in 1999 in which he discussed the need to address public health within the context of the Constitution.¹⁷⁴ As Professor Gostin correctly noted, public health legislation requires a delicate balance and assessment of what the government has the power to do, what they must do, what they do not have the power to do, and which level and branch of government must carry out mandatory actions.¹⁷⁵ He further identified the realm of individual liberties as the area within public health law that runs afoul most often of the Constitution, because while the Constitution is empowered to protect individual liberties, public health laws “curb that power.”¹⁷⁶ Professor Gostin reached the conclusion that while courts generally 'balanced' between individual liberties and public health law, that balance leaned heavily in favor of public health regulations.¹⁷⁷

Professor Gostin went on to describe the wide variety of powers at the disposal of public health authorities, from cease and desist orders, to civil commitment, to quarantine, and even to isolation.¹⁷⁸ He reached an uneasy distinction between civil confinement and

Emergency Health Powers Act.).

174 See Lawrence Gostin, *Public Health Law: Power, Duty and Restraint* (1999), available at <http://www.turningpointprogram.org/Pages/pdfs/publications/gostin.pdf>. [Hereinafter *Power, Duty and Restraint*].

175 See *Power, Duty and Restraint* at 9 (“Analyzing this question requires an assessment of *duty* (what government must do), *authority* (what government can, but is not required, to do), *limits* (what government cannot do), and *responsibility* (which government, whether federal, state, local, or tribal, is to act.)” (emphasis in original)).

176 *Id.* See also *id.* at 11 (“Government actions to promote the communal good often infringe on individual freedoms. Public health regulation and individual rights may directly conflict. Resolving the tension between population-based regulations and individual rights requires a trade-off.”).

177 *Id.* at 34 (“[W]here it adopts a balancing test, the Court almost always supports state interests over individual 'liberty' interests. In the context of infectious diseases the courts have consistently affirmed the constitutionality of compulsory treatment.”).

178 *Id.* at 34.

criminal confinement, based on the concept that civil confinement powers are “civic measures designed to prevent risks to the public,” and are “not intended to punish individuals for morally culpable behavior as with criminal prosecutions.”¹⁷⁹ In differentiating civil and criminal confinement, Professor Gostin focused on the rationale behind the confinement, instead of on the actual confinement and imposition on individual liberty suffered by the confined individual.

That the MSEHPA only requires proof by preponderance of the evidence to initiate quarantine or isolation procedures is confusing, given previous work written by the Act's author, Professor Gostin. In *Power, Duty, and Restraint*, Professor Gostin acknowledged that civil confinement of all types is a huge imposition on an individual and results in a “massive curtailment of liberty.”¹⁸⁰ He went on to say that public health law should require, in order to initiate quarantine or isolation procedures, a “compelling public health interest” proven by “clear and convincing evidence,” in addition to only carrying out the procedures if they were shown to be the “least-restrictive alternative.”¹⁸¹ The language of the MSEHPA, however, allows for quarantine without any evidentiary review, or by a showing of preponderance of the evidence.¹⁸² This evidentiary standard, in a document proposed as a national model for public emergency health statutes, falls far below even what the author himself admitted was the minimal level required to impugn upon an individual's liberty

179 *Id.*

180 *Power, Duty, and Restraint* at 35.

181 *Id.*

182 *See* MS Act § 605(b)(5) (allowing quarantine and isolation procedures based on a preponderance of the evidence), MS Act § 605(a)(1) (allowing quarantine through written directive in times of emergency).

rights.

In September 2003, a second model act, the Turning Point Model State Public Health Act (TPMSPHA) was published.¹⁸³ The authors of the Turning Point Act sought to “clearly define responsibilities and powers in the public health system”¹⁸⁴ of the states, and points out from the outset that many other treatment options and interventions today are considered “more appropriate and less intrusive to civil liberties” than quarantine and isolation.¹⁸⁵ They further contended that because previously existing public health laws did not include modern concepts of constitutional law, that they should be updated to include “advances in constitutional law around civil liberties, including due process, privacy, and anti-discrimination.”¹⁸⁶ The authors of the Turning Point Act concluded that “public health laws should clearly define powers, but they should also provide checks and balances to prevent abuses of these powers.”¹⁸⁷

Although the TPMSPHA admittedly shares many provisions with the MSEHPA,¹⁸⁸

183 See Turning Point: Collaborating for a New Century in Public Health, Model State Public Health Act: A Tool for Assessing Public Health Laws, available at http://www.turningpointprogram.org/Pages/pdfs/statute_mod/phsm_TP_model_state_ph_act.pdf. [Hereinafter TP Act].

