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# Biodefense and Constitutional Constraints

Laura K. Donohue

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## Biodefense and Constitutional Constraints

Laura K. Donohue\*

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## I. INTRODUCTION

The United States and United Kingdom both frame the threat posed by pandemic disease and biological weapons as a national security concern. The United States' most recent *National Security Strategy*, for instance, released in May 2010, highlights the dangers posed by weapons of mass destruction, pandemic disease, natural disasters, terrorism, transnational crime, and large-scale cyber attacks.<sup>1</sup> The United Kingdom's first *National Security Strategy*, released in March 2008, similarly recognizes that the Cold War threat has been replaced by concerns about "international terrorism, weapons of mass destruction, conflicts and failed states, pandemics, and trans-national crime."<sup>2</sup> The Cabinet Office explains,

Over recent decades, our view of national security has broadened to include threats to individual citizens and to our way of life, as well as to the integrity and interests of the state. That is why this strategy deals with trans-national crime, pandemics and flooding – not part of the traditional idea of national

<sup>1</sup> THE WHITE HOUSE, UNITED STATES NATIONAL SECURITY STRATEGY, 18 (2010), *available at* [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

<sup>2</sup> CABINET OFFICE, THE NATIONAL SECURITY STRATEGY OF THE UNITED KINGDOM: SECURITY IN AN INTERDEPENDENT WORLD, 2008, Cm 7291, at 3, [hereinafter UKNSS2008] *available at* <http://www.official-documents.gov.uk/document/cm72/7291/7291.pdf>.

security, but clearly challenges that can affect large numbers of our citizens, and which demand some of the same responses as more traditional security threats, including terrorism.<sup>3</sup>

In both countries, moreover, identifying and responding to the threat posed by, on the one hand, naturally occurring disease and, on the other, man-made biological agents or weapons, are linked. The reasons for this are straightforward. According to the UK, substantial loss of life may accompany any outbreak of disease—regardless of its origin.<sup>4</sup> The scale and speed of the risk each threat poses could result in equally devastating consequences.

[O]ur approach to them – to assess and monitor the risks, to learn from experiences at home and overseas, to develop capabilities to minimise the risks and the potential harm, and to absorb whatever harm does occur and then return to normality as soon as possible – is similar to our approach to other national security challenges, including terrorism.<sup>5</sup>

Institutions used in response thus provide a dual function. In 2000, the Royal Society explained, “Detection of BW attacks should be based on the existing civil arrangements in the United Kingdom for dealing with natural outbreaks.”<sup>6</sup>

Statutes and policy documents in the United States similarly link disease and weapons in terms of institutions, authorities, and approach. The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, for example, focuses on preparedness for public health emergencies *and* biological terrorism.<sup>7</sup> Homeland Security Presidential Directive 10 claims that the traditional public health approach is no longer sufficient. Health care providers and public health officials are among the first lines of defense to counter the biological weapons threat.<sup>8</sup> A new biodefense program thus combines (and strengthens the state’s ability to respond to) natural disease and biological

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<sup>3</sup> *Id.* at 3–4.

<sup>4</sup> *Id.* at 15 (“We estimate that a pandemic could cause fatalities in the United Kingdom in the range 50,000 to 750,000, although both the timing and the impact are impossible to predict exactly.”).

<sup>5</sup> *Id.*

<sup>6</sup> THE ROYAL SOC’Y, MEASURES FOR CONTROLLING THE THREAT FROM BIOLOGICAL WEAPONS, vii (2000), [hereinafter MCTBW] *available at* <http://royalsociety.org/Measures-for-controlling-the-threat-from-biological-weapons-full-report/>.

<sup>7</sup> Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 294 [hereinafter PHSBPPRA] (codified in scattered sections of 7 U.S.C., 18 U.S.C., 21 U.S.C., 29 U.S.C., 38 U.S.C., 42 U.S.C., and 47 U.S.C.).

<sup>8</sup> Press Release, Office of the Press Secretary, Homeland Security Presidential Directive 10: Biodefense for the 21<sup>st</sup> century (Apr. 28, 2004) [hereinafter HSPD 10] *available at* <http://www.fas.org/irp/offdocs/nspd/hspd-10.html>.

weapons.<sup>9</sup> National Security Presidential Directive 33, released in April 2004, similarly focuses on “21<sup>st</sup> Century Biodefense.” Included in the concept are improvements to capabilities “not only against threats posed by terrorists, but for medical response in the wake of natural catastrophes and in response to naturally-occurring biological hazards such as SARS.”<sup>10</sup> Myriad further examples present themselves.<sup>11</sup>

Where the United Kingdom and the United States part ways is in what they see as the role of the central government and most effective response to the twin threats. U.S. federal law and policy anticipates the federal imposition of quarantine and isolation.<sup>12</sup> The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, for instance, streamlines and clarifies quarantine provisions.<sup>13</sup> In 2003 the Department of Health and Human Services amended its regulations to incorporate any quarantinable disease

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<sup>9</sup> *Id.*

<sup>10</sup> Press Release, Office of the Press Secretary, Fact Sheet: President Bush Signs Biodefense for the 21<sup>st</sup> Century (Apr. 28, 2004), *available at* <http://www.fas.org/irp/offdocs/nspd/biodef.html>.

<sup>11</sup> *See, e.g.*, DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK, at 74 (2008), *available at* <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf> (noting that both the National Institutes of Health and the National Biodefense Analysis and Countermeasure Center at the Department of Homeland Security will focus on biological weapons as well as pandemic disease); HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY 1, 10, 16, 27, *available at* <http://www.hsdl.org/?view&did=479633> (bundling biological weapons and pandemic disease); Press Release, Office of the Press Secretary, Press Briefing on National Strategy for Pandemic Influenza Implementation Plan One Year Summary (Jul. 17, 2007), *available at* [merlin.ndu.edu/archivepdf/hls/WH/20070717-13.pdf](http://merlin.ndu.edu/archivepdf/hls/WH/20070717-13.pdf) (remarks of Dr. Jeff Runge, DHS Chief Medical Officer on Pandemic Preparedness) (quoting “we at DHS are focused on multi-use institutions that we can put into place for whatever emergencies arise.”).

<sup>12</sup> The federal government also has provided the lead to state governments in updating and strengthening their laws governing quarantine and isolation. The President’s 2002 National Strategy for Homeland Security listed review of quarantine authority as a priority for state governments. OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 49–50 (2002), *available at* [http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf). The CDC, in turn, funded the Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities to develop a Model State Emergency Health Powers Act. Model State Emergency Health Powers Act (Ctr. for Law & the Pub.’s Health at Georgetown & Johns Hopkins Univ., Draft for Discussion 2001), *available at* <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>. By 2006 the Act had been introduced in whole or part via 171 bills or resolutions in forty-four (44) states, the District of Columbia, and the Northern Mariannas Islands. Ctr. For Law & the Pub.’s Health, Legislative Status Update (Jul. 15, 2006), *available at* <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>.

<sup>13</sup> PHSBPA, *supra* note 7, § 264 (making quarantine applicable at an earlier stage by replacing language that previously required that the disease be “in a communicable stage” with a measure allowing quarantine “in a qualifying stage”).

listed by Executive Order, bypassing rulemaking requirements.<sup>14</sup> CDC's proposed regulations establish new periods of quarantine and the procedure to be followed in the event of its implementation.<sup>15</sup> The agency explains:

Quarantine of exposed persons may be the best initial way to prevent the uncontrolled spread of highly dangerous biologic agents such as smallpox, plague, and Ebola fever....Quarantine may be particularly important if a biologic agent has been rendered contagious, drug-resistant, or vaccine-resistant through bioengineering, making other disease control measures less effective.<sup>16</sup>

CDC, accordingly, expanded the number of domestic quarantine stations.<sup>17</sup>

Quarantine similarly lies at the core of the U.S. Pandemic Influenza Strategy Implementation Plan, which was issued by HHS as a blueprint for how agencies will respond in the event that Avian Influenza becomes human-to-human transferrable—despite the document's admission that influenza is one disease for which quarantine is likely to be particularly ineffective. Nevertheless, it refers to quarantine 138 times, and in a manner of consequence, detailing the use of quarantine both at ports of entry and in the execution of geographic quarantine (*cordon sanitaire*).<sup>18</sup> The criteria adopted for determining whom to quarantine is broad: anyone showing signs or symptoms of pandemic influenza, or who may have been exposed to influenza within 10 months.<sup>19</sup> The framework calls for the use of local law enforcement to execute quarantine.<sup>20</sup> Where states may be unable either to implement quarantine or

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<sup>14</sup> 42 C.F.R. §§ 70.6, 71.3 (2003). The White House expanded the list of quarantinable diseases to include SARS (April 2003) and pandemic influenza (April 2005). Exec. Order No. 13,295, 68 Fed. Reg. 17, 255 (Apr. 9, 2003); Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (Apr. 5, 2005).

<sup>15</sup> Control of Communicable Diseases, 70 Fed. Reg. 71,892-71,948 (Nov. 30, 2005) (to be codified at 42 C.F.R. Pt. 70 and 71).

<sup>16</sup> *Id.* at 71,892.

<sup>17</sup> CDC's Airport Quarantine Stations Designed to Halt Disease Epidemics, 12 Airport Security Report (2005). See also COMM. ON MEASURES TO ENHANCE THE EFFECTIVENESS OF THE CDC QUARANTINE STATION EXPANSION PLAN FOR U.S. PORTS OF ENTRY, INST. OF MEDICINE OF THE NAT'L ACADS., QUARANTINE STATIONS AT PORTS OF ENTRY PROTECTING THE PUBLIC'S HEALTH, *available at* <http://www.nap.edu/catalog/11435.html> (calling for a stronger quarantine regime at ports of entry).

<sup>18</sup> U.S. HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (May 2006), *available at* [http://www.whitehouse.gov/homeland/nspi\\_implementation.pdf](http://www.whitehouse.gov/homeland/nspi_implementation.pdf) [hereinafter NSPIIP]. See also U.S. HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA 7 (recommending the isolation of ill and the quarantine of non-ill passengers); *id.* at 77-78 (recommending that inbound flights be funneled to facilitate the mass quarantine of travelers); *id.* at 159 (discussing domestic travel restrictions); *id.* at 108 (anticipating the use of cordon sanitaire).

<sup>19</sup> *Id.* at 91.

<sup>20</sup> *Id.* at 12.

to maintain law and order, the government will fall back upon federal law enforcement and the military.<sup>21</sup> Even if unsuccessful, “delaying the spread of the disease could provide the Federal Government with valuable time to activate the domestic response.”<sup>22</sup>

The influenza framework introduces a range of initiatives that demonstrate how seriously quarantine is considered a potential response.<sup>23</sup> It builds the execution of quarantine into incident command.<sup>24</sup> It directs state, local, and tribal entities to prepare to “address the implementation and enforcement of isolation and quarantine.”<sup>25</sup> Within 72 hours of the initial outbreak, HHS will issue guidance on geographic quarantine.<sup>26</sup> HHS, along with DHS, DOD, and mathematical modelers, are to complete research on strategies for home quarantine.<sup>27</sup> The plan considers the impact of *cordon sanitaire*, discussing the interruption of transportation, distribution of food and medicine, and other essential services.<sup>28</sup> Consular communication is taken into account.<sup>29</sup> Private industry and schools are to consider mitigation strategies to counter prolonged absences.<sup>30</sup> The document goes so far as to address the mental health concerns that may arise in the event that quarantine is used.<sup>31</sup> Such provisions, considered at such length in regard to influenza, are even more relevant for other types of biological threats, particularly where highly virulent or no known vaccination may exist.<sup>32</sup>

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<sup>21</sup> *Id.* at 13, 153.

<sup>22</sup> *Id.* at 108. The decision whether or not to cordon off certain geographic areas would depend on a number of variables, such as the area and population affected, whether implementation is feasible, the likely success of other interventions, the ability of authorities to provide for the needs of the quarantined population, and other geopolitical considerations. *Id.* at 109.

<sup>23</sup> *See, e.g.*, NSPIIP, *supra* note 18, at 47, 131 (listing school closures, snow days, and quarantines as examples of social distancing measures). *See also, Id.* at 100, 37 (advocating social distancing measures and noting that the immediate response for overseas outbreaks will be to activate domestic quarantine stations and to begin quarantining passengers).

<sup>24</sup> *Id.* at 155.

<sup>25</sup> *Id.* at 130. HHS, coordinating with DHS, DOT, Education, DOC, DOD, and Treasury, is to give State, local, tribal entities guidance for execution of quarantine during emergency. *Id.*,

<sup>26</sup> *Id.* at 131.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 80.

<sup>29</sup> *Id.* at 52–53.

<sup>30</sup> *Id.* at Appendix A, at 183, 185, 188, 192.

<sup>31</sup> *Id.* at 111.

<sup>32</sup> *Id.* at 109. Notably, the Department of Homeland Security—not the Department of Health and Human Services—has taken a leading role. *See, e.g.*, Homeland Security Act of 2002 § 421, Pub.L. 107–296, 116 Stat. 2135, 2182 (amending 6 U.S.C. § 231 to transfer agricultural, entry inspection functions previously given to Secretary of Agriculture under Animal Health Protection Act, to DHS; these provisions can be used to stop humans as well.); *See also* Memorandum of Understanding Between Dep’t of Health and Human Serv. and the Dep’t of

In contrast to the United States, the United Kingdom, from the perspective of both law and policy, does *not* appear to consider the national imposition of quarantine to be a viable option. Government Ministers, although recently granted more legal authority, still do not have the same breadth of power to implement quarantine as that provided to their U.S. counterparts.

The United Kingdom's legal stance is grounded in history: more than a century ago, Great Britain removed explicit quarantine power from its public health laws, as the 1896 Public Health Act repealed the Quarantine Act of 1825.<sup>33</sup> The statute remained largely unchanged until the Public Health (Control of Disease) Act of 1984 and the Public Health (Infectious Disease) Regulations of 1988.<sup>34</sup> Updated by the Health and Social Care Act of 2008, the statute gives the Secretary the authority to place international travelers in quarantine. But it prevents the national government from taking local action. Instead, the provisions require that a Justice of the Peace, on application from a Local Authority, sign any Order requiring an individual to submit to medical examination, be removed to or detained in a hospital or other suitable place, or be kept in isolation or quarantine.<sup>35</sup> The decision ultimately rests with local officials.<sup>36</sup>

It is not just British statutes that depart from the American model: as a matter of policy, despite considerable concern in the United Kingdom about

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Homeland Sec., (Oct. 19, 2005) (signed by HHS and DHS to coordinate border screening activities/information for sharing contact tracing during outbreak of communicable disease (preliminary to quarantine provisions)), *available at* [http://www.aclu.org/pdfs/privacy/hhs\\_dhs\\_mou.pdf](http://www.aclu.org/pdfs/privacy/hhs_dhs_mou.pdf). It could be argued that the contemporary emphasis in the United States on quarantine is simply an effort to clarify quarantine authorities – that quarantine is, essentially, a relic of the past and that, perhaps even as evidenced by the recent Avian influenza outbreak, the government has no intention of actually imposing widespread measures. I am not convinced by this argument. It is irrelevant to claim that such powers will never be used. During high-level exercises, frequent recourse to quarantine is made: in the TOPOFF exercises in Denver, Colorado, for instance, CDC advised for the entire state to be cordoned off “to limit [the] further spread of plague throughout the United States and other countries. Colorado officials express[ed] concern about their ability to get food and supplies into the state.”; Thomas V. Inglesby et al., *A Plague on Your City: Observations from TOPOFF 32 CLINICAL INFECTIOUS DISEASES* 436, 438 (2001). The fact that such powers are on the books, moreover, and expanding, justifies taking a closer look at these authorities. And even if the current office holders do not intend to use them (although this could be questioned), different individuals will eventually come to office, in which case such powers will be available.

<sup>33</sup> 1896, 59 & 60 Vict. c. 19, [hereinafter Public Health Act 1896] (repealing 1828, 6 Geo. IV, c. 78).

<sup>34</sup> Health (Control of Disease) Act, 1984, c.22 (U.K.); Public Health (Infectious Disease) Regulations, 1988, S.I. 1546 (U.K.).

<sup>35</sup> Health and Social Care Act, 2008, c. 14, § 45(G) (U.K.).

<sup>36</sup> *But see* Civil Contingencies Act, 2004, c. 36, § 19(1) (U.K.).



pandemic disease and biological agents, for neither threat is quarantine looked to as a first line of defense. In 1999, for instance, the Ministry of Defence issued a paper, *Defending Against the Threat from Biological and Chemical Weapons*.<sup>37</sup> It highlighted specific steps to respond to biological weapons threats, without once discussing the potential use of quarantine or isolation.<sup>38</sup> Three years later, the Secretary of State for Foreign and Commonwealth Affairs presented a report to Parliament on how to counter the threat from biological weapons. The document focused, *inter alia*, on strengthening the Biological and Toxin Weapons Convention and creating a new Convention to criminalize the use of biological weapons.<sup>39</sup> Despite the UK's international treaty obligations, it did not consider quarantine.<sup>40</sup>

Even for influenza which, according to the UK's National Security Strategy, "could cause fatalities in the United Kingdom in the range 50,000 to 750,000"<sup>41</sup>, ministers explicitly reject quarantine. "Mandatory quarantine and curfews," the Department of Health writes, "are generally not considered necessary and are not currently covered by public health legislation."<sup>42</sup> The government explains,

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<sup>37</sup> MINISTRY OF DEFENSE, *DEFENDING AGAINST THE THREAT OF BIOLOGICAL AND CHEMICAL WEAPONS*, 1999 (U.K.), *available at*

<http://webarchive.nationalarchives.gov.uk/+http://www.mod.uk/issues/cbw/index.htm>. *See also* SECRETARY OF STATE FOR DEFENCE, *STRATEGIC DEFENCE REVIEW*, 1998 (U.K.), *available at* [http://webarchive.nationalarchives.gov.uk/+http://www.mod.uk/issues/sdr/wp\\_contents.htm](http://webarchive.nationalarchives.gov.uk/+http://www.mod.uk/issues/sdr/wp_contents.htm).

<sup>38</sup> *Id.* (discussing the development of vaccines, procurement of the next generation of equipment for detecting, identifying and monitoring biological hazards, and establishing a joint nuclear, biological and chemical regiment). *See also* THE ROYAL SOC'Y, *SCIENTIFIC ASPECTS OF CONTROL OF BIOLOGICAL WEAPONS*, (1994), *available at* <http://royalsociety.org/WorkArea/DownloadAsset.aspx>. (omitting reference to quarantine); MCTBW, *supra* note 6 (omitting reference to quarantine).

<sup>39</sup> SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, *STRENGTHENING THE BIOLOGICAL AND TOXIN WEAPONS CONVENTION: COUNTERING THE THREAT FORM BIOLOGICAL WEAPONS*, 2002, Cm 5484, (U.K.) *available at* <http://www.brad.ac.uk/acad/sbtwc/other/fcobw.pdf>.

<sup>40</sup> *Id.*; *See also*, HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, *THE BIOLOGICAL WEAPONS GREEN PAPER*, FIRST REPORT OF SESSION 2002-3, H.C. 150, at 5–6, *available at* <http://www.parliament.uk/business/committees/committees-archive/foreign-affairs-committee/fac-pn-19-0203/>.

<sup>41</sup> UK NATIONAL SECURITY STRATEGY, *supra* note 2 at 14–15.

<sup>42</sup> CABINET OFFICE AND DEPARTMENT OF HEALTH, *PANDEMIC FLU: UK INFLUENZA PANDEMIC CONTINGENCY PLAN*, 2005, [hereinafter UKIPCP], at 49, *available at* [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19\\_10\\_05\\_bird\\_flu.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_10_05_bird_flu.pdf); *See also* DEPARTMENT OF HEALTH, *PANDEMIC FLU: A NATIONAL FRAMEWORK FOR RESPONDING TO AN INFLUENZA PANDEMIC*, 2007, § 7.3, at 75 (arguing against both home quarantine and cordon sanitaire); *See also* 2008 UK Int'l Preparedness Strategy, 13, at [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_089527](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089527) (discussing the humanitarian implication of quarantine).

There is some evidence that big gatherings of people encourage spread, and measures to flatten the epidemic curve can helpful [sic.] in easing the most intense pressure on health services. In general, however, quarantine has been ineffective, at the most postponing epidemics of influenza by a few weeks to 2 months and even the most severe restrictions on travel and trade have gained only a few weeks.<sup>43</sup>

For influenza and “other forms of infectious disease”, documents emphasize other responses, such as the use of vaccines, international disease monitoring, and resilience.<sup>44</sup>

Why is it that the two countries, both of which consider pandemic disease and biological weapons to be a national security concern—and, indeed, link them in terms of potential identification and response—have such different approaches to the threat? This article suggests that the answer is deeply historical, shaped by each country’s unique experiences with disease, as well as each country’s constitutional framework. Careful examination of the evolution of public health law suggests that the two countries have followed distinct—and essentially reverse—trajectories, which continue to influence the manner in which current law and policy has evolved in respect to pandemic disease and biological weapons. Constitutional constraints played a key role throughout.

In the United States, what started during the colonial period as a decidedly local authority evolved, post-Revolution, to be both a local and a state authority. For more than a century, the federal government proved reluctant to interfere. It was not that disease did not pose a severe threat – or, indeed, that it was never used as a weapon. To the contrary, the colonies and, later, the states, had significant concerns about the effects of disease and, even during the Revolutionary War, there was evidence and widespread belief that the British used smallpox as a weapon. During the Civil War as well, there were several reported efforts by the Confederates to use biological weapons against Union forces. But the federal government did not adopt quarantine laws. Quarantine was widely regarded as a central tenet of state police powers.<sup>45</sup> It was so decidedly local, that many states explicitly gave towns the authority to exclude any persons or goods believed to carry sickness—even if they traveled or were transported from other U.S. cities or states. Towns and local health boards could indefinitely imprison anyone within their bounds. They could coerce doctors, nurses, and caregivers into treating those who fell ill, and they could introduce a range of other measures to try to stem the advance of disease.

During the late nineteenth century, however, the balance of power subtly

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<sup>43</sup> UKIPCP, *supra* note 42, at 117.

<sup>44</sup> See, e.g., UKNSS2008, *supra* note 2, ¶¶4.56–4.59, pp. 42–43.

<sup>45</sup> *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).

shifted. The federal government avoided a direct Commerce Clause assertion and, instead, began to use the power of the purse to buy up local and state ports, transferring their operation to federal control. Federal statutory and regulatory authorities followed. By the end of the twentieth century, federal quarantine law—at least in respect to inter-state travelers and those entering or leaving the country—had become firmly established. By the early 21<sup>st</sup> century, policy documents had begun to refer to the potential use of quarantine to respond either to pandemic or targeted attacks, shifting the discussion from Commerce Clause considerations to Article II and foreign affairs. National security demanded a federal, not a state, response. Post-Hurricane Katrina, an even more visible discussion emerged, tied to the precise role of the military in enforcing domestic provisions.

The United Kingdom, in contrast, developed in the opposite direction. The first recorded quarantine orders, issued under Henry VIII, demonstrate a monarch willing to use the military to exercise his Royal Prerogative. As the constitutional structure of the country changed, the manner in which quarantine was accomplished altered. With the Stuarts' realization that quarantine could be wielded as a powerful political tool, use of the provisions led to greater friction with Parliament. The Privy Council reformed its approach, seeking statutory authorization prior to issuing orders. The demise of the Council and transfer of public health authorities to Parliament led to the abandonment of broad quarantine power. Commercial interests lobbied it out of existence. Aided by medical treatises, the 19<sup>th</sup> century sanitation movement, and the growth of a professional bureaucracy, local port authorities and public health provisions took their place. Accordingly, by the early twenty-first century, no broad quarantine laws existed, and such policy documents as were issued to outline the government's response in the event of biological weapons or pandemic disease specifically noted that quarantine would not be used.

These important differences have almost entirely escaped academic notice. Secondary materials that discuss the history of quarantine law *qua* quarantine law tend to draw broad brush-strokes over its appearance globally.<sup>46</sup> There are very few works that carefully consider the evolution of quarantine law on either side of the Atlantic, much less in juxtaposition to the other country.<sup>47</sup>

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<sup>46</sup> See, e.g., Joseph B. Topinka, Yaw, Pitch, and Roll: Quarantine and Isolation at United States Airports, 30 J. LEGAL MED. 51, 53–57 (2009) (discussing broadly the appearance of quarantine provisions in Egypt, Marseilles, and Venice); Brock C. Hampton, Development of the National Maritime Quarantine System of the United States, 55 PUB. HEALTH REP. 1241, 1242 (discussing the development of a quarantine station in Marseilles and Venice).

<sup>47</sup> See, e.g., Krista Maglen, The First Line of Defence: British Quarantine and the Port Sanitary Authorities in the 19<sup>th</sup> Century, 15 SOC. HIST. MED. 413, 414 (2002) (“[T]he policies and practices

Instead, accounts tend to be regional and episodic: they focus on particular states, regions, or quarantine stations,<sup>48</sup> or on particular plagues or pandemic diseases, drawing attention to the virulence of the disease, the state's immediate response, and the political, social, and economic consequences.<sup>49</sup> There are no accounts available on the US response to biological weapons that connect the history of quarantine provisions to the contemporary response; nor are there similar studies on the British side. Resultantly, not only have key differences between the countries been missed, but no explanation as to why such differences mark the two states' approaches has been suggested.

This article presents a new and detailed history of quarantine provisions in the two countries, offering in the process a novel explanation as to why we continue to see disparate approaches to the use of quarantine for natural disease as well as deliberate attack. It may be that there are other explanations for the current biodefense stance in both countries. Indeed, the simple conjunction of historical precedent and contemporary approaches would, alone, be insufficient explanation. It is my argument, however, that there is considerably more than this in the historical record and the influence

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which operated to intercept the importation of infectious diseases at the ports have attracted little more than a handful of articles and sections of book chapters.”).

<sup>48</sup> See, e.g., Howard Markel, *A Gate to the City: The Baltimore Quarantine Station, 1918–28*, 110 PUB. HEALTH REP. 2, 218 (1995); Jo Ann Carrington, *Impact of Yellow Fever on Life in Louisiana*, 4 J. OF THE LA. HIST. ASS'N., 1 (1963); Susan Wade Peabody, *Historical Study of Legislation Regarding Public Health in the States of New York and Massachusetts*, 6 J. OF INFECTIOUS DISEASES 1 (1909), available at

[http://books.google.com/books/about/Historical\\_study\\_of\\_legislation\\_regardin.html](http://books.google.com/books/about/Historical_study_of_legislation_regardin.html); M.

