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I have been asked to give my views on The Model State Emergency Power Act that was authored by the Center for Law and the Public' Health at Georgetown and Johns Hopkins Universities ("Center"). This proposal has received considerable publicity in the mass media and has drawn the attention of many state legislators, including those in the State of Washington. Actually, there have been several versions of this "model act" in circulation. The original version, first published in November of 2001, listed a number of authors and indicated that it had been endorsed by several state attorneys general and sponsored by the Centers for Disease Control ("CDC"). Since then, the "model act" has been modified at least once, some of the more controversial terms have been "toned down," and a disclaimer has been added indicating that the "model act" is no longer officially endorsed by any particular agency or individual, including the original authors. The version of the "model act" I will refer to below is the one dated December 2001 downloaded from the Center's website in January 2002. I anticipate, however, that the "model act" may be revised further before this essay is published. In any event, most of what I have to say is directed at the general structure of the "model act" and the underlying assumptions of those who have made such an effort to put it in the public spotlight.

Let me start with some unkind comments about "model acts" and their drafters. Circulating a "model act" is the most cumbersome and ineffective way I can think of to inform the general public or state policymakers concerning important policy choices. If, in fact, the Center's experts or the CDC or anyone else has a clear vision of what needs to be done by the various states to prepare for the next public health emergency, they should say so – as clearly and specifically as possible – and provide the rest of us with a descriptive explanation of that vision and some insightful defense of the necessity and feasibility of achieving it. Giving us a "model act" to decipher, is a little like giving a traveler directions to an unknown location – in a dialect that

the traveler has never heard before. I imagine that many state legislators have found themselves, as I did, going through the model act line-by-line, holding the act in one hand and their state's laws in the other, and wishing that the Center had found some other vehicle to explain and defend what it thinks should be done. If and when a state wants to adopt the Center's recommendations, surely someone will have to convert those policy choices into statutory terms. That is what statute drafting is all about; it is a technical and instrumental job, but it is one that ought to follow – not precede – the more fundamental task of deciding what that statute ought to say. For that matter, even if a state decides to do any or all of what the Center has proposed, just how to draft appropriate legislation to implement that choice will depend greatly upon the pre-existing legal structure of that particular state, something that varies from jurisdiction to jurisdiction. A one-size-fits-all "model act" would be of marginal value even for this purpose. More importantly, a "model act" is of virtually no value in doing what really needs to be done now: informing our state policymakers of the choices they should consider and the merits of the alternatives that face them.

But even to the extent that I can figure out what is proposed by the "model act" or how such measures might work within the existing legal structure of a state like Washington, I'm not impressed with either the authors' ideas or their craftsmanship. As I decode the December draft, there are three major elements of the "model act". First, the "model act" would create what the author's call an emergency planning commission. Second, the act would require the reporting of various indicia of infectious diseases and other public health risks by health care providers; and it would create a "public health authority" empowered to investigate these reports and other potential causes of a public health emergency. Third, the "model act" would specify those circumstances under which the governor may declare a public health emergency and it would create a series of extraordinary powers concerning the public use of private property and the confinement of individuals during such an emergency. These latter provisions, understandably, have drawn the most public attention as they raise controversial questions about the proper balance of governmental authority in matters relating to health and the liberty and property rights of individual citizens. But many of the other provisions of the "model act" raise significant issues as well and deserve some separate attention. I will take up each major section of the act in the order in which they appear in the December draft.