184 Turning Point Model State Public Health Act: Talking Points at 3, available at http://www.turningpointprogram.org/Pages/pdfs/statute_mod/phsm_talking_points_TP_act.pdf.

185 *Id.*

186 *Id.* at 4.

187 *Id.* at 5.

188 See Turning Point: Model State Emergency Health Powers Act Commentary at 3, available at http://www.turningpointprogram.org/Pages/pdfs/statute_mod/phsm_model_emergency_law_full.pdf (discussing how the Turning Point Collaborative's previous work in drafting emergency health powers “served as a basis for the Model State Emergency Health Powers Act, [and how] [m]uch of the content of the Model State Emergency Health Powers Act will be incorporated into the Model State Public Health Act.”).

the Turning Point drafters had the benefit of an additional two years of research and were able to review the critiques of the MSEHPA. This fact was illustrated when, likely in response to federalism criticisms of the MSEHPA,¹⁸⁹ the Turning Point Act was purposely drafted to be adopted either in its entirety or piecemeal as states saw fit, into the existing administrative and public health structure that already existed in the states.¹⁹⁰ The Turning Point project touted that it was “important to understand the differences between these two [MSEHPA and TPMSPHA] pieces of model legislation.”¹⁹¹ Despite this, the two model acts share similar substantive requirements in that the TPMSPHA also necessitates that quarantine and isolation procedures enacted by public health officials be done in the “least restrictive” way, while preserving a “respect for dignity.”¹⁹²

While many of the conditions and principles that govern a public health agency desiring to quarantine or isolate an individual are the same in both the MSEHPA and the

189 See, e.g., Edward Richards, *Legislative Alternatives to the Model State Emergency Health Powers Act (MSEHPA)*, available at http://biotech.law.lsu.edu/blaw/bt/MSEHPA_review.htm (“The most serious flaw in the Model State Emergency Health Powers Act is that it ignores the diversity of state government structures and state constitutional law,” and later concluding that “public health law, more than any other area of law, is a creature of individual state history, state constitutional provisions, court precedent, and the state's physical and political environment.”).

190 See TP Act Preface, at 4. See also Turning Point Summary: The Model State Emergency Public Health Act, at http://www.turningpointprogram.org/Pages/pdfs/statute_mod/phsm_fact_sheet_emerg_health_powers_act.pdf. (noting that the MSEHPA was meant to work at a national level and help states “review and consider their public health laws”, while the TPMSOHA was meant to work at the state level and aid state, local, and tribal governments to “assess their current public health laws and to identify areas that need updating and improving.”). *Id.*

191 Turning Point Summary: The Model State Emergency Health Powers Act, available at http://www.turningpointprogram.org/Pages/pdfs/statute_mod/phsm_fact_sheet_emerg_health_powers_act.pdf.

192 TP Act § 5-108(b)(1, 8) at 33.

TPMSPHA,¹⁹³ some important provisions are altered. The TPMSPHA allow for enactment of quarantine and isolation procedures notwithstanding any public health emergency declaration, within the discretion of the public health authorities.¹⁹⁴ However, while greatly expanding the ability of health officials to order a quarantine and while not substantively changing the written directive section of the MSEHPA,¹⁹⁵ the TPMSPHA requires that written petitions to a court for an order to authorize isolation or quarantine shall not be approved unless the court finds “*by clear and convincing 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.”¹⁹⁶ Thus while the Turning Point Act seems to enlarge the scope of public health officials power over that conferred by the MSEHPA, at the same time it places more stringent constitutional limitations on the exercise of that power.¹⁹⁷

V. THE CURRENT SITUATION IN HAWAI'I

In early 2002, in response to the events of September 11, 2001, the Hawai'i legislature updated the state's emergency health laws so that the state would be better prepared if a

193 Compare TP Act § 5-108(b) with MS Act § 604(b).

194 See TP Act § 5-101(a) (“A state or local public health agency is authorized to use the powers and provisions set forth in this Article to prevent, control, or ameliorate conditions of public health importance or accomplish other essential public health services and functions.”).