DUREY, *THE RETURN OF THE PLAGUE: BRITISH SOCIETY AND THE CHOLERA, 1831-2*, (1979); N. LONGMATE, *KING CHOLERA: THE BIOGRAPHY OF A DISEASE* (1966).

For works on specific time periods, see P. BALDWIN, *CONTAGION AND THE STATE IN EUROPE, 1830-1930* (1999); JOHN BOOKER, *MARITIME QUARANTINE: THE BRITISH EXPERIENCE C 1650-1900* (2007); G.C. COOK, *FROM THE GREENWICH HULKS TO OLD ST. PANCRAS: A HISTORY OF TROPICAL DISEASE IN LONDON* (1992); Anne Hardy, *Public Health and the Expert: London Medical Officers of Health, 1856-1900*, in *GOVERNMENT AND EXPERTISE—SPECIALISTS, ADMINISTRATORS AND PROFESSIONALS, 1860-1919* 128–42 (R. MacLeod ed., 1988); A. Hardy, *Cholera, Quarantine and the English Preventative System*, 37 MED. HIST. 250, 250–269 (1993); Maglen, *supra* note 47 at 413–428.

<sup>49</sup> See, e.g., D. M. REESE, *OBSERVATIONS ON THE EPIDEMIC OF 1819, AS IT PREVAILED IN A PART OF THE CITY OF BALTIMORE* (1819); Carrington, *supra* note 48; J. H. POWELL, *BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793* (1949), John B. Blake, *Yellow Fever in Eighteenth Century America*, 44 BULL. N.Y. ACAD. MED. 6 (1968); H.R. CARTER, *YELLOW FEVER: AN EPIDEMIOLOGICAL AND HISTORICAL STUDY OF ITS PLACE OF ORIGIN* (1931). But see Alfred J. Sciarrino: *The Grapes of Wrath & the Speckled Monster (Epidemics, Biological Terrorism and the Early Legal History of Two Major Defenses—Quarantine and Vaccination)*, Part I, 7 MICH. ST. UNIV. J. MED. & L. 119 (2002–03); *The Grapes of Wrath*, Part II, 8 MICH. ST. UNIV. J. MED. & L. 1 (2003–04); *The Grapes of Wrath and the Speckled Monster*, Part III: *Epidemics, Natural Disasters and Biological Terrorism—the Federal Response*, 10 MICH. ST. U.J. MED. & L. 429 (2006).

of constitutional constraints on either side of the Atlantic, which continues to shape the contemporary dialogue. Threading through each account is the importance of the type of threat faced. For the specific diseases each country confronted, which differed, played a key role in shaping subsequent measures. The United States struggled with yellow fever, smallpox, and cholera. The United Kingdom developed its law primarily in response to plague. This influenced the contours of the measures and the groups most impacted by quarantine, leading to a tolerance of such provisions on the American side of the Atlantic, and a rejection of the same on British shores.

## II. STATE POLICE POWERS AND THE FEDERALIZATION OF U.S. QUARANTINE LAW

Prior to the founding, the American colonists routinely used both land and maritime quarantine to respond to disease. Three key observations about these measures can be made. First, such early efforts often were not successful, leading many of the colonial and early state statutes to begin by lamenting the continuing and devastating effect of disease.<sup>50</sup> This lack of effectiveness proved critical in generating later support for federal control.

Second, the components of disease which now place it within a national security framework were present from the founding: disease took an incredibly high toll in terms of human life and, at times, threatened the very foundation of government. It also was used as a weapon—by criminals and by other countries. Thus, despite scientific advances that contribute to the current biological weapons threat (such as biological engineering), the idea of disease as a weapon, which could be used against individuals or the country itself, is not new and was considered and confronted by early American measures.

Third, unlike English law, which was shaped primarily by concern about plague, colonial—and later state—measures tended to focus on smallpox and other contagious disease.<sup>51</sup> By 1721, quarantine became paired with inoculation as response to smallpox in particular.<sup>52</sup> When Yellow Fever became epidemic in late 18<sup>th</sup> century, it quickly became linked to sanitation, spurring new legislation to mitigate nuisances and continuing the use of quarantine. Cholera later became epidemic.<sup>53</sup> This is not to say that plague

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<sup>50</sup> See, e.g., Act of 1700, ch. 62, reprinted in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 61 (Philadelphia, John Bioren 1810), available at [http://archive.org/details/lawssofcommonwe1810\\_1penn](http://archive.org/details/lawssofcommonwe1810_1penn); See also Blake, Yellow Fever in Eighteenth Century America, *supra* note 49, at 674.

<sup>51</sup> Peabody, *supra* note 48, at 46.

<sup>52</sup> *Id.* at 47.

<sup>53</sup> See, e.g., JOSEPH K. BARNES ET AL. THE CHOLERA EPIDEMIC OF 1873 IN THE UNITED STATES (Washington

played no role; it did have some impact. But plague provisions often merited their own legal response, while the core provisions continued to be shaped, in the main, by other infectious diseases. This mattered because the emphasis was on individuals carrying the disease, and *not* on items of commerce, such as silk, wool, and linens—widely believed to carry plague and thus subject, across the Atlantic, to disinfection procedures that often destroyed the goods in question. As a practical matter, what this meant was that the strong commercial lobby in Britain that opposed the use of quarantine provisions was not mirrored on the American side of the Atlantic. To the contrary, it was the immigrant community, and not shipping interests, that was most often affected by the provisions. A tacit acceptance of the measures followed.

### A. Early Colonial Quarantine Provisions

The American colonies maintained quarantine provisions to counter the threat of disease. Massachusetts Bay,<sup>54</sup> New York,<sup>55</sup> the Province of Pennsylvania,<sup>56</sup> New-Castle upon Delaware,<sup>57</sup> Maryland,<sup>58</sup> and Rhode Island<sup>59</sup> entertained provisions that imposed harsh penalties—such as death without benefit of Clergy—on those refusing to abide by the law. Such measures

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D.C., U.S. Government Printing Office 1875).

<sup>54</sup> See, e.g., 2 MASSACHUSETTS, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, 1642-1649 (Boston, W. White 1853) [hereinafter 2 MASS. RECORDS]; BOSTON BOARD OF HEALTH, ACTS RELATING TO THE ESTABLISHMENT OF QUARANTINE OF MASSACHUSETTS FROM THE SETTLEMENT OF THE COLONY OF MASSACHUSETTS BAY TO THE PRESENT TIME 5 (Boston, Rockwell & Church 1881), available at

[http://books.google.com/books/about/Acts\\_relating\\_to\\_the\\_establishment\\_of\\_qu.html](http://books.google.com/books/about/Acts_relating_to_the_establishment_of_qu.html).

<sup>55</sup> See, e.g., Act of 1755, ch. XIII, reprinted in JOHN HOLT, LAWS, STATUTES, ORDINANCES, AND CONSTITUTIONS, ORDAINED, MADE AND ESTABLISHED BY THE MAYOR, ALDERMEN, AND COMMONALTY, OF THE CITY OF NEW-YORK, CONVENEED IN COMMON COUNCIL FOR THE GOOD RULE AND GOVERNMENT OF THE INHABITANTS AND RESIDENTS OF THE SAID CITY 84 (New York, John Holt 1768).

<sup>56</sup> See, e.g., An Act to prevent sickly Vessels coming into this Government, ch. 62, reprinted in THE LAWS OF THE PROVINCE OF PENNSILVANIA COLLECTED INTO ONE VOLUMN, BY ORDER OF THE GOVERNOUR AND ASSEMBLY OF THE SAID PROVINCE 19 (Philadelphia, Andr. Bradford 1714), available at <http://archive.org/details/thelawsofprovinc00penn>.

<sup>57</sup> An Act to prevent sickly Vessels coming into this Government, Laws of the Government of New-Castle, Kent and Sussex, Upon Delaware, 1752, \*67.

<sup>58</sup> See, e.g., Act of Nov. 1766, ch. 25, reprinted in 1 THE LAWS OF MARYLAND TO WHICH ARE PREFIXED THE ORIGINAL CHARTER, WITH AN ENGLISH TRANSLATION, THE BILL OF RIGHTS AND CONSTITUTION, 936 (1799) [hereinafter THE LAWS OF MARYLAND] available at

<http://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/003150/html/index.html>. See also RALPH CHESTER WILLIAMS, THE UNITED STATES PUBLIC HEALTH SERVICE: 1798-1950 at 63 (1951).

<sup>59</sup> See, e.g., An Act to Prevent the Spreading of Infectious Sickness, 1712, Acts and Laws of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, at 63-64 (on file with author).

tended to be reactive and temporary. Initially they focused on maritime trade, as reports of disease abroad resulted in orders placing vessels under quarantine. Local quarantine proved the first (and last) line of defense; accordingly, steep penalties accompanied failure to observe the law. With Britain's trading interests implicated by commercial delays that ensued, the Privy Council in England did not always look kindly on provisions originating in the new world.

### i. Massachusetts Bay

From the earliest days, townsmen in Boston passed orders regulating the town's internal health.<sup>60</sup> Yet initially neither the government of Boston nor the colony's General Court took steps to prohibit the landing of vessels carrying infectious disease or arriving from infected ports.<sup>61</sup> In 1647, however, the colony of Massachusetts Bay received reports that the "plague, or like grievous [in]fectious disease" had broken out in the West Indies.<sup>62</sup> John Winthrop, who that year became governor of Massachusetts Bay Colony, described the devastation:

After the great dearth of victuals in [the West Indies] followed presently a great mortality, (whether it were the plague, or pestilent fever, it killed in three days,) that in Barbados there died six thousand, and in Christophers, of English and French, near as many, and in other islands proportionable. The report of this coming to us by a vessel which came from Fayal, the court published an order, that all vessels, which should come from the West Indies, should stay at the castle, and not come on shore, nor put any goods on shore, without license of three of the council, on pain of one hundred pounds nor any to go aboard, etc., except they continued there, etc., on like penalty.<sup>63</sup>

The General Court subsequently passed an order instituting maritime quarantine against all vessels arriving from the West Indies.<sup>64</sup> The order

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<sup>60</sup> 2 MASS. RECORDS, *supra* note 54; BOSTON MA BOARD OF HEALTH, *supra* note 54, at 5.

<sup>61</sup> 2 MASS. RECORDS, *supra* note 54. The government of Boston was a separate municipal entity, subordinate to the colony of Massachusetts Bay. The General Court served simultaneously as a legislative, executive, judicial, and administrative body.

<sup>62</sup> *Id.* at 237.

<sup>63</sup> 2 JOHN WINTHROP, JOHN WINTHROP: HISTORY OF NEW ENGLAND FROM 1630–1649 321 (James Kendall Hosmer, ed. 1908) (Winthrop chosen Governor in 1647); *Id.* at 329 (Quarantine order issued).

<sup>64</sup> *Id.* There is discrepancy in the secondary literature about the exact date of the Massachusetts Bay order, some put it at 1647, others at 1648; *Compare, e.g.*, RALPH CHESTER WILLIAMS, THE UNITED STATES PUBLIC HEALTH SERVICE: 1798-1950 at 65 (1951); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 205–06 (2000); Richard A. Goodman, et al., The Structure of Law in Public Health Systems and Practice in LAW IN PUBLIC HEALTH PRACTICE 46–51,

required:

[A]ll (our own) and other vessels come from any pts of ye West Indies to Boston harbor shall stop (and come to an) anchor before they come at ye Castle, under ye penalty of 100£, & that no pson comeing in any vessel from the West Indies shall go ashore in any towne, village, or farme, or come within foure rods of any oth<sup>r</sup> pson, but such as belongs to the vessels company thee or shee came in, or any wayes land or convey any goods brought in any such vessels to any towne, village, or farme aforesaid, or any other place within this jurisdiction, except it be upon some iland where no inhabitant resides, without license from ye councill, or some three of them, under ye aforesaid penalty of a hundred pound for every offence.<sup>65</sup>

Not only were individuals on board ship prohibited from coming ashore, but all persons residing within Massachusetts Bay Colony were prohibited from boarding any ships or vessels arriving from the West Indies, or from buying any goods or merchandise from such vessels, without a valid license.<sup>66</sup> The penalty for violating the order was £100.<sup>67</sup> Infractions fell subject to the law.<sup>68</sup> The colony repealed the order May 2, 1649, when the yellow fever epidemic ceased.<sup>69</sup>

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263(Richard A. Goodman et al, eds. 2007); Charles V. Chapin, History of State and Municipal Control of Disease, in *A HALF CENTURY OF PUBLIC HEALTH* 133 (Mazýck P. Ravenel ed., 1921). The original writes "March 1647-1648." At the time, the start of Britain's governmental year did not line up with the Gregorian Calendar (dating from 1582), but, instead, it coincided with the Julian Calendar, which began each year on March 25. By implication, this suggests that the discussion regarding quarantine and the subsequent order took place between January 1, 1648 and March 24 1648, making 1648 the more likely date of the first quarantine order issued by the American colonies. The English government did not switch to the Gregorian Calendar until 1752. See *HANDBOOK OF DATES FOR STUDENTS OF ENGLISH HISTORY* 6–11 (C.R. Cheney ed., 1978); See also 2 MASS. RECORDS, *supra* note 54 at 237; BOSTON MA BOARD OF HEALTH, *supra* note 54, at 5.

<sup>65</sup> BOSTON BOARD OF HEALTH, *supra* note 54, at 5–6; See also 2 MASS. RECORDS, *supra* note 54, at 237; Hampton *supra* note 46 at 1245. Hampton cites to John Winthrop's History of New England and Susan Wade Peabody's "Historical Study of Legislation Regarding Public Health in the States of New York and Massachusetts." *J. INFECTIOUS DISEASE*, Suat No. 4, Feb. 1909.

According to Hampton, the New York colony may have also implemented quarantine in the same year. For other sources citing the MA Bay Colony order, See Sidney Edelman, International Travel and our National Quarantine System, 37 *TEMPLE LAW QUARTERLY* 28, 29 (1963).

<sup>66</sup> BOSTON BOARD OF HEALTH, *supra* note 54, at 6; See also 2 MASS. RECORDS, *supra* note 54, at 237.

<sup>67</sup> 2 MASS. RECORDS, *supra* note 54, at 237. The Order made arrangements for promulgation locally and to any vessels affected by its provisions.

<sup>68</sup> 2 JOHN WINTHROP, *supra* note 63, at 329. Winthrop recounts that Goodman Dell of Boston, having been informed of the order, simply lied, saying he had not been in the West Indies. He was later found out and bound over to court to answer for contempt.

<sup>69</sup> BOSTON BOARD OF HEALTH, *supra* note 54, at 7 ("The Courte doth thinke meete that the order concerning the stoping of West India ships at the Castle should hereby be repealed,



It was not until October 1665 that the settlement again imposed quarantine on vessels, this time in response to the “great plague” in London (later determined to be typhus).<sup>70</sup> The order required that permission be obtained from the governor or council to land either passengers or goods arriving from England.<sup>71</sup> Like the first order, it was intended to be temporary in nature, and in October 1667 the General Court repealed the provision.<sup>72</sup>

Following the outbreak of yellow fever in Philadelphia in 1699, Massachusetts tried to deal with the threat posed by the disease by passing a permanent and particularly stringent Quarantine Act.<sup>73</sup> No vessel carrying smallpox, or any other contagious sickness, would be allowed within half a mile of shore, without first obtaining a license from the governor or commander-in-chief of the province, or from two justices of the peace if the harbor was located more than ten miles from the governor’s home.<sup>74</sup> Neither goods nor passengers could be conveyed to land without such a license, with any violation of the provision earning the master of the vessel a £100 fine.<sup>75</sup> The 1699 statute required the captain of the vessel to inquire into the health of all passengers and to keep a record of any sicknesses on board.<sup>76</sup> Any passenger or sailor breaking quarantine would be isolated and imprisoned, held responsible financially for any costs thereby incurred by the colony, and fined a

seeing it hath pleased God to stay the sicknes there.”) £100 in 1647 amounts to 114.46 times that amount in 2009; i.e., ~£11,446. Roughly translated at the current exchange rate of 0.65, this comes to \$17,609. For rates of inflation and exchange; See <http://www.measuringworth.com/datasets/ukearnpci/result.php>. In terms of earnings and purchase power, however, the number increases to some \$244,000 today. Susan Wade Peabody, an early 20<sup>th</sup> century scholar, identifies the epidemic as yellow fever. See Peabody, *supra* note 48, at 41.

<sup>70</sup> 4 MASSACHUSETTS, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASS. BAY IN NEW ENGLAND, 1661-1674 280 (Boston, W. White 1854) [hereinafter 4 MASS. RECORDS] available at <http://archive.org/details/recordsofgoverno42mass>.

<sup>71</sup> BOSTON BOARD OF HEALTH, *supra* note 54, at 7–8.

<sup>72</sup> 4 MASS. RECORDS, *supra* note 70, at 345. See also BOSTON BOARD OF HEALTH, *supra* note 54, at 8. The Records of the Governor and company of the Massachusetts Bay in New England, edited by Dr. Shurtleff, terminated in 1686. There was a period of six years before the Governor authorized publication of the Acts and Laws of Massachusetts Bay. For much of the intervening period, there are few records, and none, in the State Library, that contain reference to quarantine law. See BOSTON BOARD OF HEALTH, *supra* note 54, at 8.

<sup>73</sup> Act of July 18, 1699, ch. 7 (Massachusetts-Bay), in BOSTON BOARD OF HEALTH, *supra* note 54, at 9 (reprinting Act in full). The act itself singled out smallpox, but included other infectious disease, whether carried by persons or goods; its introduction was specifically in response to the Yellow Fever outbreak. *Id.* at 7.

<sup>74</sup> Act of July 18, 1699, ch. 7, § 1. (Massachusetts-Bay).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at § 2.

further £20.<sup>77</sup>

England did not always acquiesce in the colonial provisions. The charter of 1691 retained a check on Massachusetts Bay. The Privy Council had three years from the moment it obtained a copy of the colonial measures, to declare them void.<sup>78</sup> Quarantine here proved particularly vexing: it fed into a broader concern held by English statesmen that “the uncontrolled manner in which the Colony was exercising its powers was becoming increasingly detrimental to the economic welfare of England and the Empire.”<sup>79</sup> Being able to retain a ship, indefinitely, simply because of the presence of any contagious disease, coupled with a significant fine for failing to observe such measures, fell beyond the Pale.<sup>80</sup> At the request of the Lords of Trade, the Privy Council refused to allow the 1699 statute to stand.<sup>81</sup> The Lords of Trade, however, did not long prevail.

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<sup>77</sup> *Id.* at § 3.

<sup>78</sup> 1 BENJAMIN PERLEY POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC CHARTERS OF THE UNITED STATES* 952 (1877), *available at* <http://archive.org/details/federalstatecons01poor>. For most of the other colonies, there was no limit to the time period within which the Privy Council must either accept or disallow new laws. The effect of an Order in Council disallowing a statute was to repeal it, effective from the time the colonial governor received notice of the order. See Dudley Odell McGovney, *The British Privy Council’s Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto*, 94 U. PA. L. REV. 59, 73–74 (1945–1946); *See also* 2 *ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, A.D. 1680–1720 v–xl* (W.L. Grant and James Munro eds., 1910) (discussing Privy Council’s relationship with the colonies from the earliest time through 1910); H. E. Egerton, *The Seventeenth and Eighteenth Century Privy Council in Its Relations with the Colonies*, 7 J. COMP. LEGIS. & INT’L L. 3d Ser. 1 (1925) (looking at the Privy Council’s 17<sup>th</sup> and 18<sup>th</sup> C relationship with the colonies). Some five hundred American colonial statutes disallowed by the Privy Council have been identified by scholars. *See, e.g.*, RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 109–202 (1915); Odell McGovney, *The British Privy Council’s Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto*, 94 U. Pa. L. Rev. 59, 73–74 (1945–1946).

<sup>79</sup> Egerton, *supra* note 78, at 7.

<sup>80</sup> The creation of the Lords of Trade and Plantations (more commonly referred to as the Board of Trade) in 1696 broadly coincides with the introduction of the quarantine provision and signals particular concern about trade and relations with the colonies. *See* DICKERSON, *AMERICAN COLONIAL GOVERNMENT, 1696–1765* (1912). One of the purposes of the board was “to examine into and weigh such Acts of the [colonial] Assemblies...as shall from time to time be transmitted”, reporting on “the Usefulness or mischief thereof to our Crown, and to our Kingdom of England, or to the Plantations themselves.” RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 48 (1915).

<sup>81</sup> Disallowed by the Privy Council Oct. 22, 1700. *See* BOSTON BOARD OF HEALTH, *supra* note 54, at 9; *See also* Peabody, *supra* note 48, at 42 (stating “There is no such act as this (that we know of) in any other of his Majesty’s plantations; And by the uncertain interpretation that may be put upon the terms Contagious, Epidemical and Prevailing Sickness, we think it may be liable to great abuses; The penalties thereby inflicted seem to us too high. And we are therefore humbly of opinion that the inconvenience thereby intended to be prevented may be better provided against by order of the Governor and Council from time to time than by any standing

In 1701 the General Assembly passed another statute that became the basis for Massachusetts' quarantine law.<sup>82</sup> Instead of applying to *any* contagious disease, the act targeted plague, smallpox, and pestilential or malignant fever.<sup>83</sup> The statute contained two parts. The first focused on *cordon sanitaire*, the removal of individuals from towns, and isolation of the ill.<sup>84</sup> It authorized selectmen to remove and isolate any persons either ill or "late before have been visited" with plague, smallpox, pestilential or malignant fever, "or any other contagious sickness, the infection of which may probably be communicated to others."<sup>85</sup> A justice of the peace was to produce a warrant to secure housing, nurses, and other necessities. Expenses, where possible, were to be paid by patient; otherwise, by the town in which the ill person lived.

The second part of the statute focused on maritime quarantine.<sup>86</sup> The act empowered justices of the peace to prevent persons coming on shore from any vessel on which sickness was present.<sup>87</sup> Information about the sicknesses were to be transmitted to the Governor, or commander in chief, who was empowered "with the advice and consent of the council, to take such further orders therein as they shall think fit for preventing the spreading of the infection."<sup>88</sup>

Although the 1701 statute provided a general authority to quarantine individuals coming from places where plague was or had been present, the colony at times passed measures focused on certain countries or regions. In 1714, for instance, the General Assembly passed an act specifically targeting all ships coming from France and other parts of the Mediterranean.<sup>89</sup> In keeping with European standards of the day, upon arrival in Massachusetts Bay, the ships were to be isolated for forty days.<sup>90</sup> Severe penalties met any commander refusing to observe the period of quarantine: namely, death.<sup>91</sup> Anyone coming ashore without express license from the Governor and council

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Act of the General Assembly.").

<sup>82</sup> Act of June 25, 1701, ch. 9 §§1-3 (Massachusetts Bay), reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 11.

<sup>83</sup> *Id.* at § 4.

<sup>84</sup> Peabody, *supra* note 48, at 42.

<sup>85</sup> *Id.*; See also, Chapin, *supra* note 64, at 134.

<sup>86</sup> Peabody, *supra* note 48, at 42.

<sup>87</sup> Act of June 25, 1701, ch. 9, in 1 THE ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 469 (Boston, Wright & Potter 1869), available at <http://archive.org/details/actsresolvespass9214mass>.

<sup>88</sup> *Id.*

<sup>89</sup> Act of Sept. 2, 1721, ch. 3, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 18.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

would be imprisoned for three years.<sup>92</sup>

Prior to this time, the province of Massachusetts Bay had not maintained a quarantine hospital.<sup>93</sup> Accordingly, on June 11, 1716, a committee began investigating where such a facility ought to be built.<sup>94</sup> Five months later, the committee concluded that one was, indeed, necessary, and recommended a suitable site.<sup>95</sup> The House of Representatives voted to purchase the land outright and to allot an additional sum of £150 to build the appropriate facilities.<sup>96</sup> The measure proved to be controversial. Inhabitants of Dorchester, Braintree, and Milton strongly objected to the erection of a facility for infectious disease in their midst.<sup>97</sup> The House of Representatives thus withdrew its order to purchase the land, and in April of 1717 formed a new committee to consider anew where, exactly, such a facility should be located.<sup>98</sup> By August the treasurer had conveyed £100 for the purchase of the southerly end of Spectacle Island.<sup>99</sup>

Troubles continued to assault efforts to build a new hospital. The project ran over budget.<sup>100</sup> In the interim, passengers landed for purposes of quarantine burdened landowners and destroyed adjacent properties.<sup>101</sup> But in 1717 new legislation continued to rely on quarantine to answer the threat of disease.<sup>102</sup> To encourage complicity with the statute's provisions, any informer

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<sup>92</sup> *Id.*

<sup>93</sup> BOSTON BOARD OF HEALTH, *supra* note 54, at 12.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (Indicating to the General Court that either Spectacle Island or Squantum Neck would prove appropriate; as both areas were already owned, however, and the owner of Spectacle Island refused to sell, the committee advised that the province buy an acre in the latter.)

<sup>96</sup> *Id.* at 12–13.

<sup>97</sup> *Id.* at 13.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 13–14; *See also* NATHANIEL B. SHURTLEFF, A TOPOGRAPHICAL AND HISTORICAL DESCRIPTION OF BOSTON 512–515 (Boston, City Council 1871), *available at* <http://books.google.com/books?id=UWkUAAAAYAAJ&ots=uaoKo0zNTk&dq=Shurtleff%E2%80%99s%20Topographical%20and%20Historical%20Description%20of%20Boston&pg=PP1#v=onepage&q&f=false>.

<sup>100</sup> BOSTON BOARD OF HEALTH, *supra* note 54, at 14 (noting that the costs had already run to £173, while further funds would be required to build a fence and well).

<sup>101</sup> *Id.* at 14–15.