The emergency planning commission is described by Article II of the "model act" as a commission of legislators, judges, local public health officials, and other "interested persons" appointed by the gov-

ernor who are empowered to write a "public health emergency plan," essentially a description of how the federal, state, and local governments will react and share authority in a public health emergency. It is hard to evaluate or critique this proposal without knowing more specifically what its authors have in mind. At the risk of repeating myself, it would be much more useful to have a textual explanation of this agency and its function and, most importantly, some sort of explanation why such an agency might be necessary or effective. If the objective of Article II is that the state should empanel still another study commission or advisory body – as states so often do – it seems unnecessary to include this commission in an already cumbersome legislative package. I would argue that it is also inappropriate: study commissions are hardly an efficient or expeditious vehicle for making important and difficult decisions. The December draft has a nonexclusive list of fifteen categories of issues that the commission is required to address within a six month-time frame. Why create a study commission for this particular set of choices, leaving these choices to be reconsidered within the state legislature once the commission has completed its study? Why *now,* when common sense and recent events would dictate that speed is of the political essence?

On the other hand, if Article II of the "model act" is proposing a regulatory agency or that any of the commission's decisions would be binding, it is indeed an extraordinary proposal: create a new governmental agency with members drawn from the various branches of government and include both local officials and "other interested persons." Give that body policymaking authority with minimal statutory limits on its scope. That's heady stuff. I can speculate that this agency would do lots of things – both good and bad – but again I return to essentially the same questions: what does the Center think this agency can and will do, and why do they think it will do so better than the normal lawmaking apparatus of the states? It's nice to be original – but why? Why this sort of commission and to what end? Are the authors really suggesting that such a commission is the better or faster vehicle for making clear, hard decisions? Are they suggesting that if structured in this fashion a governmental body can avoid political considerations? Increase public participation?

I also know that if a state were to create the type of commission suggested by the "model act" and give it binding regulatory authority, there would be serious constitutional objections to such legislation. The principles of separation of powers impose limits on the legislature's ability (a) to delegate legislative-type decisions to independent agencies, and (b) to give any authority to a governmental body made up of members of a mix of judicial, legislative, and executive actors.

For that matter, no state law can authorize a commission to exercise binding authority over what the federal government can do, which is among the things that the "model act" empowers the commission to address. The Center or whoever it was who drafted these provisions of the "model act" may well have some special insight as to how the agency or its activities could be implemented without violating these constitutional principles, but I see no indication that they are even aware that it might be a problem at all. What I do see is hardly my idea of either good policymaking or good lawyering.

Article III of the December draft requires that health care providers (or coroners or medical examiners) report "all cases of persons who harbor any illness or health condition that may be potential causes of a public health emergency to a [designated] state agency within 24 hours." Pharmacists are similarly required to report any unusual or increased use of prescription drugs that may indicate a public health emergency (veterinarians, live stockowners, and others have similar obligations with regard to animal diseases). The information requirements are extensive: providers are required to report the name, address, medical condition, location, and essentially any other information that is considered relevant to the "potential cause of a public health emergency."

The public health authority (described in Article I of the "model act" as some designated state or local agency) is charged with the authority to investigate these reports, track individuals, and, if I am reading the "model act" correctly, "ensure that they are subject to proper control measures." This public health authority is also *for examination purposes* empowered to "close, evacuate, or decontaminate any facility . . . and destroy any material when the authority reasonably suspects that such facility or material may endanger the public health." None of these powers are contingent on the existence of a declared emergency, as described below, but would be permanently authorized under the "model act."

I have no doubt that all states need to collect and analyze data on infectious diseases and other public health risks quickly and effectively. I also have no doubt that the states should structure and empower some agency to respond to identified public health risks. Indeed, all states do so in one way or another. My questions concerning the reporting requirements, the public health authority, and the broad investigational powers that would be created under the "model act," however, are not unlike those outlined above: why should a state create such an extensive system of reporting and in this particular manner? Anyone familiar with the experience of tracking AIDs and HIV exposure knows that mandatory disclosure of individual-identifying data can be counterproductive (not to mention politically volatile). If

I'm reading the language of Article III correctly, the "model act" would take that information collection to unprecedented extreme. Every doctor and every pharmacist would become an enforcement arm for a public health authority. This would be no little or infrequent matter, as these providers would be required to report all *potential causes* of public health emergencies – within 24 hours. The extent of the power of the public authority to investigate these reports is not clear from the "model act" but, as written, it is virtually without limit. As such, it is notable – and somewhat ironic – that there are no provisions for the protection of confidentiality or privacy written into the statute, although, in a later article of the "model act" the authors have had the foresight to immunize public officials from liability for exceeding their powers.