195 Compare TP Act § 5-108(d) with MS Act § 605(a).

196 Compare TP Act § 5-108(e) (4) (emphasis added) with MS Act § 605(b)(5) at 30 (requiring proof by “a preponderance of the evidence.”).

197 See *supra* discussion of Addington and Greene, section III.

disaster were to strike the Islands.¹⁹⁸ The complete overhauling of the duties and responsibilities of the Department of Health was undertaken by House Bill 2521 in January 2002, with the stated legislative purpose of enabling public health officials to “respond more effectively to emerging health problems prior to the need for the declaration of a civil defense emergency.”¹⁹⁹ The bill and its comprehensive amendments were approved by both Houses of the legislature, and it was signed into law by the Governor in mid-June of 2002.²⁰⁰

It is revealing to consider what the 2002 amendments removed from existing law. Hawai'i Revised Statute (HRS) § 325-80, which required that a “valid and effective order of any judge” was needed before anybody, including both the police and officers of the Department of Health, could continue to enforce the isolation and hospitalization of a tuberculosis patient was eliminated.²⁰¹ Prior to its repeal, Hawai'i law required that this judicial order name “one and only one hospital” in order to be considered an order “effective to require isolation or hospitalization,”²⁰² and that any person confined under such an order could not be prevented from communicating with “any relative, friend, attorney, judge, or any other person.”²⁰³

In addition to removing health law provisions regarding quarantine location, the 2002

198 *See* 2001 HI H.B. 2521; 2001 HI S.B. 2779.

199 2001 HI H.B. 2521.

200 *Id.*

201 *Id.* at Section 7.

202 *Id.* at Section 8. *See also id.* at Section 6 (another repealed provision provided that, under absolutely no circumstances was the court, the police, or public health officials allowed “to compel any person to go or to be confined in a hospital or other medical institution” when the a suitably safe quarantine location of patient's choosing existed.).

203 *Id.* at Section 7.

amendments also eliminated several court procedures relating to disease control. A provision providing for automatic release from isolation of tuberculosis patients who had not exhibited active symptoms for six months, as well as a provision entitling quarantined patients to apply for an evidentiary hearing for release as a right were both deleted.²⁰⁴

Finally, costs borne by involuntary patients confined by the state were shifted. The pre-2002 health law included language that required a quarantined person, or their parents or guardians to pay if they were able, but requiring the county to pay for those who could not pay for themselves.²⁰⁵ The newly amended language of the current HRS § 325-8 requires that every person quarantined “shall be responsible for the costs of food, lodging, and medical care, except for those costs covered and paid by the individual's health plan.”²⁰⁶ This raises serious questions regarding confinement of indigent patients.

After the 2002 public health law amendments, Hawai'i quarantine and isolation law was distilled into only two provisions,²⁰⁷ with one of the provisions only becoming effective when the governor has declared a civil defense emergency period.²⁰⁸ Many of the suggestions from the language of the MSEHPA and TPMSPHA appear in Hawai'i law. The most important provisions that remain substantially unchanged from the model acts is that quarantine must be conducted in the least restrictive way necessary to protect the public

204 2001 HI H.B. 2521 at Section 10-11.

205 *Id.* at Section 5.

206 *Id.* See Haw. Rev. Stat. § 325-8 (n) (2006).

207 See Haw. Rev. Stat. § 325-8 (2006), Haw. Rev. Stat. 128-8 (2007). Note that there are many other laws in Hawai'i relating to quarantine of animals and plants, which are outside the scope of this work.