<sup>102</sup> Act of Feb. 14, 1718, ch. 14, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 15. The Keeper of the Lighthouse and the commanding officer of Castle William had the responsibility of notifying and directing the masters of all vessels “wherein any infectious sickness is or hath lately been” to anchor; *Id.* § 1. Failure to refrain from coming ashore, or from preventing any passengers or goods from doing the same, would earn the master of the vessel a fine or £50 or six months’ imprisonment; *Id.* § 2. For any person breaking quarantine, the act levied a fine of £10 or two months’ imprisonment; *Id.* § 3.

would be granted one-third of the fines paid to the Province.<sup>103</sup>

The act, set to expire in May 1723, was to continue in force for five years.<sup>104</sup> Upon expiration, however, the act was continued for a further five years, and in 1728 it was continued until 1738 “and no longer”.<sup>105</sup> In the interim, the province made provision for its judicial and legislative bodies to convene outside infected areas, in the event that smallpox took hold.<sup>106</sup>

The 1717 act was not adequate to cover all circumstances—namely, those presented by plague. When the disease did appear, it fell subject to separate, and particularly harsh, measures. The primary threat came from ships having contact with the Mediterranean. Thus, in September 1721 the General Court enacted a new statute that again required ships coming from France or the Mediterranean to undergo 40 days' quarantine.<sup>107</sup> As in 1714, failure to observe the rules carried the penalty of death.<sup>108</sup> Any individual breaking quarantine would be imprisoned for three years without bail—considerably longer than the two months that operated under the non-emergency provisions.<sup>109</sup> The penalty for unloading goods was £500, with half of the proceeds paid to any informer, plus an additional three years' imprisonment without bail.<sup>110</sup> The statute was to be in force for three years.<sup>111</sup>

Massachusetts Bay, like many colonies, continued to maintain a quarantine hospital. The location of the hospital, and the authorities extended to hospital and health personnel, shifted over time.<sup>112</sup> Each time the quarantine hospital

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<sup>103</sup> *Id.* at § 4.

<sup>104</sup> *Id.* at § 7.

<sup>105</sup> *Id.* at § 6–7; Act of June 19, 1728, ch. 8, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 20.

<sup>106</sup> 4 & 5 Geo. 2, c. 177 (1731), reprinted in GENERAL COURT OF MASSACHUSETTS, THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 486 (Boston, T. E. Wait & Co. 1814), available at

<http://books.google.com/books?id=sBswAAAAYAAJ&ots=AYiqNoXK63&dq=The%20Charters%20and%20General%20Laws%20of%20the%20Colony%20and%20Province%20of%20Massachusetts%20Bay&pg=PR1#v=onepage&q&f=false>.

<sup>107</sup> Act of Sept. 2, 1721, ch. 3, §1, reprinted in BOSTON MA BOARD OF HEALTH, *supra* note 54, at 17. The statute also applied to any ships or vessels arriving from other ports which, at any time within the preceding six months, had been to any port in France or any port infected with the plague; *Id.* at §4.

<sup>108</sup> *Id.* at 18.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 19. Such fines were significant: looked at in the contemporary environment, they amounted to more than \$1 million; See discussion, *supra* note 69.

<sup>111</sup> BOSTON BOARD OF HEALTH, *supra* note 54, at 20. Assumedly, the statute terminated in 1723, as state records do not contain a reenactment.

<sup>112</sup> Massachusetts, for instance, continued to use the Spectacle Island Hospital until 1737, when it was re-located to Rainsford's Island; *Id.* Just over a decade later, the hospital and quarantine grounds were transferred to Deer Island. *Id.* 22–23.

moved, new legislation outlined the appropriate authorities and penalties for violation, consistent with the acts of 1701 and 1718.<sup>113</sup> Gradually, the quarantine provisions became more detailed, providing, for instance, for medical personnel for care of the sick.<sup>114</sup> Although in most cases the measures were temporary, they tended to be renewed until made indefinite.<sup>115</sup>

Massachusetts Bay also continued to pass new quarantine measures targeting vessels arriving from specific regions or particular diseases that caused concern. These measures took on an intensely local character. In 1739, for instance, the General Assembly passed an act to prevent the spreading of smallpox.<sup>116</sup> This measure required any individual coming from any region where smallpox was rampant to report within two hours of their arrival to one or more Select Men or the Town Clerk. Failure to do so carried a fine of £20.<sup>117</sup> Smallpox presented a particular threat and was dealt with through temporary means. In 1742, for instance, a similar statute, which was to remain in force “for the Space of seven Years, and no longer.”<sup>118</sup> This statute, re-printed in 1746, gave the Justice of the Peace within the county, or the Select-Men of the Town, the power to obtain a warrant to remove any persons arriving from “infected Places”.<sup>119</sup>

As for individuals *within* the colony who fell ill, special duties were placed on the Head of the Family:

[I]mmediately upon Knowledge thereof, the Head of the Family in which such Person is sick, shall acquaint the Select-Men of the Town therewith, and also hang out a Pole at least six Feet in length, a red Cloth not under one Yard long and half a Yard wide, from the most Publick Part of the infected House.<sup>120</sup>

<sup>113</sup> Compare Act of June, 29, 1738, ch. 8, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 23 with the Act of Feb. 14, 1718, ch. 14, §§ 2–3, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 15; *See also* Act of June 29, 1738, ch. 8, § 4, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 26–28 (explicitly providing for recourse to the act of 1701 in the event that the vessel was unable to proceed to the quarantine station).

<sup>114</sup> *See, e.g., Id.* at § 5.

<sup>115</sup> *See, e.g., Id.* at § 6 (limiting the statute to five years); *Id.* § 7 (extending the statute until a specified date); *Id.* at 26–28 (largely continuing the same statute through 1756); *Id.* at 33 (Reenacting the statute of 1749-50, making it indefinite).

<sup>116</sup> Act of June 15, 1739, ch. 1, reprinted in 2 The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay 987 (Boston, Wright & Potter 1874), *available at* [http://archive.org/details/actsresolvespubl\\_c02mass](http://archive.org/details/actsresolvespubl_c02mass).

<sup>117</sup> *Id.*

<sup>118</sup> An Act to Prevent the Spreading of the Small-Pox and Other Infectious Sickness, and to Prevent the Concealing of the Same, Feb. 21, 1746, Meeting of the Select-Men of Boston (on file with author).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

The flag was to remain in place “till the House in the Judgment of the Select-Men is thoroughly [sic.] aired and cleansed, upon Penalty of forfeiting and paying the Sum of *fifty Pounds* for each Offence, one Half for the Informer, and the other Half for the Use of the Poor of the Town where such Offence shall be committed.”<sup>121</sup> Refusal or inability to pay the fine was punishable by whipping, up to thirty stripes.<sup>122</sup> In the event that more than twenty families in the town had contracted smallpox, however, the requirements were lifted.<sup>123</sup>

## ii. New York

Other colonies—even from their earliest days—considered and adopted quarantine provisions. Like the Massachusetts Bay measures, these laws were intensely local in nature and became increasingly extreme over time.

Secondary sources suggest that in 1647, under Dutch rule, New York took steps to adopt its first restrictive measures.<sup>124</sup> Further orders appear to have been issued under English rule, by the Governor and Council.<sup>125</sup> By the late 17<sup>th</sup> century, concern throughout the colonies had expanded from smallpox to yellow fever. Epidemics of the disease broke out in Boston, Charleston, and Philadelphia.<sup>126</sup> When yellow fever reached New York in 1702, isolation efforts proved unsuccessful.<sup>127</sup>

Yellow fever, along with smallpox and other infectious diseases, proved formative in New York’s quarantine law. In 1755 the legislature introduced a colony-wide maritime statute.<sup>128</sup> The legislation required that any vessels with smallpox, yellow fever, or other contagious diseases anchor at Bedlow Island to be quarantined, with heavy penalties for disobedience.<sup>129</sup> Any person coming ashore could be compelled to return to the vessel or “dispose[d] of...in some other Place, in order to prevent the Infection.”<sup>130</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* Massachusetts Bay passed other measures to deal with the consequences of disease—e.g., allowing courts and legislative bodies to reconvene outside infected areas. See, e.g., 4 Geo. 2, c. 5 (1730), reprinted in *THE GENERAL COURT*, *supra* note 1066, at 486–87.

<sup>124</sup> See Peabody, *supra* note 48, at 3.

<sup>125</sup> Occurrence of such orders in 1702, 1714, 1716, 1725, 1738, 1742. Peabody, *supra* note 48, at 3.

<sup>126</sup> Blake, *supra* note 49, at 674.

<sup>127</sup> *Id.*

<sup>128</sup> Act of May 3, 1755, ch. 973, reprinted in 3 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 1071* (Albany, James B. Lyon 1894), available at [http://books.google.com/books/about/The\\_colonial\\_laws\\_of\\_New\\_York\\_from\\_the\\_y.html](http://books.google.com/books/about/The_colonial_laws_of_New_York_from_the_y.html).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

The following year the colony introduced a subsequent measure to ensure that all individuals, regardless of how they had fallen victim to disease, could be treated in a like manner.<sup>131</sup> Similar provisions were continued in 1757, to be in continuance for five years.<sup>132</sup>

### iii. The Province of Pennsylvania and County of New-Castle

Like Massachusetts Bay and New York, from its earliest days the Province of Pennsylvania, granted to William Penn and his assigns, made use of quarantine. The measures initially adopted though seem to have been somewhat softened by the views of the colony's founder.<sup>133</sup> Nevertheless, close inspection shows a pattern consistent with the other colonies in regard to both the intensely local nature of the provisions and the increasingly stringent measures adopted.

Penn himself had witnessed the savage destruction of disease as well as the devastating impact of strict quarantine law.<sup>134</sup> He was a student at Lincoln's Inn when the great plague hit London.<sup>135</sup> Death rates rapidly escalated and commerce came to a halt. "[T]he streets," one historian recounts, "were filled with mournful cries—of the painfully stricken, the grief stricken..."<sup>136</sup> The Crown's Draconian quarantine measures served to increase the suffering:

Families with plague cases were boarded up into their houses for forty days without sufficient resources. Door upon door bore the great placard with its red cross and the plea, "Lord have mercy upon us!" The spotted death swept through the city killing so many so rapidly that there weren't enough burying grounds; great pits had to be dug wherever there was waste ground and bodies brought in great wagon loads. The madness of pain and fever, mass hysteria ruled London life that summer...The Great Plague claimed an estimated seventy thousand Londoners before it receded.

Penn saw the impact of quarantine laws on the poor, and witnessed the role

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<sup>131</sup> Act of Nov. 9, 1762, ch. 1010, reprinted in 4 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 76 (Albany, James B. Lyon 1894), *available at* [http://books.google.com/books/about/The\\_colonial\\_laws\\_of\\_New\\_York\\_from\\_the\\_y.html](http://books.google.com/books/about/The_colonial_laws_of_New_York_from_the_y.html).

<sup>132</sup> Act of March 24, 1758, ch. 1061, reprinted in 4 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 236 (Albany, James B. Lyon 1894), *available at* [http://books.google.com/books/about/The\\_colonial\\_laws\\_of\\_New\\_York\\_from\\_the\\_y.html](http://books.google.com/books/about/The_colonial_laws_of_New_York_from_the_y.html).

<sup>133</sup> For the legal framework see WILLIAM PENN, FRAME OF GOVERNMENT OF PENNSYLVANIA (1682), *available at* [http://avalon.law.yale.edu/17th\\_century/pa04.asp](http://avalon.law.yale.edu/17th_century/pa04.asp).

<sup>134</sup> CATHERINE OWENS PEARE, WILLIAM PENN: A BIOGRAPHY 48–51 (1957).

<sup>135</sup> *Id.* at 50

<sup>136</sup> *Id.*



played by Quakers in administering to those in need, despite continued religious persecution of the sect by the Crown.<sup>137</sup>

His experience with disease continued. On his first voyage to America, his ship, the *Welcome*, fell subject to smallpox, in the process losing one-third of those it carried.<sup>138</sup> Penn, immune owing to childhood contact with the disease, cared for those aboard who fell ill.<sup>139</sup> For the next two decades, Penn continued to help and financially support the sick.<sup>140</sup> He felt it his duty, writing in his *Reflections and Maxims*, "They that feel nothing of charity are at best not above half of kin to the human race."<sup>141</sup>

In 1684 Penn returned to England. In his absence, the provincial assembly grew in power, perhaps contributing to its later willingness to adopt broader laws.<sup>142</sup> Penn himself found in London a healthy dose of *realpolitik* and returned to his colony in 1699—having escaped the Tower and barely gained the favor of William of Orange—determined to answer charges of failing to pass strong enough laws.<sup>143</sup> His arrival coincided with that of the "pestilential fever"—a disease believed to have been imported from the West Indies.<sup>144</sup> Quickly dubbed the "Barbados distemper", the yellow fever outbreak killed 6-8 people per day for several weeks.<sup>145</sup>

To counter this dreaded disease, in 1700 the General Assembly at New Castle introduced *An act to prevent Sickly vessels coming into this Government*.<sup>146</sup> The new provisions sought to minimize the devastation, but they did not go so far as to shut people in their homes, as the English measures to which Penn had been a witness—or, indeed, the Massachusetts Bay and New York measures—had done. Instead, the statute focused on maritime provisions. It prohibited "vessels coming from any unhealthy or sickly place whatsoever" from coming closer than a mile from land, absent a clean bill of health.<sup>147</sup> Passengers or cargo could only come ashore with a permit from the

<sup>137</sup> *Id.* at 51.

<sup>138</sup> HANS FANTEL, WILLIAM PENN: APOSTLE OF DISSENT 2 (1974).

<sup>139</sup> *Id.*

<sup>140</sup> WILLIAM HEPWORTH DIXON, WILLIAM PENN: AN HISTORICAL BIOGRAPHY 298 (1851).

<sup>141</sup> WILLIAM PENN, FRUITS OF SOLITUDE IN REFLECTIONS AND MAXIMS (1682).

<sup>142</sup> JOSEPH E. ILLICK, WILLIAM PENN THE POLITICIAN: HIS RELATIONS WITH THE ENGLISH GOVERNMENT 171 (1965).

<sup>143</sup> HARRY EMERSON WILDES, WILLIAM PENN 286–313 (1975); FANTEL, *supra* note 140, at 199.

<sup>144</sup> Edelman, *supra* note 65, at 29.

<sup>145</sup> Hampton, *supra* note 46, at 1245.

<sup>146</sup> Act of 1700, ch. 62, reprinted in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 61 (Philadelphia, John Bioren 1810) (preventing vessels without bills of health from coming within one mile of shore or landing passengers without license from the Governor and Council, or two justices of the peace, with a penalty of £100).

<sup>147</sup> Act of Nov. 1766, ch. 25, reprinted in 1 THE LAWS OF MARYLAND TO WHICH ARE PREFIXED THE ORIGINAL CHARTER, WITH AN ENGLISH TRANSLATION, THE BILL OF RIGHTS AND CONSTITUTION, 936 (1799).

local authorities.<sup>148</sup>

As with all laws passed by the province, such measures had to be laid before the Privy Council within five years of their passage; upon receipt, the council had six months to declare such measures void.<sup>149</sup> The council made liberal use of its veto power in regard to the private colony, disallowing in excess of fifty provisions within just a five year period (1700-1705)—including one measure requiring all masters and commanders of vessels to report at New-Castle.<sup>150</sup> Such decisions appear to have been influenced in part by complaints emanating from the Board of Trade that Pennsylvania, one of the most important colonies, was engaged in illegal trade.<sup>151</sup> Coupled with the colony's failure to crack down sufficiently on piracy,<sup>152</sup> trade concerns prompted the crown to retain control of all matters relative to military power, admiralty, and customs.<sup>153</sup>

Despite its concerns, however, the Privy Council left the 1700 quarantine law intact.<sup>154</sup> The statute remained in force for nearly three-quarters of a century, without amendment, until its repeal in 1774.<sup>155</sup> That year, a new statute took its place.<sup>156</sup> Finally, upon the Declaration of Independence, the General Assembly of Pennsylvania passed a statute continuing all the laws in force on May 14, 1776.<sup>157</sup>

#### iv. Rhode Island

The General Assembly of Rhode Island and Providence Plantations at Newport also passed colonial quarantine measures that demonstrate the decidedly local nature of such laws. The measures targeted contagious disease

<sup>148</sup> *Id.*; See also Edelman, *supra* note 65, at 29–30.

<sup>149</sup> Edelman, *supra* note 65, at 29–30.

<sup>150</sup> Disallowances of Feb. 7, 1705, enumerated in *Laws of the Commonwealth of Pennsylvania*, from Oct. 24, 1700 to Mar. 20, 1810, Vol. 1 (1810), at p. lvil.

<sup>151</sup> ILLICK, *supra* note 141, at 146-158, 195-199.

<sup>152</sup> *Calendar of State Papers, Colonial Series, America and the West Indies, 1697-98*, § 265.

<sup>153</sup> ILLICK, *supra* note 141, at 264.

<sup>154</sup> *Disallowances*, *supra* note 149 at lvil.

<sup>155</sup> See 1 *LAWS OF THE COMMONWEALTH OF PENNSYLVANIA* ix–xli (Philadelphia, John Bioren 1810). The records of the Privy Council, which record some 627 interim provisions, are bereft of any reference to quarantine between the statute's introduction and its repeal on Jan 22, 1774.

<sup>156</sup> 1 *LAWS OF THE COMMONWEALTH OF PENNSYLVANIA* xli (Philadelphia, John Bioren 1810) (stating that Pennsylvania's 1774 act to prevent infectious diseases was repealed).

<sup>157</sup> 1 *LAWS OF THE COMMONWEALTH OF PENNSYLVANIA* 429 (Philadelphia, John Bioren 1810). An ACT to revive and put in force such and so much of the late laws of the province of Pennsylvania, as is judged necessary to be in force in this commonwealth, and to revive and establish the Courts of Justice, and for other purposes therein mentioned; passed at a session which commenced Nov. 28, 1776 and ended Mar. 21, 1777.

broadly. They, too, steadily became more extreme. And they demonstrated a provincialism that would persist beyond the country's founding, empowering local towns to exclude individuals from other American colonies based on the threat of disease.

A 1719 act prevented any vessels carrying any contagious disease from anchoring within one mile of any landing place.<sup>158</sup> The statute required license to land from the Governor of the Colony, or in his absence, from one or more justices of the peace, with failure to obtain such a license before landing carrying a penalty of £100.<sup>159</sup> In the event that passengers or sailors came ashore, the Justice of the Peace was empowered to confine them "to any such Place, as to him shall seem convenient, for to prevent the spreading of any Infection."<sup>160</sup> Like the Massachusetts Bay act of 1699 (rejected by the Privy Council), such individuals would be subject to a further fine of £20.<sup>161</sup> The statute empowered the Naval Officer became to send medical personnel aboard any ship believed to have sickness on board to investigate.<sup>162</sup> The ship bore the responsibility of paying for any costs thus incurred.<sup>163</sup>

Smallpox in particular continued to be a problem for Rhode Island—and not just when imported from abroad. In 1721 the colony responded to an outbreak of smallpox in Boston by passing a statute that targeted goods and passengers from Massachusetts Bay.<sup>164</sup> All goods, wares, and merchandise originating in the diseased colony was to be transferred to islands offshore to be exposed to the elements for six to ten days, before being permitted to enter the colony.<sup>165</sup> Criminal penalties applied.<sup>166</sup> The law also required innkeepers to report ill lodgers, the justice of the peace being authorized to remove the sick "to any such Place as they shall think needful to prevent the spreading of

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<sup>158</sup> An Act, to Prevent the Spreading of Infectious Sickness, Feb. 27, 1711, reprinted in *THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719* 201–02 (1977). This act appears verbatim in 1719, again, without a terminal date. See *ACTS AND LAWS OF HIS MAJESTIES COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS IN AMERICA, 1719* 65 (Providence, Sydney Rider 1895), available at <http://archive.org/details/thecharteractsla00rhod>.

<sup>159</sup> *Id.* at 202.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 66, 202.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> An Act to Prevent the Small Pox Being Brought into this Colony from the Town of Boston, &c., Aug. 10, 1721, reprinted in *THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA* 119 (Newport, James Franklin 1730).

<sup>165</sup> *Id.* at 120.

<sup>166</sup> *Id.*

the same.”<sup>167</sup> In 1722 the General Assembly continued this act.<sup>168</sup>

Less than a decade later, the colony issued another statute to stem the spread of “Contagious Distempers”, preventing any vessels carrying smallpox, or originating in *any* region (including the Americas) in which contagious distemper “is brief or prevalent” to anchor their ship one mile from shore.<sup>169</sup> Any person coming ashore without explicit license from the Justice of the Peace could be returned to the vessel or “to any such Place, as to [the Justice of the Peace] shall seem convenient, for to prevent the spreading of any Infection.”<sup>170</sup> The person transferred would be required to reimburse the colony and to pay an additional £20 fine.<sup>171</sup> The statute authorized Naval Officers to board vessels and to assign a doctor to do the same in the course of medical investigations.<sup>172</sup> Unlike the earlier law, the 1730 act also made provision for individuals initially allowed into the colony, who later took ill, to be removed by the local Justice of the Peace “to such convenient Place, as shall to them appear to be necessary, to prevent the spreading thereof.”<sup>173</sup> The cost, again, would be borne by the individual who fell ill, unless such person was a slave, in which case the owner would pay.<sup>174</sup>

Despite these provisions, disease continued to plague Rhode Island generally and Newport in particular. The laws came to be seen as too intricate and convoluted. And their effectiveness left something to be desired: disease proved devastating for trade, deadly for the colonists, and expensive.<sup>175</sup>

Accordingly, in 1743 the colony repealed and re-issued substantially revised

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<sup>167</sup> *Id.* at 121–22.

<sup>168</sup> An Act for Continuing an Act, Entituled, An Act to prevent the Small Pox from being brought into this Colony from the Town of Boston, &c., May 1, 1722, reprinted in *THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA* 119 (Newport, James Franklin 1730).

<sup>169</sup> An Act to Prevent the Spreading of Infectious Sickness, reprinted in *THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA* 66–68 (Newport, James Franklin 1730).

<sup>170</sup> *Id.* at 67.

<sup>171</sup> *Id.* Alternatively, they could be put to work by the judge trying their case to pay off their debt.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 67–68.

<sup>174</sup> *Id.* at 68.

<sup>175</sup> An ACT to prevent the Spreading of the Small Pox and other contagious Sickness in this Colony, 1743, \*274, reprinted in *THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA* 273 (Newport, James Franklin 1730) (“Whereas the Small Pox and other Contagious Distempers have been several Times brought into this Colony, by Masters of Ships and other Vessels coming from infected Places; which has proved of pernicious Consequence to the Trade, and greatly endangered the Lives of many of the Inhabitants of this Colony, and occasioned a very great Expence to the Town of Newport in particular.”).

quarantine provisions.<sup>176</sup> No ship, from *any* port, with *any* person ill from any contagious disease would be allowed within one mile of shore.<sup>177</sup> The standard penalty of £100 for the master of the vessel and £20 for any individual breaking the quarantine applied.<sup>178</sup> The governor and justices of the peace had the authority to send medical personnel aboard any vessel to confirm the health of the passengers.<sup>179</sup> Town councils would secure the vessel and control all communications with shore, as well as direct the goods and merchandise to undergo 6-10 days of cleansing in the islands off Newport.<sup>180</sup> A full two-thirds of any penalty exacted for breaking quarantine would be given to any informers who alerted the authorities.<sup>181</sup> All costs associated with addressing sickness on board the vessel—including the cost of ammunition for guns firing at the vessel to prevent it from coming into the harbor—was to be paid for by the vessel itself.<sup>182</sup>

As for the health of the towns on shore, the owners of public inns became required to report on the health of their inhabitants, whom the justices of the peace could then remove. Furthermore, *any* individual ill with smallpox *could be taken from their own home* by a Justice of the Peace and placed in the local quarantine facility, “or any other convenient Place, in order to prevent the Spreading of the Infection, or otherwise at their Discretion, to place a Guard round the Dwelling House of the infected Person, as to them shall seem necessary.”<sup>183</sup> This measure effectively established the mechanisms to impose geographic quarantine within the colony. The restrictions went both ways: not only were guards to be placed to keep those within the dwellings from leaving, but, under the law, no person could enter such homes without a license from the town council or two or more Justices of the Peace.<sup>184</sup> A fine accompanied any infractions, with half to be paid to any informers.<sup>185</sup>

The Newport colony also evinced concern about the deliberate spread of disease, reserving the most serious punishments for such acts. It became a crime to willfully or purposely spread smallpox within the colony.<sup>186</sup> Anyone found guilty of the offense would be put to death, without the benefit of

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<sup>176</sup> *Id.* at 308. The Charter was printed to accompany the 1745 edition of the Acts and Laws with which it is here reproduced.

<sup>177</sup> *Id.* at 274–75.

<sup>178</sup> *Id.* at 275.

<sup>179</sup> *Id.* at 275.

<sup>180</sup> *Id.* at 276.

<sup>181</sup> *Id.* at 277.

<sup>182</sup> *Id.* at 278.

<sup>183</sup> *Id.* at 279.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 279–80.

<sup>186</sup> *Id.* at 280.

clergy.<sup>187</sup> Any *attempt* to spread disease would be countered by thirty-nine lashes, six months imprisonment, and hard labor.<sup>188</sup>

### *B. The Revolutionary War and its Aftermath*

Massachusetts Bay, New York, Pennsylvania, and Rhode Island were not unique in their introduction of quarantine provisions, despite the fact that many of the colonial quarantine initiatives were reactive, temporary, incomplete, and not particularly effective. In part this was because some of the diseases at which the measures were directed were simply endemic to the new world.<sup>189</sup>

Smallpox, in particular, continued to batter the colonies, becoming epidemic during the War of Independence, in the course of which more than 130,000 colonists died from the disease.<sup>190</sup> Historian Elizabeth Anne Fenn reports on the widespread belief at the time that the British deliberately engineered the outbreak.

Many on the American side believed that the expulsion of the black loyalists was a deliberate British attempt to spread smallpox to the continental forces, the militia, and the civilian population. Whig sympathizers had accused the British of utilizing biological warfare as early as the siege of Boston, and in Virginia it seemed that their fears were finally realized. On June 24, 1781, the Connecticut soldier Josiah Atkins stated his opinion that Cornwallis had 'inoculated 4 or 500 [blacks] in order to spread *smallpox* thro' the country, & sent them out for that purpose.'...The eviction of pox-covered black loyalists from Yorktown in October drew similar charges. James Thacher, a surgeon's mate in the Continental army, believed the terrified former slaves had "probably" been sent to the American lines "for the purpose of communicating the infection to our army."<sup>191</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* These provisions raise question about the extent to which the criminal spread of disease, such as that common with the *graisseurs* in Europe, who targeted wealthy individuals by spreading disease on their doorways, subsequently robbing the homes, may have been an issue in early colonial America. The language of the statute suggests more than just the negligent spread of disease that might be entailed in generally exposing others to such sickness. Instead, it must be willfully or purposely spread, with wicked intent to transfer the disease to others. Without further historical support, however, it is difficult to assess the contours of this concern.