More to the point, is there any evidence – from the events of September 11, 2001, or otherwise – that suggests such laws should be in place? Are state or local agencies even equipped to handle this volume of information? What would be the impact on the behavior of people seeking medical attention? Again, interesting ideas are interesting ideas, but a proposed solution to a problem – let along a "model act" – has to be tied to some assessment of the problem and its underlying causes. Why enact this type of legislation at this time? Many states have enacted comparable regulatory requirements but in much more limited circumstances – reporting of gun shot wounds for instance –and under much more carefully prescribed limits on the government's investigational response. Even those programs are controversial. State and local public health agencies have long struggled to maintain a user-friendly public image and a posture that emphasizes their public health – not their public safety character. The public health authority created by the "model act" would permanently obliterate that distinction. Do the authors of the "model act" really think we need this sort of regulatory apparatus? Why? Again I find myself reading a "model act" and looking for something that should be there but is not.

Article IV of the "model act" authorizes the governor to declare a "state of public health emergency." It specifies the power of the state legislature to terminate the state of emergency after sixty days (premised on certain legislative findings). In Articles V and VI to follow, the extraordinary powers that can be exercised by the state during a declared public health emergency are described, and will be discussed below. But even apart from the concerns I have with the extent of the emergency powers envisioned by the authors of the "model act," I have a more basic constitutional concern with Article IV.

Under the constitutional structure in most states, the governor, as the chief executive, has inherent powers to act in an emergency, apart from any gubernatorial powers that may be created by the state's statutes. The exact limits on the governor's emergency powers are not clear, as, by their nature, they are infrequently exercised and litigated. For example, there is virtually no case law in the State of Washington (that is, there are no authoritative judicial interpretations of the breadth or limits on the governor's emergency powers) and the issue has been largely ignored within the academic community.

Battles over the nature and extent of the implied executive authority at the federal level have also been infrequent, but have been important tests of our constitutional system. President Truman's attempts to nationalize steel production during the Korean War and President Carter's efforts to waive private legal claims against Iran as part of the negotiations for the American hostages in Tehran are classic examples. One key element in each of these scenarios and in the subsequent constitutional analysis of the legitimacy of the presidential actions, has been whether or not the President was acting in the absence of legislative authority or in contradiction of it. The Supreme Court has been anything but clear in its specific description of foundational principles in this area of the law. However, it has been fairly consistent in holding that the implied powers of the chief executive are at their broadest when they have been authorized by legislation (as is usually the case) extant but limited when they are carried out in the absence of legislation, and at their narrowest (some members of the Court would say they are nonexistent) when the President acts in areas where the legislature has specifically attempted to delineate what the chief executive can and cannot do.

Assuming that the state courts would follow the lead of the Supreme Court in defining the implied powers of the chief executive, the "model act" – by defining what can be done by whom and under what circumstances – would necessarily limit the authority of the governor to act in any ways other than those set out in that legislation. If I were in the governor's office, or even just concerned about the integrity of that office, I would be opposed to such a proscriptive effort – especially one in an area of such immediate concern. Among other concerns, would I want the scope of my authority in a public health emergency to be limited to that which is the end-product of a legislative debate? Politics being politics, isn't it just as likely that that legislation will be influenced by people who want to tie the governor's hands – possibly for reasons wholly unrelated to public health emergencies? More to the point, the next public health emergency may involve nuclear exposure or some result of Mother Nature's wrath, not some

bioterrorist's. A statute drawn in anticipation of the most recent public health emergency may actually inhibit the discretion of the governor to act in another unanticipated fashion. The fact that what happens next may be what no one has anticipated is, after all, undeniably part of our post-September 11, 2001, world.