208 See Haw. Rev. Stat. 128-7 et seq. (2006).

health,²⁰⁹ and that quarantine usually requires an court order authorized by a State court,²¹⁰ except that in cases of emergency and immediate threat no order is required.²¹¹

Current Hawai'i law has provisions geared towards enacting quarantine procedures in the least restrictive way necessary, but analysis of the repealed older provisions indicates that the current law is more restrictive than it could be. The enacted statute provides that the quarantine premises “shall be maintained in a safe and hygienic manner,” and that “[t]o the greatest extent possible, cultural and religious beliefs shall be considered in addressing the needs of quarantined individuals.”²¹² But the objective of “preventing or limiting the transmission of the disease to others”²¹³ is achievable at a large number of locations. To this extent, the repealed law allowing patients to choose the location of their own quarantine, if deemed safe,²¹⁴ accomplishes the same goal while not imposing as great an imposition on the patient.

The evidentiary standard required for the court to order a quarantine is much more similar to the provisions of the MSEHPA as opposed to the TPMSPHA. To issue a quarantine order, a court is required to find that the person is “*reasonably believed to have been exposed*” to a possibly contagious disease.²¹⁵ The statute later provides “[j]udicial

209 Haw. Rev. Stat. § 325-8(b) (2006).

210 Haw. Rev. Stat. § 325-8(e) (2006).

211 Haw. Rev. Stat. § 325-8(f) (2006).

212 Haw. Rev. Stat. § 325-8(b) (2006).

213 *Id.*

214 *See supra* note 202, discussion of repealed Hawai'i health laws, Section V.

215 Haw. Rev. Stat. § 325-8(i) (1) (2006) (emphasis added). *Compare* with TP Act § 5-108(e) (4) (allowing

decisions shall be based upon clear and convincing evidence,²¹⁶ but unlike the TPMSPHA which requires clear and convincing evidence that quarantine is necessary to limit the spread of the disease,²¹⁷ here it only requires that the court find clear and convincing evidence of a reasonable belief that a person may have been exposed to a disease.

It is not a crime to be infected with a disease, nor is it a crime to have been exposed to an infectious disease,²¹⁸ but as Hawai'i quarantine history indicates, you can still be isolated or quarantined.²¹⁹ In criminal law, the defendant is given the presumption of innocence because of the enormous burden confinement places on his or her liberty.²²⁰ In Hawai'i, several criminal convictions have been completely vacated because the trial court had failed

quarantine if by clear and convincing 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), and MS Act § 605(b)(5) at 30 (allowing quarantine 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.).

216 Haw. Rev. Stat. § 325-8(k) (2006).

217 See TP Act § 5-108(e) (4), *supra* discussion of the TPMSPHA, section IV.

218 See, e.g., *Phoenix Man Being Held Indefinitely Because of Virulent TB Case*, PHOENIX EXAMINER, Mar. 1, 2007 (on file with author) (noting that although the patient “has not been charged with a crime,” he was still being detained following a “compulsory detention’ order, a legal tool used only about once a year in Arizona,” filed by the Maricopa County tuberculosis control officer. Also noting that “[p]rospects for his release are unclear” and that “[t]here is certainly a high likelihood that the patient has developed additional drug resistant (sic) that may make cure impossible,” and that if this “is the case, the patient must be detained in isolation until death or patient’s own immune system contains it (50% chance of either possibility).”). *Id.*

219 See *supra* discussion of Kalaupapa and the Chinatown fire, Section II.

220 See generally R.D. Hursh, Comment Note, *Conviction of Criminal Offense Without Evidence as Denial of Due Process of Law*, 80 A.L.R.2d 1362 (2007).