<sup>189</sup> In 1721, for instance, more than half of those living in Boston contracted smallpox, with hundreds dying of the disease on a cyclical basis. Peabody, *supra* note 48, at 44.

<sup>190</sup> ELIZABETH ANNE FENN, *POX AMERICANA: THE GREAT SMALLPOX EPIDEMIC OF 1775-82* 273 (2001). In autumn 1777, Valley Forge became the site for general inoculation. FRANCIS RANDOLPH PACKARD, *THE HISTORY OF MEDICINE IN THE UNITED STATES* 264, 283, 315 (1901).

<sup>191</sup> FENN, *supra* note 190, at 131.

The charge that the British were using Smallpox as a weapon echoes in contemporary accounts. The *Pennsylvania Gazette*, for instance, wrote, "Lord Cornwallis's attempt to spread the smallpox among the inhabitants in the vicinity of York, as been reduced to a certainty, and must render him contemptible in the eyes of every civilized nation."<sup>192</sup> Benjamin Franklin referenced the same in his *Retort Curteous*.<sup>193</sup> Fenn writes, "It would be easy to dismiss these accusations as so much American hyperbole. But evidence indicates that in fact, the British did exactly what the Americans said they did."<sup>194</sup> Robert Donkin, for instance, a British officer in New York, explicitly directed the use of Smallpox as a weapon, writing "Dip arrows in matter of smallpox and twang them at the American rebels, in order to inoculate them; this would sooner disband thee stubborn, ignorant, enthusiastic savages, than any other compulsive measures. Such is their dread and fear of that disorder!"<sup>195</sup> Later in the war, General Alexander Leslie sent a letter to Lord Cornwallis, indicating his plan to distribute sick soldiers throughout the "Rebell Plantations."<sup>196</sup>

The colonies responded by issuing public statements meant to shame Britain in the eyes of other nations, and by introducing new measures to take advantage of what little was scientifically known about the disease. In Massachusetts, for instance, laws were passed by the legislature to empower justices of the court of general sessions in any county to allow for inoculating hospitals to be established.<sup>197</sup> A special statute focused on Boston: after a certain period, those who had not contracted the disease were forbidden to enter, until Boston was declared free from the disease.<sup>198</sup>

In Rhode-Island a similar statute permitted for widespread inoculation for smallpox.<sup>199</sup> The disease was decimating the Revolutionary Army at a critical

<sup>192</sup> *Id.* (quoting the *Pennsylvania Gazette*).

<sup>193</sup> *Id.*; See also Benjamin Franklin, *The Retort Courteous*, in 10 THE WRITINGS OF BENJAMIN FRANKLIN, at 111 (Albert Henry Smyth, ed., 1907), available at <http://archive.org/details/writingsofbenjam10franuoft>.

<sup>194</sup> FENN, *supra* note 1900, at 132.

<sup>195</sup> *Id.* at 132.

<sup>196</sup> *Id.* at 132.

<sup>197</sup> Act of July 9, 1776, ch. 7, available at

<http://archives.lib.state.ma.us/actsResolves/1776/1776acts0007.pdf>.

<sup>198</sup> Act of July 16, 1776, ch. 8, available at

<http://archives.lib.state.ma.us/actsResolves/1776/1776acts0008.pdf>

<sup>199</sup> An Act permitting Inoculation for the Small-Pox to be practiced in this Colony, Colony of Rhode-Island &c. in General Assembly, June Session, 1776, available at

[http://iiiiprxy.library.miami.edu:2125/WebZ/FSPage?pagetype=return\\_frameset:sessionid=fsap6-41408-hbpa3cu7-](http://iiiiprxy.library.miami.edu:2125/WebZ/FSPage?pagetype=return_frameset:sessionid=fsap6-41408-hbpa3cu7-)

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time.<sup>200</sup> The new statute authorized the erection of one hospital in each country in the colony. Guards would be placed two hundred yards outside such hospitals in every direction to prevent anyone from entering or leaving hospital grounds.<sup>201</sup> Once admitted for inoculation, criminal penalties applied for leaving without a doctor-issued certificate of health. The physicians themselves would be held responsible for anyone leaving with a certificate, who subsequently spread smallpox to others (either by way of personal contact or through his or her belongings).<sup>202</sup> Every item of clothing, linen, or sheets removed from the hospital also had to be accompanied by a certificate.<sup>203</sup> The statute gave particularly broad authority to Towns establishing such hospitals.<sup>204</sup> Any measure thus passed would have the same force and validity as if it had been enacted by the General Assembly.<sup>205</sup>

Concern about the devastating effects of disease continued well beyond the Revolutionary War. Major port cities, such as Baltimore, Boston, New York, and Philadelphia warranted special attention. The states in which these ports were located devolved broad authorities down to a local level, giving effect to two major legal frameworks: quarantine and sanitation. In both spheres public health trumped commercial considerations. States and local governments became empowered to exclude all people and goods from elsewhere in the United States, solely on the grounds of public health.

Closer examination of the four states governing the largest ports on the Eastern seaboard (Maryland, Massachusetts, New York, and Pennsylvania), coupled with Connecticut's somewhat unique approach, provide an example of both the depth and breadth of the newly-minted country's approach to disease. They also illustrate the degree to which quarantine law lay at the heart of state police powers.

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (“[A]ny Town which shall establish an Hospital as aforesaid, be, and hereby is empowered, to make such further Regulations, to prevent communicating the Infection from the Hospital in such Town, and to lay such Fines and Penalties upon the Offenders, as they shall think proper.”)

<sup>205</sup> *Id.*



## i. Maryland

Following the Revolution, states transferred colonial regulations governing quarantine into state law – some going so far as to enshrine the authorities into their state constitutions. Maryland proves a good example. The colony, which had introduced quarantine regulations in 1766, continued its measures in 1769, 1773, 1777, 1784, 1785, 1792, and 1799.<sup>206</sup> Maryland also wrote quarantine authorities directly into its state Constitution.<sup>207</sup>

Even with the carry-over, concern quickly arose as to whether its quarantine provisions were sufficient to meet any exigency that might arise.<sup>208</sup> Subsequent legislation thus expanded the governor's authority: from 1793 the governor's powers in regard to any malignant contagious disease included the authority not just to stop vessels, goods, or individuals from coming into port or reaching shore, but to prevent "all intercourse or communication", over land or water, between Maryland and *any* region where such sickness was present—*either in the United States or overseas*.<sup>209</sup> This effectively gave the governor the power to cut off relations with other states and localities. Quarantine was not just outside the federal domain. It was so decidedly local that it overrode national interests.

Even as it established its broad authority to isolate the state from other cities and states, Maryland made arrangements for the appointment of a local health officer in Baltimore.<sup>210</sup> The officer could impose quarantine of people and goods 10-20 days, with additional extensions of up to 10 days each.<sup>211</sup> The penalty for masters violating quarantine was set at \$1000, with any effort to conceal sickness on board the vessel set at \$300.<sup>212</sup> The statute further authorized the creation of a hospital for individuals placed in quarantine.<sup>213</sup>

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<sup>206</sup> The original act, Act of Nov. 1766, ch. 25, reprinted in 1 THE LAWS OF MARYLAND, *supra* note 60, at 936, was to continue in force for three years. It was renewed by the Act of Nov. 1769, ch. 4, reprinted in 1 THE LAWS OF MARYLAND, *supra* note 60, at 951; continued again in Act of June 1773, ch. 2, reprinted in 1 THE LAWS OF MARYLAND, *supra* note 60, at 978; continued for seven years by the Act of Feb. 1777, ch. 17, reprinted in 1 THE LAWS OF MARYLAND, *supra* note 60, at 1036; continued until the end of the next session by the Act of Nov. 1784, ch. 83, reprinted in 1 THE LAWS OF MARYLAND, *supra* note 60, at 1337; continued for seven years by the Act of Nov. 1785, ch. 77, reprinted in 2 THE LAWS OF MARYLAND, *supra* note 60, at 1390; and again continued to Oct. 30, 1799 by the Act of Nov. 1792, ch. 77, reprinted in 2 THE LAWS OF MARYLAND, *supra* note 60, at 1712.

<sup>207</sup> Md. Const. art. 33 (amended 1990).

<sup>208</sup> Act of Nov. 1793, ch. 43, reprinted in 2 THE LAWS OF MARYLAND, *supra* note 60, at 1728.

<sup>209</sup> *Id.*

<sup>210</sup> Act of Nov. 1793, ch. 56, reprinted in 2 THE LAWS OF MARYLAND, *supra* note 60, at 1750.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

Local ordinances rounded out the state authorities. Thus, the City of Baltimore passed measures in 1797, 1798, and 1800, making extensive provision for both the authority to quarantine people and goods, as well as to establish a lazaretto to perfect the same.<sup>214</sup>

ii. New York

New York followed a similar pattern in responding to the threat posed by disease. Like Maryland, the state legislature incorporated colonial provisions directly into law. It then expanded its authorities, giving rise to two bodies law: an increasingly robust quarantine establishment, and an ever more stringent sanitary regime. Even as the two sets of authorities evolved within the broad limits set by the state, each remained decidedly local in character. For the city of New York, as for other port cities subject to significant human and commercial traffic, the state legislature passed special measures.

Following the war, in 1784 the state legislature re-enacted and expanded colonial quarantine measures.<sup>215</sup> Quarantine was to be performed wherever, and in whatever manner, the Governor directed.<sup>216</sup> The governor became empowered to appoint a physician to inspect all vessels suspected of having disease on board.<sup>217</sup> Any attempt to interfere with the physician in the

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<sup>214</sup> See e.g., An Ordinance to preserve the health of the city, and to prevent the introduction of pestilential and other infectious diseases into the same, Apr. 7, 1797 (repealed by an Ordinance passed Feb. 27, 1799); A Supplement to the ordinance, entitled "An ordinance to preserve the health of the city, and to prevent the introduction of the pestilential and other infectious diseases, into the same", July 17, 1797 (repealed by an Ordinance passed Feb. 27, 1799); A Further Supplement to the ordinance entitled "An ordinance to preserve the health of the city and to prevent the introduction of the pestilential and other infectious diseases into the same", Sept. 4, 1797 (repealed by an Ordinance passed Feb. 27, 1799); A Further additional Supplement to the ordinance, entitled "An ordinance to preserve the health of the city and to prevent the introduction of the pestilential and other infectious diseases into the same", Feb. 28, 1798, (repealed by an Ordinance passed Feb. 27, 1799); A Supplement to the ordinance entitled "An ordinance to preserve the health of the city and to prevent the introduction of the pestilential and other infectious diseases into the same", July 15, 1800 (repealed by an Ordinance passed Mar. 20, 1801), reprinted in *Ordinances of the Corporation of the City of Baltimore, with the Act of Incorporation and Supplement thereto prefixed*, 1801, 300-317.

<sup>215</sup> An Act to prevent the bringing in and spreading of infectious Distempers in this State, Passed May 4, 1784. *Laws of the State of New-York, Seventh Session, 1784*, ch. LVII, at 82-83; See also 1 GREENLEAF'S LAWS OF NEW YORK 117.

<sup>216</sup> *Id.* The new statute placed a £200 penalty on any masters or commanders of ships failing to accurately report any disease on board.

<sup>217</sup> *Id.* Although American currency can be traced back to before the Revolutionary War, the U.S. dollar as a unit of currency was not formally approved by Congress until a resolution of Aug. 8, 1786. See RICHARD DOTY, *AMERICA'S MONEY, AMERICA'S STORY: A COMPREHENSIVE CHRONICLE OF*

exercise of his duties carried a penalty.<sup>218</sup> The statute authorized the governor to take over Nutten Island—also known as “Governor’s Island”—for quarantine purposes.<sup>219</sup>

The end of the 18<sup>th</sup> century saw a sudden upswing in attention to disease. In 1794 the New York legislature passed a measure giving the Governor the authority to build a hospital on the island.<sup>220</sup> Then, starting in 1796 under John Jay’s governorship, the legislature passed six laws in six years, each focused on stemming the spread of disease. These measures, local in nature, steadily expanded the coercive nature of state authorities and introduced further innovations related to geographic, seasonal, and merchandise-related quarantine.

The series began in 1796 with legislation that repealed the earlier act.<sup>221</sup> The new statute created a more robust regime, providing for the appointment of a health officer and health commissioners for New York City, authorizing construction of a lazaretto, enabling the governor and health officers to enact maritime and domestic quarantine, and eliminating nuisances.<sup>222</sup> The law required that all vessels carrying forty or more passengers, having on board any person with a fever, arriving from a place where sickness where an infectious disease at the time of departure prevailed, or having lost anyone en route due to sickness, to undergo quarantine.<sup>223</sup> The statute also gave the governor the authority to designate specific regions, such that any vessels arriving from these areas would automatically undergo quarantine until cleared by the health officer for entry.<sup>224</sup>

Like Maryland, New York gave its governor the power to cut off commerce and travel connecting the state with the rest of the Union—again emphasizing the local character of quarantine.<sup>225</sup> Full authority was given to the health officer to direct where quarantine would be performed, who would undergo quarantine, and what articles would be quarantined, cleaned, or destroyed.<sup>226</sup>

AMERICAN NUMISMATIC HISTORY 21-66 (1998).

<sup>218</sup> *Id.*

<sup>219</sup> New York State Supreme Court Judge Birdseye, in 1856, later refers to the 1784 act as “the germ” of New York’s quarantine system.

<sup>220</sup> Act of Mar. 27, 1794, amending Act of 1784, 3 GREENLEAF’S LAWS OF NEW YORK 146.

<sup>221</sup> An Act to Prevent the Bringing in and Spreading of Infectious Diseases in this State, April 1, 1796, Laws of the State of New-York, 19<sup>th</sup> Session, Chapter 38, 309 (repealing the Act of 1784); See also 3 GREENLEAF’S LAWS OF NEW YORK 305.

<sup>222</sup> The statute gave the governor the authority to appoint a practicing physician to serve as health officer for the city of New York. Act of April 1, 1796, ch. 38, 1796 N.Y. Laws 305.

<sup>223</sup> *Id.* at 306.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 306–07.

Failure to answer the health officer's inquiries honestly amounted to perjury.<sup>227</sup> The 1796 statute also created a health surveillance system: it required physicians to report any fevered patient considered to be infectious; a penalty of £50 accompanied each infraction.<sup>228</sup> The statute also gave broad powers to the Mayor, Aldermen, and Commonalty of the City of New York, convened in common council, to introduce sanitary provisions to alter any lots within the city, to clean streets, alleys, passages, yards, cellars, vaults, and other places, and to regulate a range of industries giving rise to sanitary concerns (e.g., glue, leather, soap, candles, and the like).<sup>229</sup> Owners and businesses would be compensated for any losses; failure to reach agreement would result in the empanelment of a jury, within three weeks, to set the amount.<sup>230</sup>

The year after passing this broad quarantine act, the legislature amended it to restrict the number of health commissioners from seven to three.<sup>231</sup> Quarantine would henceforward continue "for as many days as the commissioners shall deem necessary."<sup>232</sup> It also established specific areas within which certain industries, involving starching, fermenting, melting fat or tallow, boiling soap, or curing hides, would not be allowed.<sup>233</sup> No vessel arriving in the port of New York, which would otherwise be subject to quarantine, could be exempted by reason of having previously entered any other port in the United States, unless such ship had remained in port for certain number of days.<sup>234</sup>

In 1798, the state passed a new omnibus law, expanding the commissioners' authority and appointing a physician to serve as health officer for the city of New York.<sup>235</sup> The statute dealt with urban nuisance and maritime quarantine, even as it explicitly reserved traditional remedies against nuisance under common law.<sup>236</sup> To the Governor of the State or the Mayor of New York went further powers to issue orders relating to domestic quarantine.<sup>237</sup> The act also provided for the construction of a lazaretto on

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<sup>227</sup> *Id.* at 307.

<sup>228</sup> *Id.* at 308.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 309.

<sup>231</sup> Act of Feb. 10, 1797, ch. 16, 1797 N.Y. Laws 367.

<sup>232</sup> *Id.* at 368.

<sup>233</sup> *Id.* at 369.

<sup>234</sup> *Id.* at 368.

<sup>235</sup> Act of Mar. 30, 1798, ch. 65, 1798 N.Y. Laws 227.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 230–31. Violations of the statute would be treated as a misdemeanor, with fines attached.

governor's island.<sup>238</sup> Any persons or things within the city of New York, infected by or tainted with "pestilential matter", could be sent by the health commissioners to the lazaretto.<sup>239</sup> In 1799, the legislature designated Staten Island—six miles away—to be home to anchorage grounds and a new Marine Hospital.<sup>240</sup> To the health officer was conveyed full authority to confine and release individuals from the medical facility.<sup>241</sup> By 1801 the quarantine establishment was completed. It remained there for 60 years.<sup>242</sup>

New York law not only allowed the governor to discriminate against persons and goods from other countries or, indeed, elsewhere in the U.S., but it created an annual schedule for doing so. The 1799 statute introduced graduated geographic quarantine with seasonal constraints: all vessels arriving from the East or West Indies, Africa, the Mediterranean, the Bermuda Islands, or any other place in the south Seas *or south of Georgia*, between the end of May and the end of October, would automatically be subject to quarantine and examination.<sup>243</sup> All vessels arriving south of Sandy Hook from any other domestic port would be subject to quarantine from the first of June until the first of October.<sup>244</sup>

In 1800 the New York legislature passed yet another measure, which directly targeted commercial goods.<sup>245</sup> The statute straight out banned certain items (i.e., cotton, hides, coffee, or peltry) from being brought into the city of New York between June and November.<sup>246</sup> Any goods sent into the city in violation of the statute could be seized by the health commissioners, with the proceeds going to the benefit of the health office.<sup>247</sup> Indeed, all fines paid under the legislation would be used to offset the health office's expenses.<sup>248</sup>

Finally, in 1801, the legislature passed provisions requiring that the health officer reside at Staten Island, the resident physician in New York City, and the other commissioner at or near the Marine Hospital or in the city.<sup>249</sup> That act effectively completed New York's quarantine system, which remained in place,

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<sup>238</sup> *Id.* at 231.

<sup>239</sup> *Id.* at 232. Anyone so removed would be liable for their own board and medication.

<sup>240</sup> Act of Feb. 25, 1799, ch. 20, 1799 N.Y. Laws 319.

<sup>241</sup> *Id.* at 321.

<sup>242</sup> Quarantine at New York, *HARPER'S WEEKLY*, Sept. 6, 1879, at 706 (stating that the quarantine station was later moved to Swinburne Island (1860), and then to Hoffman Island (1873)).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Act of Apr. 7, 1800, ch. 120, 1800 N.Y. Laws 579, at 580.

<sup>246</sup> *Id.* at 580.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 581.

<sup>249</sup> Act of Mar. 30, 1801, ch. 86, 1801 N.Y. Laws 176.

with minor amendments, until 1850.<sup>250</sup>

Having established broad state power, the legislature then began to push decision-making authority down to a local level.<sup>251</sup> Commercial considerations paled in the face of public health. Section 3 of the 1850 act, for instance, gave local boards the power “To regulate and prohibit or prevent all communication or intercourse by and with all houses, tenements and places, and the persons occupying the same, in which there shall be any person who shall have been exposed to any infectious or contagious disease.”<sup>252</sup>

From a constitutional perspective, the fact that state measures should so directly impact inter-state commerce was of little consequence. Justice Grier explained in 1854 that internal police powers, which included every law introduced for the preservation of public health, “are not surrendered by the states, or restrained by the Constitution of the United States, and that consequently, in relation to these, the authority of a state is complete, unqualified, and conclusive.”<sup>253</sup> No federal regulation could “supersede or restrain their operations, on any ground of prerogative or supremacy.”<sup>254</sup> And quarantine, whatever its impact on commerce, lay at the core of state police power:

[Q]uarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society....All these things are done not from any power which the states assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservations of health, prevention of crime, and protection of the public welfare must of necessity have full and free operation according to the exigency which requires their interference.”<sup>255</sup>

The exigencies of the social compact required that such state laws “be

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<sup>250</sup> See Act of Apr. 8, 1811, ch. 175, 1811 N.Y. Laws 246. It was later revised and reenacted. See subsequent measures: Act re: Quarantine in New York Laws of 1811, chapter 175; amended by Act of Mar. 26, 1813, ch. 202, 1813 N.Y. Law 334; amended by Act of Apr. 14, 1820, ch. 229 1820 N.Y. Laws 247; amended by Act of Mar. 21, ch. 71, 1823 N.Y. Laws 64, repealed by Act of Apr. 10, 1850, ch. 324, 1850 N.Y. Laws 690.

<sup>251</sup> Act of Apr. 10, 1850, ch. 324, 1850 N.Y. Laws 690.

<sup>252</sup> *Id.* at 691.

<sup>253</sup> *Thurlow v. Com. Of Mass.*, 46 U.S. 504, 631 (18847) (Grier, J., concurring).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

executed before and above all others.”<sup>256</sup> Thomas Cooley later explained, “Numerous ...illustrations might be given of the power in the States to make regulations affecting commerce, and which are sustainable as regulations of police. Among these,” he continued, “quarantine regulations and health laws of every description will readily suggest themselves, and these are or may be sometimes carried to the extent of ordering the destruction of private property when infected with disease or otherwise dangerous.”<sup>257</sup> Such regulations, at least with regard to Commerce Clause considerations, “generally passed unchallenged.”<sup>258</sup>

Where limits did apply, however, was in the local execution of state provisions. For while the state authorities were broad, they constrained the extent to which local entities—operating on the basis of enumerated authorities—could act. One of the most important New York cases on this point came in 1856, when Judge Birdseye entertained a petition for a writ of *habeas corpus* from an individual restrained under a local health regulation.<sup>259</sup> While the ensuing decision limited the local exercise of public health law, it did not question the state’s authority to legislate in this realm; nor did it entertain the possibility of federal preemption, despite open acknowledgment of the effect of such provisions on commerce.

The facts of the case proceeded thus: the town of Castleton, having established a *cordon sanitaire*, forbade all persons from passing from within the enclosure to any other part of the town.<sup>260</sup> One Peter Roff had apparently knowingly and willfully violated the relevant regulation. Facing criminal charges and lacking sufficient funds to post bail, Roff was jailed and filed a writ of habeas corpus to challenge his imprisonment. Judge Birdseye examined the relevant provisions of the revised statutes, which provided that any two Justices of the Peace could remove individuals to whatever place was deemed appropriate for the preservation of the public health.<sup>261</sup> Birdseye found that while the powers granted to the local authorities were constitutional, the manner in which the board had exercised its authorities brought it into conflict with the state, thus voiding the local regulation.<sup>262</sup> Specifically, the prohibition on passing from the quarantine enclosure into other parts of the town proved

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<sup>256</sup> *Id.*

<sup>257</sup> THOMAS M. COOLEY, A TREATISE OF THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 722 (Boston; Little, Brown, and Co. 1883).

<sup>258</sup> *Id.*

<sup>259</sup> *People v. Roff*, N.Y. TIMES, Aug. 23, 1856 (N.Y. Sup. Ct. Aug. 16, 1856), available at <http://query.nytimes.com/gst/abstract.html?res=F30913F8385D147493C1AB1783D85F428584F9>.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

too sweeping: north and east of Castleton lay the main channel of the bay and harbor of New York, making it hard to ascertain what portion of the lands and waters covering them, between the shore and the middle of the channel, fell within the enclosure. Ships thus directed by the state officers to proceed through this channel would be acting in accordance with state measures, but fall afoul of local regulations.<sup>263</sup>

Birdseye dwelled on the indefinite nature of “the public good” as a rationale for such severe measures—noting that allowing the definition to rest on the shoulders of a handful of people in every town risked bringing state public health mechanisms—and, indeed, commerce—to a standstill.<sup>264</sup> Those working in the hospital or reporting to the quarantine officers upon arrival would be prevented from entering Castleton.<sup>265</sup> Yet the state statute required their movement, in order to fulfill their obligations under the law.<sup>266</sup> The problem was also one of precedent:

“And where shall this state of things stop? Clearly, if it may exist in Castleton, it may in every town between that and Canada. The result shows the entire absurdity of the attempt to assume such powers. It shows that the decision of the proper officers in Quarantine is final and conclusive.”<sup>267</sup>

Birdseye then turned to rights considerations—not on federal commerce clause authorities—as a limit on the exercise of quarantine itself:

[The local] regulation sentences all persons, well or sick, whether exposed to infection or not, to an unlimited imprisonment. That imprisonment, too, it may be added, is not such a one as any quarantine law can adjudge to be valid. For it is one where the restraining power does not take, and cannot by possibility take, any measure whatever either to support the life or improve the health of the party confined, or to free him from infection; that at some future period he may again enjoy the privileges of a member of society.<sup>268</sup>

The local approach stood in stark contrast to that adopted by the state, which had demonstrated a commitment to the comfort of patients and attention “to their prompt restoration to sound health and to their duties in society.”<sup>269</sup> The local approach was “at war with the whole policy of the State from its foundation.”<sup>270</sup> To sustain the assumptions of the local ordinances

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*



would be “to create in every town in the commonwealth an irresponsible tribunal, whose only rule of action shall be what *in their opinion* ‘the public good requires.’”<sup>271</sup> Birdseye explained,

The public health is doubtless an interest of great delicacy and importance. Whatever power is in fact necessary to preserve it, will be cheerfully conferred by the Legislature, and carried into full effect by the Courts. But it can never be permitted that, even for the sake of the public health, any local, inferior board or tribunal shall repeal statutes, suspend the operation of the Constitution and infringe all the natural rights of the citizen.<sup>272</sup>

Limits existed in the local exercise of quarantine law; but those very limits were established by the states, thus underscoring the extent of state sovereignty in this public health domain.