The first thing that needs to be done in a state like Washington is to sort out the inherent emergency powers of the state's chief executive – the governor – to act in the absence of legislative authority. These powers are an extraordinary and critical part of our governing structure. They allow for the government to react to emergencies that have not been expected or that are of a magnitude that would make the normal operations of government infeasible: floods, a major disaster at the nuclear storage facility in Hanford, some sort of disease outbreak – or, as we now anticipate, some sort of terrorist attack. Those of us who watched Mayor Guiliani and Governor Pataki September of 2001 witnessed, in part, the exercise of the implied powers of the executive branch. Speaking for myself, I thought both public officials were amazingly effective under the circumstances. The last thing that we need to do is adopt a "model statute" that would attempt to codify their powers in the next public health emergency – especially a "model act" that has been drafted in such a way that it appears to focus on potential biomedical emergencies but not others.

I would rather accept the status quo: the governor is empowered to act in an emergency in whatever way she thinks appropriate. The courts can adjudicate the legitimacy of those actions on a case-by-case basis. The legislatures can enact, post hoc, remedial legislation. With most problems in most times that is, admittedly, not a recipe for good public policymaking. And that's not just my own idea of good policy, it's the way the state and federal constitutions read or, to be more accurate, it is what has been read into our constitutional structure in order to make it workable. Again, if the authors of the "model act" have some reasoned basis for codifying the emergency powers of the state, they should say so and defend that view.

As noted earlier, the powers outlined in Articles V and VI of the "model act" have drawn the most public attention and controversy. Article V is entitled "Special Powers During a State of Public Health Emergency: Management of Property." It reads in part:

> Section 501. The public health authority may exercise [the power to] close, direct and compel the evacuation of, or to decontaminate . . . any facility of which there is reasonable cause to believe that it may endanger the public . . . or to destroy any material of which there is a reasonable cause to believe that it may endanger the public health.

> Section 502. The public health authority may exercise ... the following powers concerning facilities, materials, roads, or public areas:
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> > (a) To procure by condemnation or otherwise ... materials or facilities as may be necessary ... with the right to take immediate possession thereof....
> > (b) To require a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary .... The use ... may include transferring the management and supervision of the health care facility to the public health authority ....
> > (c) To inspect, control, restrict, and regulate by rationing ... or other means, the use, sale dispending, distribution, or transportation of food, fuel, clothing and other commodities, as may be reasonable and necessary to respond to the public health emergency.
> > (d) To prescribe routes, modes of transportation, and destinations in connection with the evacuation of persons or the provision of emergency services [and] to control or limit ingress and egress to and from any stricken or threatened public area, the movement of persons within the area, and the occupancy of premises ....
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> [Section 503 gives the public health authority the power to require any business or facility to be used for the disposal of hazardous waste and for the condemnation of any private property "as may be reasonable and necessary" to respond to a public health emergency.]

Article VI entitled "Special Powers During a State of Public Health Emergency: Protection of Persons" reads in part:

> Section 601. [T]he public health authority shall use every available means to prevent the transmission of infectious disease and to ensure that all cases of contagious disease are subject to control and treatment.
> Section 602. [T]he public health authority may perform physical examinations and/or tests as necessary for the diagnosis and treatment of individuals.

(a) Medical examinations or tests may be performed by any qualified person authorized to do so by the public health authority.
(b) Medical examinations or tests may not be such as are reasonably likely to lead to serious harm to the affected individual.
(c) The public health authority may isolate or quarantine . . . any person whose refusal of medical examination or test results in uncertainty regarding whether he or she has been exposed to or is infected with a contagious or possibly contagious disease or otherwise poses a danger to public health.

[Section 603 further specifies the circumstances under which the public health authority may require vaccination and treatment.]

Section 604. Isolation and quarantine.