The presumption of innocence which runs in favor of one accused of crime is one of the most familiar presumptions known to the law. Merely to state the question whether there can be a conviction of crime when the prosecution has introduced no evidence is to raise the corollary question whether such a conviction would not, in effect, nullify the presumption of innocence. *Id.*

to properly instruct the jury as to the defendant's presumption of innocence.²²¹ For the same reasons as the law protects criminal defendants, due process protects the liberty rights of people facing civil commitment.²²²

The current evidentiary standard required for courts to order quarantine in Hawai'i does not provide adequate protection for patients facing quarantine procedures. The statutory requirement of clear and convincing evidence of reasonable belief of exposure²²³ is misleading, and seems open to several interpretations because no cases have ever been decided in Hawai'i under the current law. This confusion is amplified by examining the Hawai'i State Department of Health Influenza Pandemic Preparedness & Response Plan,²²⁴ (Hawai'i Plan) which demonstrates state health officials interpretations of current law. Attached to the Hawai'i Plan in an appendix is a template for an ex parte petition for order of quarantine,²²⁵ which is meant to be used as a standard court order under HRS § 325-8.²²⁶ The template states that the court should grant the ex parte order “because probable cause exists to believe that the Respondent is reasonably believed to have been exposed to or

221 *See* State v. Iosefa, 77 Haw. 177 (Ct. App. 1984), State v. Tanaka, 92 Haw. 675 (Ct. App. 1999) (noting it “important that the presumption of innocence be preserved inviolate and undiminished throughout the jury's deliberations.”). *Id.* at 682.

222 *See supra* discussion of Addington and Greene, Section III.

223 *See supra* discussion of current Hawai'i law, Section V.

224 Hawai'i Pandemic Influenza Preparedness & Response Plan, Version 05.2, available at <http://www.hawaii.gov/health/family-child-health/contagious-disease/pandemic-flu/fluplan.pdf>. [Hereinafter Hawai'i Plan].

225 “Ex Parte Petition for Order of Quarantine” Template, Hawai'i Plan, Appendix S.

226 *See* Hawai'i Plan at 39 (“The HDOH legal counsel at the Department of the AG will be responsible for all matters related to these court proceedings. They have drafted a template for an “Ex Parte Petition for Order of Quarantine” to have available should the need arise.”).

known to have been infected with a communicable or dangerous disease.”²²⁷ A finding of probable cause only requires enough facts “as would warrant a belief by a reasonable man,”²²⁸ making the phrase ‘a probable cause finding of a reasonable belief’ seem fairly redundant. A finding of “probable cause” is not an adequate substitute for a finding by “clear and convincing evidence.”²²⁹ It is further questionable what exactly a finding by clear and convincing evidence of a reasonable belief actually entails, as the issue has been left open by the legislature.

The pandemic preparedness plan created by the Department of Health in December 2005 was in response to a potential avian influenza outbreak, and it illustrates what the Department of Health believed their powers to be in the event of a pandemic under the law of 2005, after the most recent changes were made by the legislature to quarantine and isolation law in Hawai‘i.²³⁰ The Hawai‘i Plan leaves the location for quarantine up to the discretion of

²²⁷ Hawai‘i Plan, Appendix S at A-73.

²²⁸ WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.3, at 140 (2d ed. 1992).

²²⁹ See *Kent K. v. Bobby M.*, 210 Ariz. 279, 284-285, 110 P.3d 1013, 1018-1019 (Ariz. 2005) (“Clear and convincing evidence, in contrast, reflects a heightened standard of proof that indicates that the thing to be proved is highly probable or reasonably certain. This standard places a heavier burden upon one party to prove its case to a reasonable certainty.” (internal citation omitted)), *Judicial Inquiry and Review Com’n of Virginia v. Peatross*, 269 Va. 428, 444, 611 S.E.2d 392, 400 (Va. 2005) (“The term ‘clear and convincing’ evidence’ means that the degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt.” (citations omitted)).

²³⁰ See generally Hawai‘i Plan at V, VII. See also Hawai‘i Plan at 37.

Pursuant to the provisions of Hawai‘i Revised Statutes Chapter 325-8 (HRS 325-8), the Director of Health and the HDOH have authority, separate from the Governor’s authority identified in HRS 128-8, to require isolation of an individual in this situation. The Director of Health will have primary authority for implementation of the Hawai‘i Pandemic Influenza Preparedness & Response Plan, including recommendations and request for isolation and quarantine, with guidance from the State Epidemiologist.