### iii. Massachusetts

A decade after the Constitutional Convention, Massachusetts introduced legislation to provide for maritime quarantine and the domestic removal and isolation of any sick persons by the Selectmen of the town.<sup>273</sup> Removal had to be given effect in the “best way” possible, “for the preservation of the inhabitants, by removing such sick or infected person or persons, and placing him or them in a separate house or houses, and by providing nurses, attendance, and other assistance and necessaries for them.”<sup>274</sup>

Like Maryland and New York, Massachusetts drew a line between the state and the rest of the country. Towns could require out-of-state visitors coming from infected regions to report to the Selectmen within two hours of their arrival, under threat of a \$100 fine.<sup>275</sup> Justices of the Peace could return visitors to the state whence they arrived, with a \$400 penalty in the event that the individual returned without permission.<sup>276</sup> Any inhabitant who entertained a visitor for more than two hours after the warrant to depart had been issued would be fined \$200.<sup>277</sup> Massachusetts gave similar powers to local authorities to prevent any diseased goods from entering, or remaining within, local bounds.<sup>278</sup> Inter-state commerce was not a part of the legislature’s calculus.<sup>279</sup>

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Act of June 22, 1797, ch. 16, 1797 Mass. Acts 365, available at <http://archives.lib.state.ma.us/actsResolves/1797/1797acts0016.pdf>.

<sup>274</sup> *Id.* at 356–57.

<sup>275</sup> *Id.* at 357.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 357–58.

Massachusetts emphasized the importance of local authorities with regard to quarantine and, like Maryland and New York, passed special measures for its largest port city. The newly-formed board of health in Boston was to inquire into all nuisances “and such sources of filth as may be injurious to the health of the inhabitants of said town.”<sup>280</sup> After obtaining a warrant, members of the board could forcibly enter dwellings to carry out their duties.<sup>281</sup> The manner of quarantine was left entirely in the board’s hands.<sup>282</sup> Criminal penalties for failing to abide by the board’s determinations applied.<sup>283</sup> The statute further required that keepers of lodging houses report sick travelers to the Board of Health within twelve hours of them falling ill.<sup>284</sup>

While Boston warranted special attention, Massachusetts extended similar authorities to Salem.<sup>285</sup> Soon powers of both maritime and domestic quarantine extended to the selectmen of other seaports and towns.<sup>286</sup> Similar penalties for refusing to acknowledge local ordinances applied.<sup>287</sup>

#### iv. Pennsylvania

Pennsylvania took a course similar to New York. Most of its measures contained sunset clauses, but more often than not, the state legislature simply reintroduced—and expanded—the relevant authorities.<sup>288</sup> By 1799 the state had created a detailed quarantine regime and sanitary framework, targeted at preventing smallpox and yellow fever from taking hold.<sup>289</sup> Like Massachusetts, the state created a robust board of health, as well as health commissioners and

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<sup>279</sup> *See id.*

<sup>280</sup> Act of June 20, 1799, ch. 10, 1799 Mass. Acts 327, *available at* <http://archives.lib.state.ma.us/actsResolves/1799/1799acts0010.pdf>

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at §8.

<sup>283</sup> *See id.* at 333 (stating that the penalty was capped at a \$500 fine and/or six months’ imprisonment).

<sup>284</sup> *Id.* at §11.

<sup>285</sup> Act of June 16, 1800, ch. 19, 1800 Mass. Acts 27 (Empowering Salem to construct a board of health and to authorize commissioners to remove and prevent nuisances), *available at* <http://archives.lib.state.ma.us/actsResolves/1800/1800acts0019.pdf>.

<sup>286</sup> Act of Feb. 26, 1800, reprinted in *The Perpetual Laws of the Commonwealth of Massachusetts, from the Establishment of its of its Constitution in the year 1780, to the end of the year 100*, Vol. III, containing the Laws from January 1799 to November 1800, March 1801, at 70–71.

<sup>287</sup> *Id.* § 2.

<sup>288</sup> *See, e.g.*, Act of Apr. 22, 1794, ch. CCXXXIX; 1794 Pa. Laws 553; Act of Apr. 4, 1796, ch. XXXVII; 1796 Laws 70; Act of Apr. 4, 1798; ch. CXXLI, 1798 Pa. Laws 70; Act of Apr. 11 1799, ch. CCXXVIII; 1799 Pa. Laws 489 (to remain in force for three years).

<sup>289</sup> 1799 Pa. Laws 489.

a quarantine master.<sup>290</sup> The board was to govern the marine hospital and to create a new lazaretto for the performance of quarantine.<sup>291</sup>

Like the city of New York, Philadelphia created a temporal maritime regime, requiring every ship arriving between April and October to submit to examination.<sup>292</sup> All vessels carrying contagious disease became required to obtain a certificate of health before passengers and goods could come ashore.<sup>293</sup> To the physician and the quarantine master were given the broad authority to detain and purify both passengers and cargo.<sup>294</sup> Far from avoiding any impact on inter-state commerce, to the Board of Health was given further authority to make regulations preventing the transport of specified commercial goods into the city of Philadelphia—regardless of their origin.<sup>295</sup>

Quite apart from the port city's regime, the state itself maintained a geographic maritime quarantine, requiring all vessels arriving from specified places, between mid-May and early October, to discharge their cargoes and ballast, together with the bedding and clothing, to be cleaned and purified.<sup>296</sup> In parallel provisions, Pennsylvania did not distinguish between foreign and domestic travelers and goods. Between specified dates, *all* persons, goods, merchandise, bedding, and clothing entering the state was to undergo at least 30 days quarantine, under penalty of \$500 and forfeiture of goods and merchandise, with half of the resources thus obtained to be given to the informer.<sup>297</sup>

Pennsylvania, again like New York, instituted a public health surveillance system, further requiring the board of health to inquire into any outbreaks of contagious disease in the United States, or on the continent of America, and to report their findings to the Mayor of Philadelphia.<sup>298</sup>

Gone was William Penn's more measured approach. Citizens could be shut up in their own homes, refused any visitors, and removed at the board of health's discretion.<sup>299</sup> Substantial criminal penalties applied.<sup>300</sup> All fines

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<sup>290</sup> *Id.* at §1.

<sup>291</sup> *Id.* at §2.

<sup>292</sup> *Id.* at §3.

<sup>293</sup> *Id.* at §4.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at §§10–11.

<sup>296</sup> *Id.* at §5.

<sup>297</sup> *Id.* at §§6–7.

<sup>298</sup> *Id.* at §18.

<sup>299</sup> *Id.* at §19. (“[A]ll communication with the infected house or family, except by means of Physicians, nurses or messengers to convey the necessary advise [sic.], medicines and provisions to the afflicted, accordingly as the circumstances of the case shall render the one or the other mode, in their judgment, more conducive to the public good with the least private injury.”)

thereby obtained would be used to finance the board of health.<sup>301</sup> The statute explicitly addressed the potential conflict of interest that might arise: no citizen would be disqualified from sitting as judge or juror, or from giving testimony, in cases that might arise under the act “by reason of his, her or their common interest in the appropriation of the sum or penalties imposed for such offence.”<sup>302</sup> Pennsylvania also established sanitary provisions, dealing with “all nuisances which may have a tendency [in the opinion of the board of health] to endanger the health of the citizens.”<sup>303</sup> The statute provided for the construction of a new lazaretto, which would be supported by a new tax.<sup>304</sup>

#### v. Connecticut

Some state measures went well beyond the quarantine laws introduced in Maryland, New York, Massachusetts, and Pennsylvania. Connecticut provides a good example and merits brief discussion, if for no other reason than it illustrates the seriousness with which the new states treated the threat of disease.

In 1711, for instance, the state legislature passed *An Act Providing in Case of Sickness*, empowering the Selectmen of any town, with a warrant from two justices of the peace, to remove sick or infected persons.<sup>305</sup> The statute applied to any person who “may justly be suspected to have taken the Infection” of Smallpox or any other contagious sickness, where such infection “may probably be communicated to others.”<sup>306</sup> Where suitable “nurses or tenders” might not be present, a warrant could issue from the infected town to *other* towns in Connecticut, requiring them to provide the necessary assistance.<sup>307</sup> Refusal to nurse individuals back to health carried a fine.<sup>308</sup>

Whenever any individual within the state became infected with smallpox, or any other contagious disease, it became the duty of the head of the family, or master of the vessel, to mount a white cloth signaling the presence of disease.<sup>309</sup> Such signal could only be removed by a Justice of the Peace or a

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<sup>300</sup> *Id.* at § 20 (stating that a failure to abide by regulations set by the Board of Health carried a \$500 fine and a term of imprisonment at hard labor between one and five years).

<sup>301</sup> *Id.* at §20.

<sup>302</sup> *Id.* at §21.

<sup>303</sup> *Id.* at §23.

<sup>304</sup> *Id.* at §§ 2, 24–25.

<sup>305</sup> AN ACT PROVIDING IN CASE OF SICKNESS, 1784, ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA, 227-31. (New London, Timothy Green, 1784).

<sup>306</sup> *Id.* at 227.

<sup>307</sup> *Id.* at 228.

<sup>308</sup> *Id.* at 229.

<sup>309</sup> *Id.*

Selectmen of the town.<sup>310</sup> Domestic pets received their fair share of attention: the state went so far as to *require*, wherever infectious disease raged, that “all owners of Dogs shall destroy their Dogs or cause them to be killed; and in Neglect thereof, it shall be lawful for any person to kill the said Dogs.”<sup>311</sup> Any person bringing goods, wares, or merchandise infected with disease into any town in Connecticut, either by land or water, would be fined.<sup>312</sup> It fell entirely to the Selectmen to determine the length and manner of airing all commercial items.<sup>313</sup>

The 1794 act also criminalized the direct or indirect transfer of Smallpox between individuals, even as it shifted the burden of proof to the individual thus accused.<sup>314</sup> The statute allowed, however, for the accused to counter the accusation by swearing to the court that he or she did not voluntarily, directly, or indirectly give or receive the infection.<sup>315</sup> Smallpox inoculation required a certificate from the civil authority—but such programs first required a two-thirds vote of the selectmen to begin.<sup>316</sup>

In summary, while some states, like Connecticut, took public health measures to an extreme, the salient point is that following the Revolution, public health was firmly in the hands of state legislatures. Like Maryland, New York, Massachusetts, Pennsylvania, and Connecticut, Delaware,<sup>317</sup> South Carolina,<sup>318</sup> Rhode Island, and Virginia<sup>319</sup> introduced quarantine laws. The state legislatures, in turn, delegated considerable authorities to the local entities, in whose hands lay not just the decision to quarantine individuals entering their bounds (either by land or sea), but the contours of *how* to give effect to quarantine. While some state provisions limited the extent of criminal culpability for breaking quarantine, they almost universally left the prosecution and operation of quarantine in the hands of local towns and municipalities. Local authorities were so firmly in the lead, that many states gave cities and towns the authority to cut off all communication and commerce

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<sup>310</sup> *Id.* at 229.

<sup>311</sup> *Id.* at 229.

<sup>312</sup> *Id.* at 230.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 231. (“[W]henever any Person shall be brought to Trial for Breach of this Act, in communicating or receiving the Small-Pox, aiding or assisting therein, such Person shall be deemed and adjudged guilty thereof, although the complainant shall not be able to produce any other Proof than to render it probable.”).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 230.

<sup>317</sup> *See, e.g.*, 2 Del. Laws 136 (1797); 3 Del. Laws 17 (1799) (supplementing the act).

<sup>318</sup> *See, e.g.*, 1794 S.C. Acts 20.

<sup>319</sup> *See, e.g.*, 1793 Va. Acts 19.

with *any* part of the United States.<sup>320</sup>

### *C. Federal Forays*

With the strong local character of quarantine in mind, it is perhaps unsurprising that the federal response to the yellow fever epidemic at the end of the eighteenth century (particularly when it hit Philadelphia) was to duck. The 1794 statute authorized the President to convene Congress outside of the Capitol in the event that “the prevalence of contagious sickness” or “other circumstances...hazardous to the lives or health of the members” should occur.<sup>321</sup>

In other words, Congress’ first response to the devastating epidemic was not to take charge or even to act in the realm of public health. Indeed, that same year, in accordance with Constitutional restrictions on the states, Congress acquiesced in the appointment of a health officer in Maryland for the Port of Baltimore and approved the levy of a tonnage tax for a limited period to allow Maryland to offset the cost.<sup>322</sup> But it was a state appointment, keeping public health firmly in the state domain. Federal involvement was limited to the revenue questions thereby incurred.

It was not until twenty years after the Revolution that Congress introduced a federal statute addressing quarantine.<sup>323</sup> Repealed three years later, the legislation subordinated the federal government to state authority: it merely empowered the President to offer assistance to states in enforcing quarantine, *if they requested it*.<sup>324</sup> The legislation was preceded by much hand wringing in Congress about the extent of states’ rights and concerns about giving too much authority to the Executive.<sup>325</sup>

The offensive language that sparked the debate would have created a “National Executive power to locate all quarantine stations.” Members of the

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<sup>320</sup> See, e.g., 3 Del. Laws 17 (1799).

<sup>321</sup> Act of Apr. 3, ch 17, 1 Stat. 353 (1794). See 2 U.S.C. § 27 (1958) (providing a current version of the statute).

<sup>322</sup> Act of June 9, ch. 61, 1 Stat. 393 (1794) (providing congressional consent to an act of the state of Maryland).

<sup>323</sup> Act of May 27, ch. 31, 1 Stat. 474 (1796) (repealed 1799); See also 6 ANNALS OF CONG. 2916 (1796-97). For discussion of the Yellow Fever epidemic raging at the time; See POWELL, *supra* note 49.

<sup>324</sup> Act of May 27, ch. 31, 1 Stat. 474 (1796) (repealed 1799); See also Edwin Maxey, Federal Quarantine Laws, 43 AM. L. REV 382 at 384 (1909).

<sup>325</sup> See 5 ANNALS OF CONG. 87 (1796) (committing “An act relative to quarantine” to Messrs. Rutherford, Bingham and Langdon, to consider and report to the Senate); 5 ANNALS OF CONG. 1359 (1796). See also Goodman, *supra* note 64 (noting the tenor of the debates).

House strongly objected to taking such authority away from the states.<sup>326</sup> The question was not the role quarantine played in commerce, but the impact it had on public health.<sup>327</sup>

[T]he regulation of quarantine had nothing to do with commerce. It was a regulation of internal police. It was to preserve the health of a certain place, by preventing the introduction of pestilential diseases, by preventing persons coming from countries where they were prevalent. Whether such persons came by land or by water, whether for commerce or for pleasure, was of not importance. They were all matters of police.<sup>328</sup>

And practical reasons undergirded leaving such authority in the hands of the states. Georgia, for instance,

was one thousand miles from the seat of Government, and from their situation with respect to the West Indies, they were very subject to the evil of vessels coming in from thence with diseases; and if they were to wait until information could be given to the President of their wish to have quarantine performed, and an answer received, the greatest ravages might in the mean time, take place from pestilential diseases.<sup>329</sup>

It was precisely because of such practical concerns that states had long been “in the habit of regulating quarantine, without consulting the General Government.”<sup>330</sup> States, on the front line of defense, were “better calculated

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<sup>326</sup> 5 ANNALS OF CONG. 1350 (1796) (statement of Milledge) (“spoke...of the power of regulating quarantine being in the State Governments.”).

<sup>327</sup> See *Id.* at 1352 (Statement of W. Lyman) (“[T]hought the individual States had the sole control over the regulations of quarantine. It was by no means a commercial regulation, but a regulation which respected the health of our fellow-citizens.”); *Id.* at 1354 (statement of W. Lyman) (“Quarantine was not a commercial regulation, it was a regulation for the preservation of health. If commerce was incidentally affected, it ought so to be, when the object was the preservation of health and life. The United States, it was true, could prevent the importation of any goods, whether infected or not, but it did not thence follow that they could permit the landing of infectious goods contrary to the laws of any State. The several States possessed the sole power over this subject. They were the best judges of the due exercise of it.”); *Id.* at 1357 (statement of Page) (“the right of the people to preserve their health...was one of the first rights of Nature.”).

<sup>328</sup> *Id.* at 1353 (Statement of Gallatin); *Id.* at 1354 (Statement of W. Lyman) (“The right to preserve health and life was inalienable. The bill was not only unnecessary and improper, but it was an injudicious interference with the internal police of the States.”); *Id.* at 1358 (Statement of Holland) (“[T]he Constitution being silent with respect to health laws, he supposed the passing of them was left to the States themselves.”); *Id.* (Statements of Brent) (suggesting that “the constitution did not authorize” such federal interference with state police powers).

<sup>329</sup> *Id.* at 1351 (Statement of Milledge).

<sup>330</sup> *Id.*

to regulate quarantine.”<sup>331</sup> Such power was akin to the states’ right to self-preservation.<sup>332</sup> And history proved instructive: the very fact that the states had already acted in this area demonstrated that quarantine was a state power.<sup>333</sup> Representatives were uneasy at the prospect of the Executive overriding state decisions as to where and when to execute quarantine and the manner in which it would be implemented.<sup>334</sup>

The few Representatives that spoke in favor of stronger independent federal authorities located quarantine within Congress’ commerce powers.<sup>335</sup>

Gentlemen might as well say that the individual States had the power of prohibiting commerce as of regulating quarantine: because, if they had the power to stop a vessel for one month, they might stop it for twelve months. This might interfere with regulations respecting our trade, and break our Treaties.<sup>336</sup>

For them, only the federal government had the coercive authority—and resources—to enforce such measures.<sup>337</sup> In the end, the House of Representatives decided 46-23 to strike the “National Executive power” language, requiring instead that the federal government act in aid of the States in their performance of quarantine.<sup>338</sup>

The federal government’s subservient approach continued. Two years

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<sup>331</sup> *Id.* at 1348 (Statement of Heister); *Id.* (Statement of Kittera) (“[E]ach State . . . understood its own concerns better than the General Government, and therefore the regulation [of quarantine] might be safely left with them.”).

<sup>332</sup> *Id.* (Statement of Giles).

<sup>333</sup> *Id.* at 1350 (Statement of Swanwick).

<sup>334</sup> *See Id.* at 1351–52 (Statement of S. Smith) (suggesting that such concerns were “unworthy”).

<sup>335</sup> *See Id.* at 1348 (Statement of S. Smith) (“the performing of quarantine was in the direction of the General Government: it was a commercial regulation.”); *Id.* at 1350 (Statement of Bourne); *Id.* (Statement of Sitgreaves) (“[T]he strongest and best reason for a law, such as the one proposed, is, that it is a matter of very serious doubt whether, upon this subject, the States had any authority at all, and whether all such power is not vested by the Constitution in the congress, under their general authority to regulate commerce and navigation.”).

<sup>336</sup> *Id.* at 1352–53 (Statement of Hillhouse).

<sup>337</sup> *See Id.* at 1348 (Statement of S. Smith) (“[States] could not command the officer of a fort to use force to prevent a vessel from entering their port. The authority over him was in the General Government.”); *Id.* (Statement of S. Smith) (“[T]he Constitution did not give to the State Governments the power of stopping vessels from coming into their ports.”); *Id.* at 1350 (Statement of Sitgreaves) (“It was true, the State of Pennsylvania had made some regulations on the subject of quarantine; but, without the aid of the United States, they could not carry them into effect. They may direct, by their Governor and board of Health, quarantines to be performed, but they could not force any vessels to observe their directions, without the aid of the General Government.”).

<sup>338</sup> *See Id.* at 1352 (Statement of Williams).



after the national executive power controversy, President John Adams signed a law creating the first hospital as part of the U.S. Marine Hospital Services.<sup>339</sup> The legislation placed the hospitals under local control.<sup>340</sup> In 1799 Congress repealed the Act and gave the Secretary of the Treasury the power to direct that officers of the United States abide by rules and assist in executing quarantine laws consistent with State health laws.<sup>341</sup> Subsequent orders issued by the Secretary of the Treasury reiterated that Marine Hospital Service Officers, customs officials, and revenue officers were to cooperate in enforcing local quarantine law and regulations.<sup>342</sup>

With the federal government clearly in a support role, debates in Congress did not revolve around states' rights.<sup>343</sup> Instead, new measures focused on areas where the federal government exercised plenary power. The 1799 statute specifically noted, for instance, that any changes with regard to duties of tonnage would require Congressional approval.<sup>344</sup> It also created a federal inspection system for maritime quarantine.<sup>345</sup> This system allowed the federal government to begin gathering information about illness. Treasury provided financial assistance and direction. The statute empowered the federal government to purchase and erect warehouses to examine goods and merchandise entering any port.<sup>346</sup> Five years after granting the same powers to the legislature and Congress, the legislature ensured that the federal government could remove federal officers, prisoners, and executive and judicial officers, and re-locate them, in the event of an epidemic.<sup>347</sup>

#### i. Foreign Affairs, Commerce, and Efficacy Concerns

However much quarantine powers might be central to the state's ability to protect the health and welfare of its citizens, the economic impact of quarantine—as a domestic matter and as a dent in U.S. foreign trade

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<sup>339</sup> Elizabeth Fee, Public Health and the State: the United States, in *THE HISTORY OF PUBLIC HEALTH AND THE MODERN STATE* 224, 233 (Dorothy Porter, ed., 1994).

<sup>340</sup> Sciarrino, *supra* note 49, at 432–33.

<sup>341</sup> Act of Feb. 25, ch. 12, 1Stat. 619 (1799) (current version at 42 U.S.C. § 97 (1958)). For discussion of this statute, see Maxey, *Federal Quarantine Law*, 23 *POL. SCI. Q.* 617, 617–18 (Dec. 1908).

<sup>342</sup> Hugh S. Cumming, *The United States Quarantine System During the Past Fifty Years*, in *A HALF CENTURY OF PUBLIC HEALTH* 118, 120–21 (Mazzyck P. Ravenel ed., 1921).

<sup>343</sup> See *Debates and Proceedings of the Congress of the United States*, 5th Congress, May 15, 1797–Mar. 3, 1799 (1851), at 2792–95.

<sup>344</sup> Act of Feb. 25, ch. 12, 1 Stat. 619 (1799) (current version at 42 U.S.C. §97 (1958)).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at § 3.

<sup>347</sup> *Id.* at §§ 4–7.

(particularly when other countries imposed quarantine on U.S. vessels)—could hardly be ignored. Faced by foreign retribution, federal interest in expanding its role in the quarantine realm grew.

The states' failure to stem yellow fever towards the end of the 18<sup>th</sup> Century, for example, prompted a series of orders in England targeted at U.S. vessels.<sup>348</sup> These measures significantly disrupted foreign trade. In 1793, for instance, the Privy Council issued an order imposing two-week quarantine on all ships arriving from Philadelphia, Delaware, and New Jersey.<sup>349</sup> Soon seen as unnecessary, the Council subsequently revoked the order.<sup>350</sup> In its place, England adopted sanitary measures, requiring airing and cleansing of the vessels and the destruction of the personal effects of any person who died during the voyage. The following year, the Privy Council again responded to the American yellow fever epidemic with fourteen days' quarantine for ships arriving from Baltimore.<sup>351</sup> As the yellow-fever scare subsided, the Council revoked the order.<sup>352</sup> Thus began a pattern that continued through 1799: in response to outbreaks of disease in the U.S., the Privy Council would issue orders targeting certain ports and delaying or destroying the transport of U.S. goods.<sup>353</sup>

New legislation specifically targeted at the United States rode the crest of these regulations and entered into law. The problem was the nature of the disease: the application of existing English law to yellow fever was questionable. The governing statutes authorized orders to be issued in response to "plague," the definition of which had to be substantially relaxed to incorporate different diseases. The Privy Council sought to avoid a conflict by simply referring in their orders to a fever "of the Nature of the Plague." Initially, this sleight-of-hand did not cause much concern. As one historian explains, "the national mood was to put the health of the public before

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<sup>348</sup> BOOKER, *supra* note 48, at 256.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 257.

<sup>351</sup> *Id.* at 258. The Order referred to fever "of the Nature of the Plague" similar to the one in Philadelphia in 1793. *Id.* at 258–59.

<sup>352</sup> *Id.* at 259.

<sup>353</sup> In October 1795, the Privy Council issued a new order, setting quarantine against all ships from New York and Norfolk. *Id.* at 259. Three months later, it lifted the Order. *Id.* at 260. In October 1797 another order issued against arrivals from Philadelphia. *Id.* The Privy Council revoked it less than three months later. *Id.* at 261. The following September the Privy Council reintroduced quarantine against Philadelphia. *Id.* at 260–61. The following month saw it expanded the order to include New York and Boston. *Id.* at 262. Two months later, the Privy Council lifted the measure. *Id.* In October 1799, the Privy Council re-imposed a quarantine order against Philadelphia and extended it to New York. *Id.* And in 1800, the Privy Council responded to reports of infectious fever in Virginia and Maryland with an order against arrivals from either state. *Id.* Five weeks later, the Privy Council rescinded the orders. *Id.*

ambiguities of language.”<sup>354</sup> But when the Master of an American ship, Thomas Calovert, under letter of the law, answered in the negative as to whether plague was onboard, the Law Officers of the Crown indicated to the Privy Council that they could not enforce penalties against him: “A paradoxical situation had therefore been reached in which quarantine regulations were justified by virtue of the vague meaning of ‘plague’, but that same imprecision provided a perfect defence against allegations that the rules had been breached.”<sup>355</sup>

The Privy Council immediately wrote to George Rose, secretary to Treasury, requesting that Parliament entertain a bill that would widen the definition of diseases against which quarantine might be enforced.<sup>356</sup> Accordingly, on April 5, 1798, the government introduced new quarantine legislation specifically to meet American yellow fever concerns.<sup>357</sup>

The United States complained loudly and frequently to England about the use of quarantine against American ships. Britain remained unmoved: the country did not trust American bills of health. The government had received reports that people traveling from the West Indies to Philadelphia had been allowed to land, while possibly diseased vessels were quickly turned around and sent toward Britain.<sup>358</sup>

Congress thus confronted two problems: first, as a matter of foreign relations, friction with European powers as to whether domestic provisions were sufficient to stem the spread of disease—with significant economic costs to the country. Second, on the domestic front, the continuing yellow fever epidemics demonstrated the gross inadequacy of state quarantine regulations.<sup>359</sup> Members of the House began to lament the tendency of local entities to assume that disease was imported, and never native in origin.<sup>360</sup> They denounced state authorities as provincial and scientifically-backwards. Illness on board vessels had more to do with sanitation than with where the ships might have visited on their travels.<sup>361</sup>

Considering the magic influence of names, it were to be wished that the term

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<sup>354</sup> *Id.* at 258–59.

<sup>355</sup> *Id.* at 259.

<sup>356</sup> *Id.*

<sup>357</sup> Composite Act, 1798, 38 Geo. 3, c. 33, cited in BOOKER, *supra* note 48, at 261.

<sup>358</sup> BOOKER, *supra* note 48, at 368.