(a) [T]he public health authority may isolate and quarantine an individual or groups of individuals and maintain places of isolation and quarantine and set rules, and make orders . . . .
(b) The public health authority shall adhere to the following conditions and principles when isolating or quarantining: [This subsection and subsection (c) then specify various individual protections that must be provided to isolated and quarantined individuals.]

Section 605. Procedures for Isolation and Quarantine

(a) The public health authority may **temporarily** isolate or quarantine an individual or group through a written directive if delay . . . would significantly jeopardize the public health authority's ability to prevent or limit the transmission of a contagious or possibly contagious disease . . . . Within ten days after issuing the written directive, the public health authority shall file a petition ... for a court order . . . . A hearing shall be held with five days of filing the petition. . . . In extraordinary circumstances for good cause shown the public health authority may apply [for a continuance] for up to ten days . . . . The court shall grant the petition if, by a preponderance of the evidence, isolation or quarantine is shown to be reasonably

> necessary to prevent the transmission of a contagious or possibly contagious disease to others . . . .
> (b) [This subsection outlines similar procedures for isolation and quarantine with advance (24 hours) notice to the individual or group.]
> . . . .
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> Section 608. The public health authority may . . . require in-state health care providers to assist in the performance of vaccination, treatment, examination, or testing of any individual as a condition of licensure . . . or the ability to continue to function as a health care provider in the state . . . . [The public health care authority may] appoint and prescribe the duties of such out-of-state providers as may be reasonable and necessary to respond to the public health emergency . . . .

The provisions of Articles V and VI excerpted above only outline the powers that the "model act" would allow the state during a declared emergency. In statutory interpretation, as in so many other things in life, the devil may be found in the details as often as in the broad outlines of an enactment. Words like "reasonable and necessary" and "preponderance of the evidence" carry a lot of legal baggage. The details of how and when isolation orders would be issued might create a program so constrained that it becomes a rare event, even in emergencies. Again, if the authors of the "model act" really want the states to consider authorizing public officials to do what the language of the "model act" suggests, we would all be better served with a textual description of what is proposed and, most importantly, some justification for creating what appears to be a public health version of martial law.

I could go through these subsections line-by-line, or spend hours (or pages) raising questions about the "temporary" isolation of groups of people without notice or requiring medical providers to participate in mass testing programs as a condition of their licensure or any one of a number of other specific provisions. But my basic question, in all cases, would have the same common element: Why? What is it that we have learned about the public health risks that we face that would counsel creating this elaborate and draconian apparatus? What is it that we cannot do now, under existing statutory enactments or through the implied powers of the governor, that we need to empower some public authority to do through such sweeping legislation? Why, for that matter, recommend that state legislatures even consider such legislation – given the media circus that would likely surround such de-

liberations? There are lots of theories of liberty and reasoned justifications for its denial. Under most, individual and economic liberty is assumed the status quo and its denial is selectively justified and done so in a particularized fashion. Why do we need all of what is outlined in the "model act"? Should not that justification precede, rather than follow, the drafting of implementing language?

I can think of circumstances under which some individuals may have to be isolated or quarantined involuntarily. There might even be extraordinary circumstances under which isolation or quarantine should be mandated on the basis of a "group" – although again I find myself wondering exactly what the authors meant by such terminology in Articles V and VI. I also can imagine events that would necessitate some massive marshalling of medical resources, both public and private. But why create the regulatory apparatus for doing so in advance? Why do so in such plenary and heavy-handed terms? Is there any reality-based evidence that American providers need to be regulated in such a fashion during an emergency? Why not improve education and communication and funding such that providers can and will do what the "model act" would simply require under penalty of criminal sanctions? Again I reflect on what we learned in the Fall of 2001 about the behavior in a public health emergency of government officials, medical care providers, businesses and property owners, and thousands of ordinary Americans. Neither then, nor now, do I find myself wishing that the Model State Emergency Health Powers Act had been in effect. There are some things I do wish had been in existence during the Fall of 2001 which will be implemented for the next comparable scenario: more funding for state and local health departments, new procedures for communicating across jurisdictions and from public health to public safety agencies, better training for emergency medical personnel, and so on. I find little to suggest that what we need is the ability to quickly suspend civil rights and to grant public health officials unlimited power to command and control all public and private resources. If my state is ever faced with a public health emergency, I would prefer that we respond to it on a case-by-case basis and in the ad hoc way anticipated under our constitutional system.