Id.

health officials,²³¹ with no mention of allowing people to choose their own quarantine venue, if deemed safe, in order to make the detainment less restrictive. Even though the Department of Health concluded “the effectiveness of these community measures has not been completely evaluated,”²³² the Hawai’i Plan allows the Department of Health to take isolation and quarantine procedures beyond imposing restrictions on individuals and groups, providing for measures such as “canceling public events, limiting public transportation, [and] restriction of movement of segments of the community.”²³³

The Department of Health also recognized that while it was not a legal requirement, public access and maintaining public support was integral to both the implementation as well as the continued functionality of the preparedness plan.²³⁴ As such, the plan was supposed to be “developed and approved. . . by a review process that includes both subject matter experts and the general public.”²³⁵ The influenza plan, and Hawai’i pandemic preparedness procedure in general are neither readily accessible, nor easily explained to the public. There has not been the widespread education and dissemination of knowledge that was seen even by Department of Health officials as integral to the success of such a plan in the event of a

231 *See* Hawai’i Plan at 33.

232 *Id.* Also note that provisions for community-based control measures are absent from both the MSEHPA and the TPMSPHA.

233 *Id.*

234 *Id.* at 35 (“Necessary to retain public support. Inconsistent implementation may undermine the public confidence in health officials and their policies and impact the credibility of the use of quarantine and public health containment measures.”).

235 *Id.*

pandemic.²³⁶ Although the plan is accessible on the internet, it is generally found only by those searching for it. Furthermore, not every person in Hawai'i has internet access.

If pandemic conditions in Hawai'i reach a critical level such that existing law cannot adequately protect the public health, Hawai'i law also allows the Governor to declare a civil defense emergency in the state if she finds that "an attack upon the State has occurred or that there is danger or threat thereof."²³⁷ The Hawai'i plan expressly recognizes that a pandemic in the Islands may escalate to the level that the governor can declare a civil defense emergency under Hawai'i statute.²³⁸ Once the Governor has declared the state of emergency, additional powers are gained by the Governor that allow for the suspension of any law impeding civil defense, without exception.²³⁹ Additionally, the Governor may require the quarantine or isolation of any person "in any case where in the governor's opinion the existing laws are not adequate to assure the public health and safety."²⁴⁰ Although this emergency executive action is somewhat outside the scope of legislative and administrative health law reform addressed in this paper, it serves to demonstrate the utmost importance of establishing both constitutional and effective laws and policies so that the situation never

236 See Hawaii State Department of Health, *Pandemic Flu Information*, available at <http://www.hawaii.gov/health/family-child-health/contagious-disease/communications/pandemicflu.html>.

237 Haw. Rev. Stat. § 128-7 (2006).

238 See Hawai'i Plan at 37 (noting "[a]s the pandemic threat escalates and in the event that it becomes a civil defense emergency requiring resources outside of the control of the Director of Health, the Governor and State Civil Defense will become involved.").

239 See Haw. Rev. Stat. § 128-8(4) (2006) (The governor, in the event of a civil defense emergency period, may "[s]uspend any law which impedes or tends to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, civil defense or other emergency functions, including without limitation, laws which by this chapter specifically are made applicable to civil defense personnel.").

240 Haw. Rev. Stat. § 128-8(2) (2006).

escalates the point of requiring the declaration of an emergency.

VI. CONCLUSION

While quarantine and isolation procedures are some of the greatest impositions on the liberties and freedoms of citizens, they must be recognized as a necessary evil. In a constantly changing world, especially with Hawai'i situated on the front lines of the United States' battle against global pandemics,²⁴¹ the state must be prepared for a wide variety of diseases, biological attacks, and bacterial infections.

The nature of Hawai'i also creates some other unique problems for public health legislation. The economy is based largely on tourism, and there are many species of migratory birds that travel through Hawai'i on a regular basis,²⁴² factors both of which serve to increase the risk of a pandemic reaching Hawai'i. Furthermore, the remoteness of Hawai'i makes it very challenging to move things in or out of the state if the ports had to be shut down. Because Hawai'i does not produce nearly as much as it uses in terms of medicines and consumables, the community is nearly entirely dependent on outside shipping arriving in Honolulu.²⁴³ At no time was this problem more evident than after the September 11 attacks, when ports were closed to ships coming or going, and no supplies reached Hawai'i for weeks.²⁴⁴ People cannot easily get out of Hawai'i either, whether they are infected and

241 See Kristen Scharnberg, *Hawaii on Front Lines for Bird Flu*, CHICAGO TRIBUNE ONLINE EDITION, March 1, 2006, archived at http://media.hawaii.gov/temp_media_stg/ChicagoTribune.3.1.06.pdf.