<sup>359</sup> Maxey, *supra* note 3416, at 617–18

<sup>360</sup> Report from Mitchell to the House of Representatives (Feb. 25, 1803), in 7 American State Papers: Documents, Legislative and Executive, of the Congress of the United States 531, 532 (Washington, Gales & Seaton, 1832), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=014/llsp014.db&recNum=4>.

<sup>361</sup> *Id.*

quarantine should be erased from the statute books of the Union, and of each particular State. Regulations, precise and explicit, should, in the opinion of your committee, be formed to prevent foul and infectious vessels, with sickly crews, from entering our ports, or proceeding on any voyage in that situation.<sup>362</sup>

The solution was not to allow each state to respond in the manner they deemed most expedient, but to establish uniform federal regulations which ensured that all sea vessels be subject to sanitary and hygienic procedures, thus greatly reducing incidents of disease—and preempting foreign actions against U.S. trade.<sup>363</sup>

Thus far, in the Constitutional realm, police powers had trumped commerce. But quarantine and proper sanitary provisions, cost money.<sup>364</sup> Treasury was to prove the thin end of the wedge, as Congress steadily allocated ever-greater resources to stop the spread of disease.<sup>365</sup>

## ii. The Growing Debate

Even as Treasury began to direct more resources towards stopping the spread of disease, disagreement about whether quarantine should be in state or federal hands grew.<sup>366</sup> Consistent with the earliest debates in Congress, states claimed quarantine authority under their police powers, while federal authority derived from its authority to regulate interstate commerce.<sup>367</sup> Federal and state courts initially weighted the scales in favor of state power. Thus, in 1824, Chief Justice Marshall famously enumerated quarantine as at the heart of those authorities reserved to the state:

That immense mass of legislation, which embraces every thing within the territory of a

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<sup>362</sup> *Id.* at 532.

<sup>363</sup> *Id.*

<sup>364</sup> *See, e.g.*, Letter from Albert Gallatin to the House of Representatives (Feb. 17, 1806), in 7 American State Papers: Documents, Legislative and Executive, of the Congress of the United States 622–23 (Washington, Gales & Seaton, 1832), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=014/llsp014.db&recNum=4>.

<sup>365</sup> *See, e.g.*, Report from Mitchell to the House of Representatives (Feb. 25, 1803), in 7 American State Papers: Documents, Legislative and Executive, of the Congress of the United States 531, 532 (Washington, Gales & Seaton, 1832), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=014/llsp014.db&recNum=4>.

<sup>366</sup> Joseph Barbera et al, Large-Scale Quarantine following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences, 286 J. AM. MED. ASS'N 2711, 2712 (2001).

<sup>367</sup> *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, 186 U.S. 380, 377–88 (1902) (Upholding quarantine law in question and implementation as appropriate exercise of state police power); *Gibbons v. Ogden*, 22 U.S. 1, 205–06 (1824).

State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State...<sup>368</sup>

Marshall's position in *Gibbons v. Ogden* came to dominate the federal interpretation of state police powers. Indeed, five years later, when the Secretary of the Treasury asked the Attorney General, John M. Berrien, whether Treasury could itself issue quarantine regulations, Berrien replied that, under *Gibbons*, it could not.<sup>369</sup> Until the close of the Civil War, this position remained unchallenged. State judicial bodies shared Marshall's view. The Supreme Judicial Court of Maine, for instance, focusing on the City of Rockland's quarantine provisions, held that while the town officers could not appropriate a vessel and turn it into a hospital, it was entirely within their authority to place it in quarantine.<sup>370</sup>

As a practical matter, a number of local boards of health controlled quarantine. Philadelphia (1794), New York (1796), and Boston (1799) provide salient examples.<sup>371</sup> But not all localities had boards. Between 1800 and 1830, for instance, there were only five permanent boards of health. Nevertheless, the trend had begun. By 1873, more than 30 boards of health had formed, with the power to exercise quarantine, mitigate nuisances, and pursue sanitary reform.<sup>372</sup> Sped by the writings of prominent medical reformers such as

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<sup>368</sup> *Gibbons v. Ogden*, 22 U.S. 1, 205–06 (1824).

<sup>369</sup> John Berrien, *Quarantine at Alexandria*, in 2 *Official Opinions of the Attorneys-General of the United States*, 263, 263–66 (Washington, Robert Farnham, 1852), available at [http://books.google.com/books?id=w8xDAAAIAAJ&pg=PA190&lpg=PA190&dq=opinion+of+the+attorney+general+of+the+united+states+1829&source=bl&ots=TXihf3s7-3&sig=5oOnOD9cRiMNxdKb4uvMTv\\_j3X0&hl=en&sa=X&ei=yCrYUM7-NKiOOQGJj4GAAw&ved=0CEsQ6AEwBQ](http://books.google.com/books?id=w8xDAAAIAAJ&pg=PA190&lpg=PA190&dq=opinion+of+the+attorney+general+of+the+united+states+1829&source=bl&ots=TXihf3s7-3&sig=5oOnOD9cRiMNxdKb4uvMTv_j3X0&hl=en&sa=X&ei=yCrYUM7-NKiOOQGJj4GAAw&ved=0CEsQ6AEwBQ).

<sup>370</sup> *Mitchell v. City of Rockland*, 45 Me. 496 (1858).

<sup>371</sup> Act of June 20, 1799, ch. 10, 1799 Mass. Acts 327, available at <http://archives.lib.state.ma.us/actsResolves/1799/1799acts0010.pdf>

<sup>372</sup> Chapin, *supra* note 85, at 137–38. In 1869 the first permanent state board of health was established. DOROTHY PORTER, *HEALTH CIVILIZATION AND THE STATE: A HISTORY OF PUBLIC HEALTH FROM ANCIENT TO MODERN TIMES* 155 (1999) (noting that Louisiana introduced the first state board of health in 1855, but it failed to effectively exercise its quarantine authorities.) Massachusetts again proved the first in this regard, but the idea of creating a state entity that would oversee sanitation and disease monitoring took some time to take hold. See, e.g., LEMUEL SHATTUCK, *BILLS OF MORTALITY, 1810-1849, CITY OF BOSTON, WITH AN ESSAY ON THE VITAL STATISTICS OF BOSTON FROM 1810 TO 1841* (1849). The District of Columbia followed Massachusetts' lead in 1870, and California and Virginia in 1871. Mazÿck P. Ravenel, *The American Public Health Association, Past, Present, Future*, in *A HALF CENTURY OF PUBLIC HEALTH*, 14 (Mazÿck P. Ravenel ed., 1921). By 1876, twelve states had boards of health. *Id.* It was not until 1921, though, that an equivalent body could be found in every state. Chapin, *supra* note 85, at 155.

Benjamin Rush, dirt and disease became increasingly linked. Accordingly, states began integrating sanitary reform into law. The Massachusetts Public Health Act of 1797 became a model for other states—almost none of whom, at the close of the 18<sup>th</sup> Century, had public health organizations.<sup>373</sup> For the next seventy-five years, municipal cleanliness was seen as the key to public health.<sup>374</sup>

Miasmatic theories of disease transmission paralleled the sanitary reforms.<sup>375</sup> Nevertheless, the use of quarantine—and the enforcement of local quarantine provisions—did not disappear. They continued to be an automatic (and reactive) response to public health emergencies. In 1804, for instance, New Orleans appointed a board of health.<sup>376</sup> When the emergency ended, the state abolished the board. In 1818 New Orleans re-constituted the board, again giving it the power to impose quarantine,<sup>377</sup> again abolishing it in 1819, and again resurrecting the board in 1821 to counter yellow fever.<sup>378</sup> By 1825 the city's business lobby had again succeeded in obtaining the board's dismissal.<sup>379</sup>

The local boards of health were not above using their powers to target other cities and ports in the United States—and, based on dubious scientific understandings, were often unsuccessful in their efforts to stem the advance of disease. In 1821, for instance, Andrew Jackson established a Board of Health at Pensacola “to take active oversight of the quarantine and health regulations.”<sup>380</sup> The following year, the Pensacola Board of Health announced the existence of yellow fever, and warned “all inhabitants to remove, to retire to the country.” The Pensacola *Floridian* cited the “[e]xposure to the sun, consumption of green fruit, and intemperance” as “among the causes for the fever cases originating locally.” In addition, the paper indicated that “fear itself was the most contributing cause of fever.”<sup>381</sup> By 1825, the Pensacola Board of

<sup>373</sup> PORTER, *supra* note 377, at 148.

<sup>374</sup> Chapin, *supra* note 85, at 135; *See also; Id.* at 140.

<sup>375</sup> The miasmatic theory of disease—that atmospheric conditions created disease—was certainly not new. Hippocrates, for instance, theorized that polluted air caused pestilence. But the debate took hold in the 19<sup>th</sup> century on both sides of the Atlantic. Some scholars point to this debate as contributing to the strength of sanitary reformers in the United States and the demise of quarantine law. Dorothy Porter, for instance, points to Walter Reed's success in launching a quasi-military campaign against Yellow Fever in Cuba (1900) and Panama (1914), as inspiration for the sanitary shift in focus in Louisiana and elsewhere. PORTER, *supra* note 46, at 155, 157.

<sup>376</sup> *Id.* at 148.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> George F. Pearce, Torment of Pestilence: Yellow Fever Epidemics in Pensacola, 56 FLA. HIST. Q. 448 (1978).

<sup>381</sup> *Id.*

Heath had imposed quarantine measures against all vessels arriving in the port from Mobile and New Orleans.<sup>382</sup> By October 1825, yellow fever was rampant in the region.<sup>383</sup> Further outbreaks in 1830, 1846, and 1847 occurred.<sup>384</sup>

The system, of questionable effectiveness and significant cost, could not be sustained. A series of National Quarantine and Sanitary Conventions accompanied the march to Civil War.<sup>385</sup> The purpose of the conventions was to reform the current system of quarantine. The question was what direction to take.

The two principal reform groups at the time, otherwise diametrically opposed, shared a strong interest in establishing a national quarantine system. Contagionists, believing that disease spread through contact between individuals, sought a more uniform, national system to halt public exposure.<sup>386</sup> Anti-contagionists, believing that disease spread by other means and that sanitation was far more important, sought an end to what were perceived as ineffective, and possibly harmful, local laws.<sup>387</sup> Both looked to the federal government for the final word. The Commerce Clause provided a hook. Reporting in 1860, the Committee on External Hygiene explained:

We consider that quarantine from its close connection with the U.S. Revenue Department, and the important bearing which it has upon commerce (which Congress alone can regulate) and upon travellers soon to be disperse throughout different and distant States of the Union, is a national, rather than a State concern, and we cannot conceive that a uniform system of quarantine can be established throughout the Union unless it be organized...as a national institution.<sup>388</sup>

Of particular concern was the politicization of local measures. Lamenting the state of New York, one reformer argued:

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<sup>382</sup> *Id.* (citing Pensacola Gazette and West Florida Advertiser, August 6, 1825.)

<sup>383</sup> *Id.* at 453.

<sup>384</sup> *Id.* at 453–54.

<sup>385</sup> *See, e.g.*, NATIONAL QUARANTINE AND SANITARY CONVENTION, PROCEEDINGS AND DEBATES OF THE SECOND NATIONAL QUARANTINE AND SANITARY CONVENTION, HELD IN THE CITY OF BALTIMORE, (John D. Toy, Baltimore, 1858) [hereinafter SQSC]; NATIONAL QUARANTINE AND SANITARY CONVENTION, PROCEEDINGS AND DEBATES OF THE THIRD NATIONAL QUARANTINE AND SANITARY CONVENTION, HELD IN THE CITY OF NEW YORK, APRIL 27<sup>TH</sup>, 28<sup>TH</sup>, 29<sup>TH</sup>, AND 30<sup>TH</sup>, 1839 (Edmund Jones & Co., New York, 1859) [Hereinafter TQSC]; NATIONAL QUARANTINE AND SANITARY CONVENTION, PROCEEDINGS AND DEBATES OF THE FOURTH NATIONAL QUARANTINE AND SANITARY CONVENTION, JUNE 14, 15, AND 16, 1860 (Geo. C. Rand & Avery, Boston, 1860) [Hereinafter FQSC].

<sup>386</sup> Michael Les Benedict, Contagion and the Constitution: Quarantine Agitatio from 1869 to 1866, 25 J. HIST. MED. 177, 178 (1970).

<sup>387</sup> *Id.*

<sup>388</sup> FQSC, *supra* note 385, at 170.

They all tend in one direction; they all look towards the increase of perquisites, and the increase of that personal and political power which is sure to be abused. ...Our Quarantine laws are inconsistent, they are more than barbarous; they are oppressive; they are not arranged, in any respect, with reference to the exact and absolute necessities for sanitary protection, much less for commercial and public convenience.<sup>389</sup>

Before the reformers could enter the political arena to advance their cause, however, the Civil War broke.

The course of the war underscored the extent to which the states were dependent on other localities to stem the tide of disease.<sup>390</sup> Naturally-occurring disease, however, was not the only threat. Reports suggest that Confederate forces attempted to use disease against soldiers and civilian populations.<sup>391</sup> In 1862-63, plans to use bodies and garments infected with yellow fever to spread disease among the northerners emerged.<sup>392</sup> Other plots involved infecting clothing with smallpox and then selling the clothes to the Union soldiers.<sup>393</sup> On several occasions Confederate forces contaminated wells and ponds with poisons and dead animals.<sup>394</sup> The northern forces refused to follow suit: War Department General Orders No. 100, issued in 1863, stated, "The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare."<sup>395</sup>

The war underscored the country's vulnerability to disease as well as the difficulty of amassing, at a state level, the resources necessary to combat it. When cholera hit in 1865, New York failed in its effort to obtain assistance from the Secretary of the Navy.<sup>396</sup> A number of states refused to introduce quarantine. And so a wartime bill took the bull by its horns, seeking the transfer of quarantine to federal hands.<sup>397</sup> The bill would have empowered the Secretary of War, with the assistance of the Secretaries of the Navy and Treasury, to enforce quarantine at all ports of entry, as well as to establish *cordon sanitaire* in the interior.<sup>398</sup>

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<sup>389</sup> TQSC, *supra* note 385, at 38, quoted in Benedict, *supra* note 38691, at 179.

<sup>390</sup> *Id.* at 181.

<sup>391</sup> Jeffery K. Smart, Chemical and Biological Warfare Research and Development During the Civil War, U.S. Army Soldier and Biological Chemical Command, at 5, *available at* [http://www.wood.army.mil/ccmuseum/ccmuseum/Library/Civil\\_War\\_CBW.pdf](http://www.wood.army.mil/ccmuseum/ccmuseum/Library/Civil_War_CBW.pdf).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 5.

<sup>395</sup> *Id.*

<sup>396</sup> TQSC, *supra* note 385, at 38, quoted in Benedict, *supra* note 386, at 182-183.

<sup>397</sup> *Id.* at 185. See also Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), 93 COLUM. L. REV. 1833, 1865 (1993).

<sup>398</sup> CONG. GLOBE, 39 Cong., 1st Sess. at 1201 (Mar. 6, 1866), *available at*



Senators balked. Henry B. Anthony (R-RI) pressed Senator Zachariah Chandler, chair of the Commerce Committee on the extent of the Secretaries' authorities to enforce quarantine. "[A]ll the powers at their command may be used if necessary," Chandler replied.<sup>399</sup> Shocked, Anthony asked if they could impose martial law. Chandler answered that they could "use any power requisite to stop the cholera." Anthony protested, "I would rather have the cholera than such a proposition as this."<sup>400</sup>

Even in the wake of war, with the enemy forces employing disease as a weapon, legislators proved reluctant to transfer state authority to the federal government. Despite calls for more vigorous national action, as Historian Les Benedict explains, "most Americans still regarded general police regulation—the ordinary day-to-day legislation affecting crime, health, sanitation, personal property, etc.—to be the responsibility primarily of the states."<sup>401</sup> State quarantine authority existed separate and apart from Congress' enumerated powers.<sup>402</sup> Lot M. Morrill (R-ME) adopted the prevailing view, "All sanitary regulations touching the health of this country within the jurisdictional limits of the several States are matters of police regulations."<sup>403</sup> The Civil War thus may have marked an important shift in the development of American federalism, but it was not one immediately reflected in the quarantine realm.

#### D. Shifting Federal Role

Immediately following the Civil War, the national government still had to walk a fine line. It remained constrained by state police powers, but it nevertheless began to expand into the realm of infectious disease and to begin drawing on its spending power to encourage states to turn over quarantine facilities to federal control.

In 1878 Congress introduced a new statute, for the first time creating federal authorities with regard to infectious disease.<sup>404</sup> The statute gave the Marine Hospital Service the power to adopt rules and regulations to govern vessels arriving from overseas.<sup>405</sup> Such measures must still defer to state

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<http://memory.loc.gov/ammem/amlaw/lwclink.html>

<sup>399</sup> CONG. GLOBE, 39 Cong., 1st Sess. at 2444–45 (May 8, 1866), available at

<http://memory.loc.gov/ammem/amlaw/lwclink.html>.

<sup>400</sup> *Id.* at 2445.

<sup>401</sup> Benedict, *supra* note 386, at 188.

<sup>402</sup> *Id.* at 189.

<sup>403</sup> CONG. GLOBE, 39 Cong., 1st Sess. at 2521 (May 10, 1866), available at

<http://memory.loc.gov/ammem/amlaw/lwclink.html>.

<sup>404</sup> Act of Apr. 29, 1878, ch. 66, 20 Stat. 37 (1878).

<sup>405</sup> *Id.*

law.<sup>406</sup> The statute also created a worldwide surveillance system, requiring consular officers to send weekly reports on the state of health in foreign ports and to inform the Supervising Surgeon General of any infectious or contagious diseases abroad.<sup>407</sup> The statute further reflected the growing emphasis on science prevalent in the reformers' movements: Congress made appropriations for "investigating the origin and causes of epidemic diseases, especially yellow fever and cholera, and the best method of preventing their introduction and spread."<sup>408</sup>

The following year, Congress repealed the sections of the statute empowering the Marine Hospital Service to make rules and regulations independent of state boards.<sup>409</sup> The repeal, however, was scheduled to sunset after four years, at the close of which the repealed provisions of the 1878 act went back into effect.<sup>410</sup> The 1879 statute created criteria for sanitation on board ships and expanded the number of federal quarantine stations.<sup>411</sup> It also created a national board of health. Again, its powers were circumscribed: the members were to cooperate with and to help the local and state boards of health—not supplant them. Their remit was limited to cholera, smallpox, and yellow fever, for which they were to consider the need for a national quarantine system. A subsequent resolution freed up resources for the federal government to take a stronger national lead: it required that the Secretary of the Navy place vessels not required for other purposes at the disposal of the commissioners of quarantine, when requested by the National Board of Health.<sup>412</sup> The statute also authorized the appointment of medical officers to overseas consulates and to supervise the enforcement of sanitary measures for ships leaving for U.S. ports.<sup>413</sup>

Perhaps most importantly, quarantine stations were expensive to operate and maintain, and following the Civil War, few states had extra resources at their disposal. The solution was at once elegant and powerful; the 1879 statute made it possible for local ports to relinquish their quarantine facilities to the federal government, which would then reimburse them and take

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<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 333, § 2.

<sup>408</sup> Cumming, *supra* note 3427, at 121.

<sup>409</sup> Act of Mar. 3, 1879, ch. 202, 20 Stat. 484, (1879) § 10; *See also* Act of July 1, 1879, ch. 61, 21 Stat. L. 47 (amending the 1879 act and designating a disbursing agent).

<sup>410</sup> Act of Mar. 3, 1879, ch. 202, 20 Stat. 484, (1879) §10; Government Officers Anxious: the Power of the Federal Authorities in Quarantine Matters, N.Y. TIMES, Sept. 1, 1989, *available at* <http://query.nytimes.com/mem/archive-free/pdf?res=F60C1EF83C5F1B738DDDA80894D1405B8285F0D3>.

<sup>411</sup> 20 Stat at 484.

<sup>412</sup> S.J. Res. 6, 46th Cong., 21 Stat. 50 (1879).

<sup>413</sup> Cumming, *supra* note 3427, at 121.

responsibility for preventing the importation of disease. This provision proved central in paving the way for the transfer of state power to federal hands. The statute also gave the federal government the authority to make additional rules regulating inter-state quarantine, in the event that local regulations were found to be inadequate. In 1882, Congress further enabled federal expansion in this area, creating a fund for state and local entities to obtain assistance for suppressing epidemics.<sup>414</sup> The President could, at his discretion, respond to an actual or threatened epidemic by appropriating up to \$100,000.<sup>415</sup>

With these changes, the federal government found itself in a new role in which it appeared to perform better than the states could acting alone. The Marine Hospital Service (MHS) proved a to be a rising star, with a series of highly visible successes. In 1882, for instance, Texas found itself threatened by a yellow fever epidemic. MHS provided assistance to maintain a *cordon sanitaire* around Brownsville, calming concerns in the bordering areas. Widely hailed as a success, in 1883 the service established quarantine stations for the detention and treatment of infected ships at Ship Island (for Gulf Quarantine) and Sapelo Sound (for South Atlantic Quarantine).<sup>416</sup> It expanded in 1887 to build a laboratory on Staten Island, an institution that gradually morphed into what is now the National Institutes of Health.

### i. Regional Initiatives

Regional initiatives soon emerged with a goal of standardizing quarantine laws and ensuring notification across state and international lines. These conferences played a key role in developing a broader consensus about the form quarantine ought to take and the appropriate role for the federal government. Their occurrence was aided by the ascendancy of the theory of contagion and growing agitation within the medical community for better standards.

One of the earliest meetings took place in 1886, when the International Conference of the Boards of Health met in Toronto, Canada, and resolved that each state and provincial board of health, and where no state board of health existed, the local board, would notify the other boards in the event of cholera, yellow fever, or smallpox.<sup>417</sup> Responding to concerns that accurate reporting

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<sup>414</sup> Gov't Officers Anxious: the Power of the Federal Authorities in Quarantine Matters, N.Y.

TIMES, Sept. 1, 1892, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F60C1EF83C5F1B738DDDA80894D1405B8285F0D3>.

<sup>415</sup> *Id.*

<sup>416</sup> Cumming, *supra* note 342, at 122.

<sup>417</sup> Int'l Conference of Bds. Of Health, Resolutions, (1886), reprinted in PROCEEDINGS OF THE QUARANTINE CONFERENCE HELD IN MONTGOMERY, ALABAMA, ON THE 5<sup>TH</sup>, 6<sup>TH</sup>, AND 7<sup>TH</sup> DAYS OF MARCH, 1889

might be influenced by commercial interests, the conference resolved that, where rumors suggested the presence of pestilential disease in any State or Province, and definite information one way or the other could not be obtained from the proper health authorities, “the health officials of another State are justified in entering the before-mentioned State or Province for the purpose of investigating and establishing the truth or falsity of such reports.”<sup>418</sup> The following year the International Conference of State Boards of Health met in Washington.<sup>419</sup> This meeting reaffirmed the Toronto principles, further resolving the following:

That in the instance of small-pox, cholera, yellow fever and typhoid fever, reports be at once forwarded, either by mail or telegraph, as the urgency of the case may demand; and further, that in the instance of diphtheria, scarlatina, typhoid fever, anthrax or glanders, weekly reports, when possible, be supplied, in which shall be indicated, as far as known, the places implicated, and the degree of prevalence.<sup>420</sup>

Similarly, in 1889 Alabama called for a regional conference to harmonize southern quarantine laws.<sup>421</sup> The meeting took place in the shadow of a recent, devastating yellow fever epidemic in Florida.<sup>422</sup> Alabama invited delegates from Texas, Florida, Louisiana, Mississippi, South Carolina, North Carolina, Georgia, Tennessee, Kentucky, and Illinois.<sup>423</sup> With the Civil War fresh in the minds of participants, papers prior to the conference evinced concern about preserving state rights.<sup>424</sup> But the papers also expressed concern that the southern states were particularly vulnerable: inconsistent laws and

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41–42, (Montgomery, Brown Printing Co. 1889) [hereinafter PQCHMA] *available at* [http://books.google.com/books?id=UH8zSLjH4cAC&pg=PA42&lpg=PA42&dq=%22international+conference+of+state+boards+of+health%22&source=bl&ots=PIQTKDDIhO&sig=8EJsNgnKwmbI4S7j9C2DyT2F2b0&hl=en&sa=X&ei=mhLbUITnH-enOAGR\\_4CwDw&ved=0CEMQ6AEwAg#v=onepage&q=%22international%20conference%20of%20state%20boards%20of%20health%22&f=false](http://books.google.com/books?id=UH8zSLjH4cAC&pg=PA42&lpg=PA42&dq=%22international+conference+of+state+boards+of+health%22&source=bl&ots=PIQTKDDIhO&sig=8EJsNgnKwmbI4S7j9C2DyT2F2b0&hl=en&sa=X&ei=mhLbUITnH-enOAGR_4CwDw&ved=0CEMQ6AEwAg#v=onepage&q=%22international%20conference%20of%20state%20boards%20of%20health%22&f=false).

<sup>418</sup> *Id.*

<sup>419</sup> Int’l Conference of State Bds. Of Health, Resolutions, (1886), reprinted in PQCHMA, *supra* note 422, at 42–43.

<sup>420</sup> *Id.*

<sup>421</sup> PQCHMA, *supra* note 422, at 4.

<sup>422</sup> *Id.* at 60.

<sup>423</sup> *Id.* at 4 (establishing that there were visiting guests from Michigan, Maryland, Havana, Marine Hospital Service).

<sup>424</sup> *Id.* at 47. From New York, for instance, Dr. A. N. Bell commented, “Every organized government, State or local, has the right of protecting itself against the introduction of infectious or contagious diseases, and, to this end, of excluding any person or thing and of prohibiting communication by or with any country or place deemed likely to introduce infectious or contagious diseases of any kind.”

commercial corruption blighted the system. Variation in maritime measures resulted from politics—not geography, climate, or science.<sup>425</sup>

Geographic quarantine and enforced isolation generated particularly heated debate. There was little patience for giving the government the authority to take people from their own homes. Further, efforts to depopulate entire areas might lead to panic.<sup>426</sup> Accordingly, the conference resolved:

In the beginning of an outbreak of yellow fever there is no need of depopulation at all, except of infected houses, or infected districts; but if people who are able to afford the expense desire to leave they should do so quietly and deliberately, and no obstacles should be placed in their way; and those who leave healthy districts of the city or town should go wherever they please, without let or hindrance.<sup>427</sup>

Those departing should only be allowed to leave “under such restrictions as will afford reasonable guarantees of safety to the communities in which they find asylum.”<sup>428</sup> Where depopulation may be necessary, detention should be limited to ten days.<sup>429</sup> To address corruption, the conference shifted the emphasis from local authorities to state authorities.<sup>430</sup> And it adopted standard rules for regulation of railroads, balancing the interests of commerce against the demands of public health.<sup>431</sup>

Finally, the conference made specific demands of the Federal government. First, that the Federal government disinfect all mail.<sup>432</sup> Second, that the Secretary of the Treasury increase revenues for the patrol service on the coast of Florida to the extent necessary to prevent smuggling.<sup>433</sup> Third, the conference requested that the U.S. government enter into negotiations with Spain with view towards placing U.S. sanitary inspectors at Spanish ports with such legal jurisdiction as would be necessary for the enforcement of health regulations.<sup>434</sup> Delegates were particularly concerned about the threat of yellow fever from Cuba, the “fountain head” of the disease.<sup>435</sup>

In concert with regional meetings, calls for federal regulation began echo within the fields of medicine and industry. Discoveries by Louis Pasteur,

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<sup>425</sup> *Id.* at 58–59.