Surely what we need in the state of Washington and in many other states is a discussion of how to prepare for the next public health emergency. I strongly suspect that that discussion will focus quickly on staffing, infrastructure, and other resource and organizational problems. But we also should discuss the adequacy of our states' legal structure as well. Among other things, we should immediately figure out the parameters of the governor's emergency powers under our state's constitutional structure. That is particularly important in

Washington since there are frequent claims – that are rarely acted upon – that under the peculiarities of Washington's constitutional structure local public health officials have implied emergency powers. It is possible that we may decide that given our constitutional structure and existing statutory framework remedial legislation should be adopted. But it is also possible that nothing more can or should be added to our legal structure. We may find instead that what we need is more resources and more expertise and better coordination of both. Not incidentally, to the extent that we do decide to empower a public health authority to do some of the more draconian things outlined in the "model act," both as a political and constitutional matter, we should be doubly sure that the resources and expertise are available to do those things accurately and effectively.

It is entirely possible that the most basic assumption underlying the "model act" is flawed. If in fact there is a need for some remedial legislation of the type outlined in the "model act," or, for that matter, any other, it may need to be federal legislation, not state legislation. Anthrax doesn't respect state borders or jurisdictional niceties. Whatever public health emergency we experience in Washington is likely to be a problem for Oregon and Idaho and, for that matter, Canada as well. Think about the number of Washingtonians that get on and off airplanes, trains, or Interstate 5 each day. In both practical *and* constitutional terms, public health emergencies that reach across state borders can only be resolved at the federal level. That may not be what conservative politicians like to hear, but interstate problems, including interstate public health emergencies are the province of congressional, not state authority; for that matter, interstate activities are one area in which the states *cannot* act even in the absence of federal action. As I have said so often above, I have a hard time deciphering what the authors of the "model act" envision we need, but it seems rather odd to me that they have chosen to implement that vision through a model *state* law. At the very least, it would seem the federal/state issue deserves some prefatory attention in their proposal, particularly as it is quite possible that that at least portions of their vision could only be enacted as a matter of *federal* law.

Since September 2001 there has been a sense that all of us, individually and collectively, ought to be doing something to prepare for the next public health emergency. But with all due respect to my colleagues at the Center for Law and the Public's Health, drafting a "model act" is about the last thing that legal experts need to be doing. I mean that first, but not entirely, in the temporal sense. I have suggested above a number of legal issues that deserve immediate attention and to which the expertise of a group of academic lawyers could have been usefully applied. I also think that the authors could present

their vision of what it is that they think the states ought to be doing in a vehicle that is more useful that a "model act."

To borrow an over-used metaphor, there is a political window of opportunity here, albeit one born in tragedy. A few years ago a proposal to create a new federal agency to regulate airport safety would have been a political nonstarter, simply because it was a proposal to create a new federal agency. Now we have one. If in the weeks preceding September 11, 2001, someone had proposed a massive federal financing program for state and local health departments, no one in Congress would have listened, let alone spent their political capital in support of such a program. Yet in November of 2001, Congress quickly and in a bipartisan fashion enacted a billion-dollar spending program described by the Secretary of Health and Human Services as "the largest one-time investment in our nation's public health." All indications are that the state legislatures are similarly minded and prepared to do something as well. Such political opportunities for public health programs are rare, and even this one is likely to be short-lived. People whose research or expertise can help policymakers focus on the most critical questions or provide them with meaningful answers should do so or outline possible options for public policy; cognizant of how quickly political opportunities can be lost.