242 *Id.* at 2.

243 *Id.*

244 *Id.* at 3.

seeking treatment or are healthy and seeking to escape the natural confinements of the Islands. This hasn't changed since the Bubonic Plague and subsequent Chinatown fire of 1900,²⁴⁵ but it is more exasperated today by the fact that there are not enough hospital beds or medical facilities to deal with the explosion of population that Hawai'i experienced over the last several decades.²⁴⁶

The starting point and baseline for all public health laws must be the Constitution. Any public health law that empowers an agent of the state to quarantine or isolate an individual must first give that individual an evidentiary hearing where that person has the opportunity to be represented by counsel, and where the standard of proof required to civilly confine the individual is clear and convincing evidence.²⁴⁷ This is impractical in the event of a pandemic striking a large percentage of the population, and as Professor Richards noted, in the event of a great pandemic “[i]t is inconceivable that the courts would stand in the way of actions to control a major public health threat. . . even if the state was clearly stepping beyond its statutory powers.”²⁴⁸

States have to balance concerns of preserving public health with concerns of staying

245 See *supra* discussion of the 1900 Chinatown fire, Section II.

246 See Kristen Scharnberg, *Hawaii on Front Lines for Bird Flu*, CHICAGO TRIBUNE ONLINE EDITION, March 1, 2006, archived at http://media.hawaii.gov/temp_media_stg/ChicagoTribune.3.1.06.pdf (noting that a “major fear is that Hawaii hospitals, which routinely have about 90 percent of their beds filled, would be inundated during a pandemic.” Also noting that if the hospitals in Hawai'i are filled to their capacity, doctors “don't just have the luxury of sending patients to a neighboring state that may have extra beds or more doctors.”). *Id.* at 3.

247 See *supra*, discussion of Addington and Greene, section III.

248 Edward Richards, *Legislative Alternatives to the Model State Emergency Health Powers Act (MSEHPA)*, available at http://biotech.law.lsu.edu/blaw/bt/MSEHPA_review.htm (also noting that “judges will not stand in the way of emergency actions taken to protect the public from a clear and present danger,” and that there is “the history of judicial restraint on emergency powers is one of blind obedience to civil and military authority, not one of necessary actions thwarted by overly particular jurists.”). *Id.*

within the framework of the Constitution. Because the Constitution so handcuffs forceful detention procedures, Hawai'i should focus on other methods of isolating and treating diseases. One of the methods for containing contagious diseases identified by the CDC and mentioned as a side note in the Hawai'i Pandemic Preparedness & Response Plan was that of self and home quarantine.²⁴⁹ By allowing people to stay in their own homes, and by widely disseminating health recommendations and techniques developed and proven to reduce the spread of the disease,²⁵⁰ the same goal that government-forced quarantine seeks could be established by people's free will. The Board of Health already has noted, “[m]ost people will likely follow self-quarantine and home quarantine recommendations provided by the HDOH and the CDC.”²⁵¹ Ideally, the government and Board of Health could incentivize people to conform to a home quarantine regimen, by providing free or subsidized access to medical care and safety implements. The Constitution places severe restrictions on the government detaining civilians involuntarily,²⁵² but there is no provision that stops the government from rewarding people who choose to quarantine themselves by following state suggested

249 See Hawai'i Plan at 34.

250 See, e.g., Beautiful Britain, *Eyam Village and the Great Plague*, available at <http://www.beautifulbritain.co.uk/htm/outandabout/eyam.htm> (Eyam was a village in Derbyshire, England, that engaged in a self-imposed quarantine in response to a 1665-1666 plague outbreak. Even with the rudimentary technology of the day, Eyam's fourteenth month-long self-quarantine successfully limited the plague outbreak from spreading beyond the village. “Eyam's selfless villagers, with their strong Christian convictions, had shown immense personal courage and self sacrifice. They had prevented the plague from spreading to other parishes, but many paid the ultimate price for their commitment.”). *Id.* See also History Learning Site, *Eyam and the Great Plague of 1665*, available at http://www.historylearningsite.co.uk/eyam_and_the_great_plague_of_166.htm (noting that the “sacrifices made by the villages of Eyam may well have saved cities in northern England from the worst of the plague.”).