<sup>426</sup> *Id.* at 16–18.

<sup>427</sup> *Id.* at 18.

<sup>428</sup> *Id.* at 19.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 21.

<sup>431</sup> *Id.* at 39–41.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at 35.

<sup>434</sup> *Id.* at 36.

<sup>435</sup> *Id.* at 38.

Ferdinand Cohn, and Robert Koch gave birth to modern microbiology, in the process verifying the germ theory of disease.<sup>436</sup> These advances propelled quarantine from being seen as a reactive, politically-sensitive model, to one driven by rationality.<sup>437</sup> Attention expanded to those who had come into contact with the ill.<sup>438</sup> Prominent medical personnel argued that by aligning detention to the incubation period of the disease, and by instituting sterilization of medical tools, efforts to contain sickness would obtain more success.<sup>439</sup>

In 1888 the Philadelphia College of Physicians issued an influential report, asserting that a national system of maritime was the only way to secure the United States against the importation of disease.<sup>440</sup> Resources mattered: “Such necessary uniformity can be obtained by no other arrangement, for the reason that the National Government is alone able to defray the expense of complete quarantine establishments at every port, according to the requirement of each and without regard to the revenue derived from the shipping of any.”<sup>441</sup>

The College of Physicians identified a number of problems with the current system. First, as both a substantive and a procedural matter, the rules were reactive: “They have seldom or never been drafted with a full recognition of the need of adequate and constant protection of the health of the general public.”<sup>442</sup> Moreover, the national government depended upon states requesting assistance, which meant that they did not become involved until the middle of an emergency, rather late in the game to prevent an epidemic.<sup>443</sup> Second, health laws were focused on local interests and corrupted by “the commercial interests of rival ports, the partisan struggles of opposing political factions, and the heedless parsimony with which money has been doled out for the execution of such health laws as exist.”<sup>444</sup> Third, the failure of ports of entry to stop disease ended up hurting the inland areas the most—which

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<sup>436</sup> See Frederick P. Gorham, *The History of Bacteriology and its Contribution to Public Health Work*, in *A HALF CENTURY OF PUBLIC HEALTH* 66, 69 (Mazýck P. Ravenel, ed. 1921); See also *COLL. OF PHYSICIANS OF PHILA., AN ADDRESS FROM A SPECIAL COMMITTEE OF THE COLLEGE OF PHYSICIANS OF PHILADELPHIA TO THE MEDICAL SOCIETIES OF THE UNITED STATES: CONCERNING THE DANGERS TO WHICH THE COUNTRY IS EXPOSED BY THE INEFFECTUAL METHODS OF QUARANTINE AT ITS PORTS, AND IN REGARD TO THE NECESSITY OF NATIONAL CONTROL OF MARITIME QUARANTINE* 23 (1887).

<sup>437</sup> Cumming, *supra* note 342, at 120.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *COLL. OF PHYSICIANS OF PHILA., supra* note 437, at 1.

<sup>441</sup> *Id.* at 14.

<sup>442</sup> *Id.* at 2–3.

<sup>443</sup> *Id.* at 16.

<sup>444</sup> *Id.* at 3. See also *Id.* at 19.

meant that the ports did not have any direct incentive to observe strict measures.<sup>445</sup> Fourth, the current federal authorities were inadequate. While sanitation mattered, it was also insufficient.<sup>446</sup> Reference to the United Kingdom would be misplaced: Great Britain had fewer people, a smaller territory, significant resources, fewer immigrants, and atmospheric conditions not favoring disease.<sup>447</sup> Fifth, as for the commercial impact, the problem in America was people, not cargo.<sup>448</sup> Much would be gained by detaining the “immigrant classes”, who, in light of the advantages they were about to receive—could hardly begrudge the small sacrifice.<sup>449</sup>

It is important to note here that in the communities most affected by quarantine provisions, the United States differed greatly from the United Kingdom.<sup>450</sup> In England in particular, the primary concern had historically been with plague—a disease carried by wool, silk, and other goods. Thus *it was the merchant class, not the immigrant class, which was most affected by restraints on travel and trade.*<sup>451</sup> Resultantly, the English shipping industry took a strong interest in the question of quarantine and, as soon as it was constitutionally viable, lobbied national quarantine authority out of existence.<sup>452</sup> In contrast, no organized lobby stood ready to defend immigrants arriving in the United States.<sup>453</sup> Indeed, the almost redemptive quality of cleansing came to justify and reinforce quarantine at the borders.<sup>454</sup>

The College of Physicians noted the advantages of a national approach.<sup>455</sup> A federal system would create uniformity and distribute the costs evenly among the states.<sup>456</sup> In this manner, the federal government could afford better training.<sup>457</sup> By stopping disease at the ports, a national system would prevent inter-state quarantines, which hurt trade in the interior.<sup>458</sup> The government could shift resources between ports when necessary, in the

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<sup>445</sup> *Id.* at 13. During the 1873 cholera outbreak, it had been Ohio, Minnesota, and the Dakotas that had suffered the most, as the railroad swept immigrants from the ports to the interior. In 1887, when the small port of Tampa, Florida, had failed to stop a yellow fever outbreak, it, too, had swept through the south.

<sup>446</sup> *Id.* at 14.

<sup>447</sup> *Id.* at 5–6.

<sup>448</sup> *Id.* at 7.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 3–4.

<sup>451</sup> *Id.* at 5.

<sup>452</sup> COLL. OF PHYSICIANS OF PHILA., *supra* note 436, at 23.

<sup>453</sup> *Id.* at 5.

<sup>454</sup> *Id.* at 5–6.

<sup>455</sup> *Id.* at 14.

<sup>456</sup> *Id.* at 14–15.

<sup>457</sup> *Id.* at 16.

<sup>458</sup> *Id.* at 17.

process freeing quarantine from local politics.<sup>459</sup> The physicians were not unaware of state concerns about federalism, but necessity overrode the traditional police powers reserved to the states.<sup>460</sup> Congress must pass new legislation.<sup>461</sup>

Industry, like the medical community, came to support the shift, and gradually the states, too, began to come around.<sup>462</sup> Many of them had already begun transferring their quarantine stations to federal control.<sup>463</sup> A paper from New Orleans, circulated to the Southern states, explained: “[T]he time has come when Federal Resources and Federal power should be organized and exercised to regulate and control Inter-state as well as foreign quarantine, and to prevent the introduction and extension of contagious and infectious diseases in the United States.”<sup>464</sup> Congress should pass legislation for the appointment of a Chief Commissioner of Health, charged with the collection and distribution of infectious disease information.<sup>465</sup> A new federal health commission would divide into six sections, each focused on the prevention of a different disease: yellow fever, cholera, typhoid, scarlet fever, small-pox, and diphtheria.<sup>466</sup>

The Federal Government quietly drove the discussion, encouraging regional agreement and standardization.<sup>467</sup> The Alabama conference, for instance, may have been technically organized by a state—indeed, only state delegates had a vote.<sup>468</sup> But the role of the Surgeon General could hardly be ignored: it was he who set the agenda.<sup>469</sup>

## ii. Judicial Reflection: Morgan’s Steamship

In the midst of these developments, a timely case led the courts to uphold quarantine as within state police powers, but it also raised the possibility of federal preemption. The case stemmed from the Louisiana legislature’s decision in 1882 to authorize the construction of a quarantine station in New

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<sup>459</sup> *Id.* at 20.

<sup>460</sup> *Id.* at 44.

<sup>461</sup> *Id.* at 21.

<sup>462</sup> See, e.g., J.C. Clark, Quarantine Regulations, in PROCEEDINGS OF THE QUARANTINE CONFERENCE HELD IN MONTGOMERY, ALABAMA, ON THE 5TH, 6TH, AND 7TH DAYS OF MARCH, 1889 69–70.

<sup>463</sup> *Id.* at 86.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 87.

<sup>467</sup> *Id.* at 5.

<sup>468</sup> *Id.*

<sup>469</sup> *Id.* at 49.



Orleans.<sup>470</sup> A subsequent statute required vessels and passengers entering the Mississippi River through the station to pay a fee and undergo examination.<sup>471</sup> Morgan's Steamship Company challenged the statute, saying that it violated the Constitution by imposing tonnage duties and interfering in the federal regulation of commerce.<sup>472</sup>

The Supreme Court disagreed.<sup>473</sup> The precautions taken by Louisiana were "part of and inherent in every system of quarantine."<sup>474</sup> They differed "in no essential respect from similar systems in operation in all important seaports all over the world, where commerce and civilization prevail."<sup>475</sup> Justice Miller, writing for the Court, added, "If there is a city in the United States which has need of Quarantine laws it is New Orleans."<sup>476</sup> Not only was the city on the front line of defense, but New Orleans served as a funnel through which trade to the interior flowed. While quarantine laws impacted interstate commerce, it was better to reserve such matters to the states—*at least until invalidated by Congress*:

[I]t may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on this subject will be abrogated, at least so far as the two are inconsistent. But until this is done, the laws of the State on this subject are valid.<sup>477</sup>

The court noted that for nearly a century, Congress had refrained from directly regulating quarantine; nor had it passed "any other law to protect the inhabitants of the United States against the invasion of contagious and infectious diseases from abroad."<sup>478</sup> Nevertheless cholera and yellow fever raged.

During all this time the Congress of the United States never attempted to exercise this or any other power to protect the people from the ravages of these dreadful diseases. No doubt they believed that the power to do this belonged to the States. Or, if it ever occurred to any of its members that congress might do something in that way, they probably believed that what ought to be done could be better and more wisely done by the authorities of

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<sup>470</sup> Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455 (1886).

<sup>471</sup> *Id.*

<sup>472</sup> *Id.* at 456.

<sup>473</sup> *Id.* at 459.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.* at 458.

<sup>476</sup> *Id.* at 459.

<sup>477</sup> *Id.* at 464.

<sup>478</sup> *Id.* at 466.

the States who were familiar with the matter.<sup>479</sup>

The Court found it unlikely that this practice, widely accepted for a century, violated the Constitution.<sup>480</sup> While the states might still have quarantine authority, however, the possibility of federal preemption now presented itself.

### iii. Federal Legislation in the wake of Morgan's Steamship

For the next five years, federal quarantine measures followed *Morgan's Steamship*, almost on an annual basis. The first one, in 1888, was relatively minor: it simply introduced penalties for the violation of quarantine laws and regulations.<sup>481</sup> In 1890, however, Congress began to flex its muscles, passing a statute that authorized the Secretary of the Treasury to develop rules and regulations to prevent the interstate spread of disease.<sup>482</sup> Hitherto such authorities applied only to the nation's ports.<sup>483</sup> The statute specified cholera, yellow-fever, small-pox, and plague, stating that whenever the President was satisfied as to its presence, "he is hereby authorized to cause the Secretary of the Treasury to promulgate such rules and regulations as in his judgment may be necessary to prevent the spread of such disease from one State or Territory into another..."<sup>484</sup> The concentration of these authorities in the Secretary of the Treasury underscored the nexus between commerce and disease. The statute made it a misdemeanor for any officer or agent of the U.S. at any quarantine station, or any other person employed to help prevent the spread of disease, to violate quarantine laws, with a fine of up to \$300 and imprisonment up to 1 year upon conviction.<sup>485</sup> Common carriers were treated more severely, with any violation earning a fine of up to \$500 or imprisonment for up to two years.<sup>486</sup>

In 1891 a new Immigration Act expanded border inspection and quarantine authority.<sup>487</sup> This did not, however, mean that the national government could not introduce new regulations where none existed; nor did it mean that Federal regulations could not be more stringent than local regulations.<sup>488</sup>

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<sup>479</sup> *Id.*

<sup>480</sup> *Id.*

<sup>481</sup> Act of Aug. 1, 1888, ch. 727, 25 Stat. 355 (1888).

<sup>482</sup> Act of Mar. 27, 1890, ch. 51, 26 Stat. 31 (1890).

<sup>483</sup> 25 Stat. at 355.

<sup>484</sup> 26 Stat. at 31.

<sup>485</sup> *Id.* § 2.

<sup>486</sup> *Id.* § 1.

<sup>487</sup> Act of Mar. 13, 1891 ch. 551, 26 Stat. 1084 (1891); *See also* Goodman, *supra* note 64, at 46–51, 263.

<sup>488</sup> 20 U.S. Op. Att'y Gen. 468 (1892).

Stricter measures would not, in the Solicitor General's view, "conflict with or impair" local sanitary regulations:

A State might be without the machinery to enforce a safe quarantine; its officer might through mistaken opinions or corrupt motives fail in his duty. It is not to be tolerated that an entire people possessing a government endowed with the powers I have enumerated should be exposed to the scourge of contagion and pestilence through such causes.<sup>489</sup>

So, where state measures were found inadequate, the federal government could act.

Accordingly, in 1893, Congress repealed the 1879 legislation, expanded the Marine Hospital Service responsibilities and provided for further federal authorities in support of state quarantine efforts.<sup>490</sup> The supervising Surgeon-General of the Marine-Hospital Service became required to examine all state and municipal quarantine regulations and, under the direction of the Secretary of Treasury, to cooperate with and help state and municipal boards of health in the execution and enforcement of their rules and regulations—as well as Treasury's rules and regulations—to prevent introduction of contagious and infectious diseases into the United States or between U.S. states or territories.<sup>491</sup> All quarantine laws in force would be published.<sup>492</sup>

The 1893 statute neither eliminated nor took over the state role, but it gave the Secretary of the Treasury the authority to enact *additional* rules and regulations to prevent the introduction of diseases, foreign and interstate, where local ordinances either did not exist or were inadequate.<sup>493</sup> The regulations must apply uniformly.<sup>494</sup> State and local officers would enforce federal measures where they were willing to act; if they refused or failed to do so, the federal government would assume control.<sup>495</sup> Warehouses, purchased by Treasury, would be used for merchandise subject to quarantine "pursuant to the health-laws of any State".<sup>496</sup> The Secretary of the Treasury could

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<sup>489</sup> 20 U.S. Op. Att'y Gen. 474–75 (1892). This read of Congressional action in introducing the Act of 1878 did not comport with the view taken by the Supreme Court in *Morgan's S.S. Co. v. La. Bd. of Health*, 118 U.S. 455 (1886).

<sup>490</sup> Act of Feb. 15, 1893, ch. 114, 27 Stat. 449 (1893).

<sup>491</sup> *Id.* at § 4.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.* at § 2.

<sup>494</sup> *Id.* at § 3.

<sup>495</sup> *Id.* at §3 (authorizing the President to "execute and enforce the same and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose.").

<sup>496</sup> Treas. Reg. §§ 4794–95 (1893).

prolong the period of retention, subject to state law.<sup>497</sup> As in earlier legislation, where contagious disease raged and presented a danger to officers of the revenue, the Secretary of the Treasury had the authority to remove them to a safer location so they could continue their duties.<sup>498</sup>

The 1893 statute was the first national legislation to require a bill of health from all vessels arriving in the United States—centuries after the same had been required in England. Failure to arrive with a clean bill of health carried a fine of up to \$5,000 per ship.<sup>499</sup> Subsequent regulations required that bills of health be obtained for vessels arriving from European, Asiatic, African, South American, Central American, Mexican, and West Indian ports.<sup>500</sup> They exempted domestic vessels engaged in trade on the North American coast and inland waters, as long as the ports were free from infection.<sup>501</sup> The bills were somewhat detailed, although not as specific as their corresponding British regulations.<sup>502</sup> Inspection had to be conducted within six hours of departure.<sup>503</sup>

The statute also strengthened the country's international disease surveillance program, requiring consular officers to make weekly reports to the Treasury on the state of disease abroad—instead of only reporting epidemics once they had taken hold.<sup>504</sup> The consular reports would, in turn, be provided to home ports.<sup>505</sup> When infected vessels arrived in the United States, the Treasury could remand the vessel, at its own expense, to the nearest quarantine station.<sup>506</sup> The President obtained the further power to designate countries gripped by infectious or contagious disease and to prohibit the introduction of persons or property from such regions.<sup>507</sup> Finally, the

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<sup>497</sup> *Id.* at § 4796.

<sup>498</sup> *Id.* at § 4797. Similarly, the President, in the face of an epidemic, could order the removal of all public offices “to such other places as he shall deem most safe and convenient for conducting public business.” *Id.* § 4798.

<sup>499</sup> Act of Feb. 15, 1893, ch. 114, 27 Stat. 449, at § 1.

<sup>500</sup> Treas. Reg. Art. 1 (1893).

<sup>501</sup> *Id.*

<sup>502</sup> *Id.* U.S. bills of health required the name of the vessel, nationality, tonnage, iron or wood, the number of compartments for cargo/passengers, crew members, the names of captain and medical officer, the number of passengers, the port of departure, any sicknesses during law voyage, the last port of call, sanitary conditions, the source and potability of the water and food supplies, the nature and condition of the cargo, diseases prevalent at the port of origin and the surrounding country, and the number of cases/deaths from yellow fever, Asiatic cholera, plague, smallpox, typhus fever, over past two weeks.

<sup>503</sup> *Id.* at Art. III.

<sup>504</sup> *Id.* at § 4.

<sup>505</sup> *Id.* at § 5.

<sup>506</sup> *Id.* at § 6.

<sup>507</sup> *Id.* at § 7. It is not clear how often this power was used. By 1921, however, the authority

legislation further smoothed the material transfer of quarantine structures to the federal government, authorizing the Treasury to receive buildings and disinfecting apparatus and to pay reasonable compensation to the state.<sup>508</sup>

### *E. Police Powers, Preemption and the Spending Clause*

By the turn of 20<sup>th</sup> century, the federal government had made some advances into the quarantine realm, but it had yet to preempt the states. State quarantine was alive and well. In December 1899, for instance, plague broke out in Chinatown and other parts of Honolulu.<sup>509</sup> Eventually, the city of Honolulu was placed under quarantine and, at one point, the local board of health ordered that an entire city block, facing the trade winds, be burned.<sup>510</sup> The quarantine did not end until May 1900.<sup>511</sup>

Efforts to challenge state authority on constitutional grounds fell short, with the judiciary further underscoring its position in *Morgan's Steamship*.<sup>512</sup> In 1898, for instance, in the face of a yellow fever epidemic, the Louisiana State Board of Health issued an order declaring New Orleans and other parts of the state under geographic quarantine.<sup>513</sup> The Board prohibited entry of all persons, whether "acclimated, unacclimated or said to be immune."<sup>514</sup> Shortly before the order was issued, the French liner *Brittania* arrived in New Orleans with 408 passengers and a clean bill of health.<sup>515</sup> Before the passengers could disembark, however, the Board of Health directed the ship to leave Louisiana—threatening to extend quarantine to any place the ship landed.<sup>516</sup> After days of dispute, the liner sailed to Pensacola, Florida, and the company brought suit on the grounds that the State Board of Louisiana had violated the Act of February 15, 1893.<sup>517</sup>

*Compagnie Francaise v. Louisiana State Board of Health* reiterated the key findings in *Morgan's Steamship*. Justice White, writing for the court, held that the state had the authority to enact and enforce laws "for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious

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was viewed as based on unsound science. See Cumming, *supra* note 342, at 122.

<sup>508</sup> Treas. Reg. § 8 (1893).

<sup>509</sup> Wong Chow v. Transatlantic Fire Ins. Co., 13 Haw. 160, 161 (1900).

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455, 467 (1886).

<sup>513</sup> Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380 (1902).

<sup>514</sup> *Id.* at 385.

<sup>515</sup> *Id.* at 381.

<sup>516</sup> *Id.* at 382.

<sup>517</sup> *Id.* at 383.

diseases.”<sup>518</sup> The Louisiana Board of Health had, with this purpose, passed a resolution preventing anyone from entering a place in the state where quarantine had been declared.<sup>519</sup> “[T]hat from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question.”<sup>520</sup> But like Justice Miller in *Morgan’s Steamship*, Justice White left open the possibility of Commerce Clause preemption:

[W]henver Congress shall undertake to provide...a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent.<sup>521</sup>

Until Congress exercised its power, however, “such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the constitution.”<sup>522</sup>

Three years later, the Court again underscored state authority to legislate in the realm of public health. *Jacobson v. Massachusetts* centered on compulsory vaccination.<sup>523</sup> Justice Harlan upheld state authority to enact such laws, explaining, “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>524</sup> Like quarantine, compulsory smallpox vaccination was held to be a legitimate exercise of state’s police power to protect public health and safety.<sup>525</sup> Local boards of health had been the ones to determine whether mandatory vaccination was required.<sup>526</sup> Their decision had therefore been neither unreasonable nor arbitrary.<sup>527</sup>

State legislatures and courts continued to regard quarantine law as firmly within the state domain.<sup>528</sup> By 1913, however, the shifting tide had begun to

<sup>518</sup> *Id.*

<sup>519</sup> *Id.* at 398.

<sup>520</sup> *Id.* at 387. *See also* *Asbell v. Kansas*, 209 U.S. 251 (1908) (holding that the Federal Quarantine Act of 1905 was treated as totally irrelevant to the question of the power of the state to enforce its inspection laws, which were held not to conflict with the inspection provisions of the act of 1903).

<sup>521</sup> *Compagnie Francaise de Navigation a Vapeur*, 186 U.S. at 388.

<sup>522</sup> *Id.* at 387.

<sup>523</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>524</sup> *Id.* at 27.

<sup>525</sup> *Id.* at 28 (citing *R.R. Co. v. Husen*, 95 U.S. 465, 472 (1877)).

<sup>526</sup> *Id.* at 27.

<sup>527</sup> Wendy E. Parmet et al, *Individual Rights versus the Public’s Health—100 years after Jacobson v. Massachusetts*, 352 *NEW ENG. J. MED.* 652 (2005).

<sup>528</sup> *See, e.g., Wong Wai v. Williamson*, 103 F. 1 (C.C.N.D. Cal. 1900) (challenging a San Francisco

gain momentum.<sup>529</sup> That year, the Supreme Court recognized that states were free to adopt quarantine regulations *that did not conflict with Federal statutory or regulatory initiatives*.<sup>530</sup> The subtle undertones of the decision suggested not that the states had the ultimate authority, but that it was only by leave of Congress that they could act in this area.<sup>531</sup>

During this period, the federal government continued to assist the states, while quietly accepting transfer of authority and equipment in what one mid-20<sup>th</sup> century scholar referred to as “a process of accretion and erosion.”<sup>532</sup> In 1921, the last state transferred its holdings and the authority to regulate them, to the federal government, bringing the total to approximately 100 quarantine stations.<sup>533</sup> The Surgeon General reflected:

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ordinance requiring Chinese residents of the city to be administered a bubonic plague vaccine on grounds of equal protection); *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900) (challenging the same ordinance on equal protection grounds); *Ex Parte Company*, 139 N.E. 204, 206 (Ohio 1922) (“[T]he power to so quarantine in proper case and reasonable way is not open to question. It is exercised by the state and the subdivisions of the state daily.”); *Ex parte Johnson*, 180 P. 644, 644–45 (Cal. Dist. Ct. App. 1919) (all judges concurring) (“[T]he adoption of measures for the protection of the public health is a valid exercise of the police power of the state, as to which the Legislature is necessarily vested with large discretion, not only in determining what are contagious and infectious diseases, but also in adopting means for preventing their spread.”); *Barmore v. Robertson*, 302 Ill. 422 (Ill. 1922) (finding “it is not necessary that one be actually sick, as the term is usually applied, in order that the [state] health authorities have the right to restrain his liberties by quarantine regulations.”).

<sup>529</sup> *The Minnesota Rate Cases*, 230 U.S. 352, 406 (1913).

<sup>530</sup> *Id.*

<sup>531</sup> *Id.* at 408–09.

<sup>532</sup> Sidney Edelman, *International Travel and our National Quarantine System*, 37 *TEMP. L. Q.* 28, 35 (1963). In 1905 a Yellow Fever outbreak in New Orleans caused panic. Health workers soon found that the situation had gotten out of hand. The governor declared a state of emergency. Federal public health officials helped to contain the epidemic—and head off friction between Mississippi and Louisiana (derived from the former’s allegation that Louisiana was concealing the extent of the yellow fever outbreak so as not to hurt interstate commerce). See also ALAN M. KRAUT, *GOLDBERGER’S WAR: THE LIFE AND WORK OF A PUBLIC HEALTH CRUSADER* 56–57 (2003); Sciarrino, Part I, *supra* note 49, at 167–8. In 1911, the Marine Hospital Service worked with the Port of New York to prevent the entry of cholera from abroad. See e.g., JOHN M. LAST, *PUBLIC HEALTH AND HUMAN ECOLOGY* 311 (1998); Cumming, *supra* note 342, at 128. Congress continued to facilitate the transfer of quarantine stations, previously operated by state or local governments, to federal authorities. *Id.* at 123. The quarantine of women with venereal disease in World Wars I and II, while driven by the federal government, took place under state laws. See MARILYN E. HEGARTY, *VICTORY GIRLS, KHAKI-WACKIES, AND PATRIOTUTES: THE REGULATION OF FEMALE SEXUALITY DURING WORLD WAR II* (2008); John Parascandola, *Presidential Address: Quarantining Women: Venereal Disease Rapid Treatment Centers in World War II America*, 83 *BULL. HIST. MED.* 431–59 (2009); DAVID J. PIVAR, *PURITY AND HYGIENE: WOMEN, PROSTITUTION, AND THE “AMERICAN PLAN” 1900–1930* (2002).

<sup>533</sup> Neuman, *supra* note 397, at 1865.