251 Hawai'i Plan at 34.

252 See *supra* discussion of constitutional limitations on civil commitment, Section III.

guidelines.

Critics would argue that many people would not follow the self-quarantine rules, and that with the stringent Constitutional restrictions on formal quarantine, public health officials could not effectively contain the spread of a contagious pandemic. Other avenues, besides quarantine and isolation are available to secure the public health, however. State legislators could criminalize the intentional or negligent spreading of an epidemic.²⁵³ There are established criminal laws that perform a similar function already in existence today with regards to HIV and AIDS.²⁵⁴ Although 25 states have laws criminalizing either purposeful or willfully negligent transmission of sexually transmitted diseases,²⁵⁵ Hawai'i currently has no such laws.²⁵⁶

By combining self-quarantine incentivization with the criminalization of behavior associated with exposing the public unnecessarily to an infectious contagion, the need for civil confinement would be greatly decreased. However, by criminalizing what is in essence the violation of 'voluntary' self-quarantine procedures, a tight line must be walked by the legislature and public health officials. While officials must still observe the due process rights protecting the individual liberties of those criminally prosecuted, Hawaii's 'speedy trial

253 See *Power, Duty, and Restraint* at 36-38 (Professor Gostin identifies using criminal law as a tool of public health as complicated, but a viable part of public health authorities arsenal to “compel individuals to conform with health and safety standards.”).

254 See generally Zita Lazzarini, Sarah Bray, Scott Burris, *Evaluating the Impact of Criminal Laws On HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239 (2002) (noting that “a person who carelessly infects another with HIV through the failure to take reasonable precautions commits a less serious crime than a person who spits at another with the belief he can thereby transmit HIV. A crime may occur even if the harm the actor intended to cause did not come about or was impossible, so long as some step the actor believed could cause harm was taken in the attempt to do so.”). *Id.* at 240.

255 *Id.* at 241.

256 *Id.* at Table 1.

law' allows for a six month gap between filing of criminal charges and commencement of trial,²⁵⁷ providing a long holding period if necessary. While this is substantively no different than using a written directive to quarantine a person posing a substantial health risk, the detention of a criminally accused defendant both lasts far longer than quarantine under written directive, and the speedy trial law is already a well-established and accepted facet of Hawai'i law.²⁵⁸ Because it is inescapable that process is due to any person that government wishes to confine, it only makes sense that if an individual was to be forcibly detained, that the matter be criminal and not civil.

Ultimately, in the event of a total breakdown in government, no amount of preemptive legislation would be effective. Thus, it is fruitless to argue against the executive power of the Governor to declare a state of emergency and impose what is effectively martial law, because that would be the last defense against descending into a lawless situation. However, by informing people as to how the state plans to deal with a pandemic and educating people as to how to prevent both their own infection and the infection of others, the people of Hawai'i would be compelled by their own interests to impose a self-quarantine. By criminalizing intentional or recklessly negligent pandemic exposure, state and public health officials could accomplish the same objective that quarantine and isolation achieve, but without the lingering constitutional questions hanging overhead. These changes should be made to current Hawai'i law so that in the event of a pandemic, individual constitutional

257 See Haw. R. Penal P. Rule 48(b) (2006) (“Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months.”).

258 See generally *State v. Soto*, 63 Haw. 317, 627 P.2d 279 (Haw. 1981), *State v. Estencion*, 63 Haw. 264, 625 P.2d 1040 (Haw. 1981), *State v. Dunn*, 8 Haw. App. 238, 798 P.2d 908 (Haw. App. 1990).

rights and civil liberties will be preserved while the public health is still safeguarded.

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