The transition of a quarantine system, composed of units operated by the municipal or state authorities, to a compact federal organization has been gradual, but persistent. One after another cities and states have transferred their quarantine stations to the national Government, so that, with the passing of the New York Quarantine Station from state to national control on March 1, 1921, the Public Health Service now administers every station in the United States and in the Hawaiian Islands, the Philippines, Porto Rico, and the Virgin Islands.<sup>534</sup>

At that point, the federal government was inspecting some two million passengers and crew, and 20,000 vessels each year.<sup>535</sup>

Centralized control brought with it a number of advantages. As reformers anticipated, it allowed maritime quarantine to be uniformly administered, so as not to favor one port over another.<sup>536</sup> It generated a higher quality of quarantine officers, as the United States could now create a trained corps that could be moved between stations.<sup>537</sup> It also allowed for greater cooperation between medical authorities, customs, and immigration services.<sup>538</sup> It placed the country in a stronger position to comply with its international treaties (and to demand that foreign countries reciprocate).<sup>539</sup> It ensured that the costs would be distributed among the states, all of whom benefitted from preventing the introduction of disease at the ports of entry.<sup>540</sup> Perhaps most importantly, it pulled quarantine from the grasp of local politics, and placed it in the hands of qualified medical personnel.<sup>541</sup> Surgeon General Hugh Cumming proclaimed it as the triumph of science over politics.<sup>542</sup>

#### F. Contemporary Quarantine Authorities

In 1939 the U.S. Public Health Service moved from the Treasury to the Federal Security Agency.<sup>543</sup> Five years later, Congress introduced the Public Health Service Act, which became the first of two pillars on which current federal quarantine authority rests.<sup>544</sup> The other is the 1988 Robert T. Stafford

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<sup>534</sup> Cumming, *supra* note 342, at 123.

<sup>535</sup> *Id.* at 131.

<sup>536</sup> *Id.* at 123.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

<sup>539</sup> *Id.* at 123–24.

<sup>540</sup> *Id.* at 124.

<sup>541</sup> *Id.*

<sup>542</sup> *Id.* at 119.

<sup>543</sup> Goodman, *supra* note 64, at 46–51, 263.

<sup>544</sup> Codified as amended at 42 U.S.C. §§ 264–72 (2002).



Disaster Relief and Emergency Assistance Act.<sup>545</sup>

i. Public Health Service Act of 1944

Consistent with Commerce Clause considerations, the 1944 Public Health Service Act limits federal quarantine authority to disease introduced at ports of entry or inter-state movement of goods or services.<sup>546</sup> The statute gives the Secretary of Health and Human Services (HHS) the authority to make and enforce any regulations as in her judgment may be necessary “to prevent the introduction, transmission, spread of communicable diseases from foreign countries into the states or possessions, or from one State or possession into any other State or possession.”<sup>547</sup> Quarantine is limited to the communicable diseases in Executive Order 13295.<sup>548</sup> Since 1983, this list has included cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, and viral hemorrhagic fevers.<sup>549</sup> In April 2003, the Bush Administration added SARS and the following year influenza causing, or having potential to cause, a pandemic.<sup>550</sup> The HHS Secretary has the authority to apprehend and examine any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (1) moving or being about to move between states, or (2) a probable source of infection to individuals who may be moving between states.<sup>551</sup> If, after inspection, an individual is found to be infected, the Secretary of HHS can detain the individual for such a time, and in such a manner as may be reasonably necessary.<sup>552</sup>

In 2000, authority transferred from the Secretary of HHS to the Director of the CDC, authorizing her to take whatever measures may be necessary to prevent the spread of communicable disease from one state to any other state

<sup>545</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (2007) (amending the Disaster Relief Act of 1974, Pub. L. 93–288).

<sup>546</sup> 42 U.S.C. § 264–72.

<sup>547</sup> 42 U.S.C. § 264(a); 42 C.F.R. §§ 70-71 (2000); *See also* 21 C.F.R. § 1240.3 et seq. In 1953 the Eisenhower Administration launched the Department of Health, Education and Welfare (HEW) under the Executive’s then-existing authority to form new bureaucratic entities absent legislative veto. President Dwight D. Eisenhower, Reorganization Plan No. 1 of 1953, Transmitted to Congress Mar. 12, 1953, *available at* <http://www.presidency.ucsb.edu>. In 1980 HEW became the Department of Health and Human Services. *See e.g.*, 20 U.S.C. § 3508 (Redesignation of Department of Health, Education, and Welfare).

<sup>548</sup> Exec. Order No. 13295, 68 Fed. Reg. 17255 (Apr. 4, 2003).

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*; *See also* Exec. Order No. 13375, 70 Fed. Reg. 17299 (Apr. 1, 2005).

<sup>551</sup> 42 U.S.C. § 264(d). “Qualifying stage” means disease is in communicable stage, or is in a precommunicable state, if the disease would likely cause a public health emergency if transmitted to other individuals; 42 U.S.C. § 264(d)(2).

<sup>552</sup> 1944 Public Health Services Act, 58 Stat. 682, § 361 (1944) (codified at 42 U.S.C. § 264(d)).

where local health authorities have not taken adequate steps to prevent the spread of the disease.<sup>553</sup> Regulations prohibit infected people from traveling across state lines without explicit approval or a permit from the health officer of the state, if applicable under their law.<sup>554</sup> Further restrictions can be placed on individuals who are in the “communicable period of cholera, plague, smallpox, typhus or yellow fever, or who having been exposed to any such disease, is in the incubation period thereof.”<sup>555</sup> Regulations also establish CDC control over foreign arrivals.<sup>556</sup>

The authority claimed in 1921 to be obsolete—executive power to prohibit persons or goods from designated areas from entering the United States—continues to be in effect (the authority has not been delegated to the Surgeon General).<sup>557</sup> And special quarantine powers apply in times of war, whereupon the HHS Secretary, in consultation with the Surgeon General, may indefinitely detain individuals reasonably believed to be infected or a probable source of infection.<sup>558</sup> Unlike peacetime authorities, it is not necessary for an individual to be in a qualifying stage of infection.<sup>559</sup>

The Surgeon General exercises control over all U.S. quarantine stations and can establish additional stations as necessary.<sup>560</sup> The consular reporting requirements have been retained under such rules as established by the Surgeon General.<sup>561</sup> U.S. Customs and the Coast Guard must assist in executing federal quarantine law.<sup>562</sup> Bills of health continue to be required for all vessels entering or leaving U.S. water and air space.<sup>563</sup> Violation of general federal quarantine provisions is punishable by a fine of up to \$1,000, by imprisonment of not more than one year, or both.<sup>564</sup> Violations of specific federal quarantine or isolation orders is a criminal misdemeanor, punishable by a fine of up to \$250,000, one year in jail, or both.<sup>565</sup> Organizations violating such orders are subject to a fine of up to \$500,000 per incident.<sup>566</sup> Federal District Courts may enjoin individuals and organizations from violation of CDC quarantine

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<sup>553</sup> See 65 FR 49906; 42 C.F.R. 70.2.

<sup>554</sup> 42 C.F.R. 70.3.

<sup>555</sup> See 42 C.F.R. 70.5–70.6 (restricting travel primarily for communicable disease).

<sup>556</sup> 42 C.F.R. § 71.

<sup>557</sup> 42 U.S.C. § 265 (2012).

<sup>558</sup> *Id.* at § 266.

<sup>559</sup> *Id.*

<sup>560</sup> *Id.* at § 267.

<sup>561</sup> *Id.* at § 268(a).

<sup>562</sup> *Id.* at § 268(b).

<sup>563</sup> *Id.* at §§ 269-270.

<sup>564</sup> *Id.* at § 271.

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*

regulations.<sup>567</sup>

Most recently, the Centers for Disease Control have proposed the adoption of new regulations that would, *inter alia*, impose stronger reporting requirements on airlines and ships regarding their passengers. *Figure 1*, below, outlines the proposed information to be collected from all travelers prior to embarkation. The proposed regulations also require travel permits for qualifying diseases. The detention of carriers and the screening of any passengers considered ill are also included, as are measures for imposing “provisional quarantine”. This last measure targets individuals who refuse to be quarantined, and would be authorized by the CDC Director of Global Quarantine for a period of three business days.

Data elements required by CDC NPRM	Currently collected by airlines	Required by DHS/APIIS for international flights
Name .....	Yes .....	Yes.
Emergency contact .....	Intermittent to rarely for domestic flights, more frequently for international flights.	No.
Flight information .....	Yes .....	Yes.
Phone number .....	Intermittent .....	No.
Email address .....	Intermittent—usually only for Internet, phone, or travel agent reservations.	No.
Current home address .....	Intermittent—usually only for Internet or travel agent reservations.	No.
Passport or travel document number and country (for foreign nationals for domestic and international flights).	Only for international flights .....	Yes.
Travelling companions .....	No .....	No.
Returning flight information .....	Usually only if booked at same time or with same airline .....	No.

Figure 1

The proposed regulations demonstrate the key role science has come to play: the length of detention is determined by the incubation period of each disease. An opportunity to contest quarantine would be provided by administrative hearings. These proposed regulations have yet to be passed; they remain in the consultative phase.

In 1963 the federal authority to quarantine was challenged.<sup>568</sup> At that time, the World Health Organization had declared Stockholm to be a smallpox-infected area.<sup>569</sup> When a passenger from Stockholm arrived in the United States and was not able to produce documentation proving prior vaccination, the Public Health Service quarantined the passenger for fourteen days.<sup>570</sup> The District Court, upholding the detention, noted that the federal government had acted in good faith, that the individual had had a history of unsuccessful vaccinations, and that detention during the incubation period was required to

<sup>567</sup> See 28 U.S.C. § 1331 (2012).

<sup>568</sup> See *United States ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 790–91 (E.D.N.Y. 1963).

<sup>569</sup> *Id.* at 790.

<sup>570</sup> *Id.*

determine whether the individual had been infected.<sup>571</sup>

Other judicial challenges to the current federal quarantine provisions have not arisen; however, there are a number of issues ripe for consideration. The courts, for instance, have yet to rule on whether federal *cordon sanitaire* would withstand constitutional challenge. Following *United States v. Lopez*, it appears that the courts are willing to recognize some limits on the Commerce Clause authorities.<sup>572</sup> And, as discussed throughout this article, quarantine law has historically been regarded as at the core of state police powers, reserved through the 10th Amendment. On the other hand, the Supreme Court's recent decision in *United States v. Comstock* raises question about whether a necessary and proper claim could equally well uphold federal action in this realm.<sup>573</sup> Justice Breyer, writing for himself and four other justices, compared the civil commitment statute upheld in *Comstock* to medical quarantine. At least two justices, however, Justice Alito and Justice Kennedy, who voted to uphold the law, did not adopt the breadth of Breyer's decision. Kennedy, in particular, stated that the majority did not give the Tenth Amendment due weight.

Due process challenges might also surface, particularly in regard to whether the procedures and the grounds for quarantine are sufficient; for while due process standards have evolved over the 20th and into the 21st century, the legislative framing for quarantine has remained relatively constant. The proposed regulations would tailor the period of quarantine more carefully to each disease, as well as provide for an administrative hearing to contest quarantine. Whether these are sufficient is merely speculative, as they have yet to be adopted. They do improve, however, upon the system in place since 1944.

## ii. Robert Stafford Disaster Relief and Emergency Assistance Act

The second pillar of federal quarantine authorities is the Robert T. Stafford Disaster Relief and Emergency Assistance Act.<sup>574</sup> This legislation provides federal assistance to state and local governments in the event of an emergency. The Disaster Mitigation Act of 2000 amended the Stafford Act to further encourage state, local, and tribal areas to coordinate disaster

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<sup>571</sup> *Id.* at 791.

<sup>572</sup> See *e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>573</sup> See *e.g.*, *United States v. Comstock*, 130 S. Ct. 1949, (2010).

<sup>574</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707 (1988) (codified as amended at 42 U.S.C. §§ 5121-5206 (2000)); Disaster Relief Act of 1974, Pub. L. No. 93-288.

management planning and implementation.<sup>575</sup> Like the early Congressional initiatives in the quarantine realm, the legislation places the federal government solely in a supportive capacity.<sup>576</sup>

There are two main types of Stafford Act declarations: (1) a major disaster declaration under Title IV, and (2) an emergency declaration under Title V. A major disaster declaration is predicated upon a formal request by the Governor for federal assistance.<sup>577</sup> The type of incident that qualifies is limited: it may only be used in response to “any natural catastrophe...or, regardless of cause, any fire, flood, or explosion.”<sup>578</sup> In other words, it does not apply to non-natural incidents (e.g., criminal activity, terrorist attacks, or acts of war). It would, however, cover any fire, flood, or explosion arising from such incidents. To obtain federal assistance, the state must have a mitigation plan in place, creating an incentive for increased coordination and integration of mitigation activities.<sup>579</sup> The President is not *required* to grant the state’s request, but, instead, is given the *option* of responding.<sup>580</sup> Although the statute does not directly mention quarantine, it authorizes the President to provide health and safety measures (which would, presumably, include medical detention).<sup>581</sup> The statute does *not* provide a cap for the amount of monetary assistance available to an affected area under a major disaster declaration.

In contrast to the major disaster declaration, an emergency declaration, which falls under Title V, may be made *either* pursuant to the request of a state governor, *or* the President may unilaterally declare an emergency for an incident involving a primary federal responsibility.<sup>582</sup> As with the major disaster declaration, the President retains the discretionary authority of deciding when to act.<sup>583</sup> For an emergency declaration pursuant to a state

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<sup>575</sup> Disaster Mitigation Act of 2000 Pub. L. No. 106-390 (codified as amended at Stafford Act at 42 U.S.C. ch.68).

<sup>576</sup> 42 U.S.C. § 5121 (2012). The contours of federal activity include revising and broadening the scope of existing disaster relief programs; encouraging the development of comprehensive state and local disaster preparedness and assistance plans; helping to coordinate responses between different states and localities; and encouraging hazard mitigation measures to reduce losses from disasters; *See also* Pub. L. 93-288, title I, § 101, May 22, 1974, 88 Stat. 143; Pub. L. 100-707, title I, § 103(a), Nov. 23, 1988, 102 Stat. 4689.

<sup>577</sup> 42 U.S.C. § 5170.

<sup>578</sup> *Id.* at § 5122(2).

<sup>579</sup> *Id.* at § 5170a.

<sup>580</sup> *Id.*

<sup>581</sup> *Id.* at § 5170a(3)(D) (“In any major disaster, the President may . . . provide technical and advisory assistance to affected State and local governments for . . . provision of health and safety measures.”).

<sup>582</sup> *Id.* at § 5170.

<sup>583</sup> *Id.* at § 5191.

governor request, “any occasion or instance” may suffice.<sup>584</sup> The process for making the request is substantively similar to the request for a major disaster declaration.<sup>585</sup> But unlike major disaster assistance, emergency declaration response is capped at \$5 million, unless the President explicitly determines a continuing need.<sup>586</sup> The emergency declaration is thus both broader (covering a wider range of incidents) and narrower (owing to financial limits) than a major disaster declaration.<sup>587</sup>

Where an emergency involves matters of federal primary responsibility, the President is free to act absent a governor’s request.<sup>588</sup> The statute, though, does not define “primary responsibility”; instead, it provides a broad category: “subject area[s] for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.”<sup>589</sup> Typically, emergencies declared pursuant to the primary responsibility clause involve incidents on federal property, such as the 1995 Oklahoma City Bombing or the 2001 attack on the Pentagon (although in both of these cases, later requests from state governors commuted them to major disaster declarations). Financial and physical assistance is then provided directly through FEMA, arguably sidelining the DHS Secretary to no role whatsoever in the response.

### *G. Continued Expansion in the Federal and Military Realm*

While the Public Health Services Act and the Stafford Act provide the pillars for the current federal quarantine structure, the area continues to be in flux. To a significant extent, these changes have been influenced by the bundling of pandemic disease and biological weapons—highlighted at the start of this article. Along with this shift has come growing attention to the role of the military in enforcing such provisions.

HSPD 10, for instance, considers the military to be central to U.S. strategy.<sup>590</sup> In large measure this stems from the biological weapons component of the threat. In enacting the 2002 Homeland Security Act, Congress explained:

[B]y its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law

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<sup>584</sup> *Id.*

<sup>585</sup> *See id.*

<sup>586</sup> *Id.* at § 5193(b)(1).

<sup>587</sup> *See* § 5193; *See also* ALAN COHN, DISASTER PREPAREDNESS, Book Manuscript (forthcoming).

<sup>588</sup> 42 U.S.C. § 5192.

<sup>589</sup> 42 U.S.C. § 5191(b).

<sup>590</sup> *See* HSPD 10, *supra* note 8.

enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the constitution to respond promptly in time of war, insurrection, or other serious emergency. [...] Existing laws, including [the Insurrection Act and the Stafford Act] grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destructions, and these laws specifically authorize the President to use the Armed Forces to help restore public order.

Such broad language suggests that the federal government could use the military in response to any national emergency, including natural disasters.

Congress contemplated a similar role for the federal government—and the military—following Hurricane Katrina. The storm hit the U.S. Gulf Coast in August 2005 and precipitated the destruction of the levees surrounding New Orleans. The 2007 Defense Authorization Act subsequently addressed the role of the military in the event of natural disaster, pandemic, or biological weapons attack (again, coupling pandemic disease and the biological weapons threat).<sup>591</sup> One of the chief criticisms levied against the federal government was that they had dragged their feet in mounting an appropriate response. For example, thirty-six hours after the hurricane hit, Michael Chertoff, Homeland Security Director, finally issued a memo declaring it an “incident of national significance,” thereby shifting the responsibility to FEMA.<sup>592</sup> President Bush wanted to federalize the Louisiana National Guard, but Louisiana Governor Kathleen Blanco refused. The President considered and rejected a proposal to federalize the Guard over her objection.<sup>593</sup>

To clarify federal authority in the future, the 2006 Administration convinced Congress to amend the Insurrection Act for the first time in more than 200 years, re-naming it “Enforcement of the Laws to Restore Public Order.”<sup>594</sup> The new language expanded the statute, almost exclusively used in

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<sup>591</sup> 10 U.S.C. 15, §§ 331–335.

<sup>592</sup> *E.g.*, Jonathan S. Landay, Alison Young & Shannon McCaffrey, Chertoff Delayed Federal Response, MEMO SHOWS, KNIGHT RIDDER NEWSPAPERS, Sept. 13, 2005, *available at* <http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines05-0914-04.htm>; *See also* SARAH A. LISTER, CONG. RESEARCH SERV., RL 33096, HURRICANE KATRINA: THE PUBLIC HEALTH AND MEDICAL RESPONSE (2005), *available at* <http://fpc.state.gov/documents/organization/54255.pdf>; BIPARTISAN COMMITTEE CREATED BY HOUSE RESOLUTION 437; A FAILURE OF INITIATIVE: FINAL REP. OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H. R. REP. NO. 109-377 (2006), *available at* <http://www.gpoaccess.gov/serialset/creports/katrina.html>.

<sup>593</sup> *See e.g.*, US CONST, art. II, § 2, cl. 1; DEP'T OF DEF. DIRECTIVE 5525.5 at E4.1.2.4, (1986) *available at* [http://www.fas.org/irp/doddir/dod/d5525\\_5.pdf](http://www.fas.org/irp/doddir/dod/d5525_5.pdf); DEP'T OF DEF. DIRECTIVE 3025.12 (1994) *available at* <http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf>.

<sup>594</sup> John Warner National Defense Authorization Act for Fiscal year 2007, Pub. L. No. 109-364, §

the past to restore civil order, to cover instances of “domestic violence” where public order was disrupted due to a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.”<sup>595</sup> The statute authorized the President to use federal troops to “restore public order and enforce the laws of the United States” *without* a request from the governor or legislature of the state involved, in the event s/he determines that local authorities are unable to maintain public order where either equal protection of the laws is impeded or the execution of federal law and related judicial process is obstructed. The legislation required that the President notify Congress as soon as practicable, and every fourteen days thereafter, until ordinary law enforcement was restored.<sup>596</sup> Congress passed the bill over the strong objection of all fifty-one governors.<sup>597</sup>

The governors objected to giving the President the authority to impose martial law in the event of a public health crisis or biological weapons attack, without any contact or collaboration with the states.<sup>598</sup> In one fell swoop, the legislation overturned more than two centuries of practice. The locus of the new powers were both legislative and executive war powers—not commerce clause considerations. The way in which the provisions had been introduced proved particularly concerning. The *New York Times* pointed out that the new

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<sup>595</sup> 10 U.S.C. § 333 (2006), amended by 10 U.S.C. § 333 (2008).

<sup>596</sup> *Id.*

<sup>597</sup> In February 2006, National Governors met with Rumsfeld to emphasize that any changes to the role of the National Guard would have to be agreed to by the governors. See letter from Janet Napolitano, Governor; Tim Pawlenty, Chair NAG; Michael F. Easley; and Mark Sanford, to the Hon. Donald Rumsfeld, Secretary, Department of Defense, (Aug. 31, 2006) (on file with the National Governors Association). The Administration largely ignored the governors’ concerns and introduced the bill into Congress, prompting letters from the National Governors Association; See, e.g., Letter from Mike Huckabee, Governor and Janet Napolitano, Governor, to the Hon. Duncan Hunter, Chair, Comm. on Armed Services, U.S. House of Reps. and the Hon. Ike Skelton, Ranking Member, Comm. on Armed Services, U.S. House of Reps. (Aug. 1, 2006) (on file with the National Governors Association); Letter from multiple United States Governors to the Hon. Bill Frist [sic], Majority Leader U.S. Senate, the Hon Harry Reid, Minority Leader, U.S. Senate, the Hon. J. Dennis Hastert, Speaker, U.S. House of Representatives, the Hon. Nancy Pelosi, Minority Leader, U.S. House of Representatives, (Aug. 6, 2006) (on file with the National Governors Association); letter to Majority and Minority Leader of the Senate, Speaker and Minority Leader of the House of Representatives. (Bill Frist, Harry Reid, Dennis Hastert, Nancy Pelosi), August 32, 2006; Letter from Governor Janet Napolitano, Chair NAG, Tim Pawlenty, Michael F. Easley, and Mark Sanford, to the Hon. Donald Rumsfeld, Secretary, Department of Defense (August 31, 2006).

<sup>598</sup> Letter from Governors Michael F. Easley, Co-lead on the National Guard and Mark Sanford, Co-lead on the National Guard, to the Hon. Patrick J. Leahy, U.S. Senate and the Hon. Christopher “Kit” Bond, U.S. Senate (Feb. 5, 2007) (on file with the National Governors Association).



powers had been “quietly tucked into the enormous defense budget bill without hearings or public debate. The president,” moreover, “made no mention of the changes when he signed the measure, and neither the White House nor Congress consulted in advance with the nation’s governors.”<sup>599</sup>

The following year Senators Patrick Leahy (D-VT), Christopher Bond (R-MO) introduced a bill to repeal the changes to the Insurrection Act, returning it to its original form.<sup>600</sup> An impressive list of state interests lined up in support: the National Governors Association, National Sheriffs’ Association, Enlisted Association of the National Guard, Adjutants General of the United States, National Guard Association, National Lieutenant Governors Association, National Conference of State Legislatures, and Fraternal Order of Police all sought a return to the Insurrection Act.<sup>601</sup> Leahy and Bond attached their rider to the National Guard Empowerment Reform Bill, passed by Congress December 14, 2007, and signed into law by President Bush January 30, 2008.<sup>602</sup>

Despite the restoration of the Insurrection Act language, use of the military—Title 32 troops and Title 10 forces—to respond to public health crises has Congressional and academic support.<sup>603</sup> Even without the statute, the deployment of military in Katrina was largest military deployment in domestic bounds since the Civil War.<sup>604</sup> And the policy documents currently in place support the use of the military to enforce quarantine.<sup>605</sup> Such use of the military feeds into the broader issue of the role of the military on domestic soil—an area that has attracted increasing attention post-9/11.<sup>606</sup>

<sup>599</sup> Editorial, Making Martial Law Easier, NY TIMES, Feb. 19, 2007.

<sup>600</sup> See Statement of Sen. Patrick Leahy on Legislation to Repeal Changes to the Insurrection Act (S. 513) (Feb. 7, 2009), available at <http://votesmart.org/public-statement/239998/statement-of-sen-patrick-leahy-on-legislation-to-repeal-changes-to-the-insurrection-act>.

<sup>601</sup> *Id.*

<sup>602</sup> H.R. 4986, 110<sup>th</sup> Cong. § 1068 (as enacted on Jan. 30, 2008) (repealing the rider attached to National Guard Empowerment Reform Bill, passed by Congress Dec. 14, 2007 and signed into law by Bush Jan. 30, 2008).

<sup>603</sup> See, e.g., Bipartisan Report, *supra* note 592; STEVE BOWMAN, LAWRENCE KAPP, & AMY BELASCO, CONG. RESEARCH SERV., RL 33095, HURRICANE KATRINA: DOD DISASTER RESPONSE, Sept. 19, 2005; Sciarrino, Part III, *supra* note 49, at 426.

<sup>604</sup> Bipartisan Report, *supra* note 592, at 201.

<sup>605</sup> See, e.g., Influenza Implementation Plan, *supra* note 11, at 12.

<sup>606</sup> See, e.g., Memorandum from John Yoo, deputy Assistant Attorney General for the Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel for the Department of Defense (Oct. 23, 2001) available at <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf> (determining the application of the Fourth Amendment to military conduct within the United States); Memorandum from John Yoo, Deputy Assistant Attorney General for the Office of Legal Counsel, to William J. Haynes II, General Counsel for the Department of Defense (March 14, 2003) available at <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf> (referring to the

There are practical reasons for the current state of play. At the most basic level, the link between biological weapons and pandemic disease makes sense: it may be very difficult to determine, at the outset, whether emerging disease is natural, biologically engineered, or the result of deliberate attack. Regardless of origin, natural or engineered diseases may have equally devastating consequences and require similar response mechanisms to limit their spread. Mitigation measures may equally be required – and effective. Isolation and quarantine, in turn, may be the only defense the government has against either emerging disease or engineered weapons. As for the use of the military, biological weapons research has historically been in the purview of the armed forces, making it perhaps the most prepared and effective entity in responding to such attacks. It may also be the only agency with the necessary technologies, resources and manpower to be able to respond in the event of an emergency, regardless of whether it results from an attack or from natural causes.

But practical explanations aside, these provisions raise troubling questions relating to state police powers, federalism, individual rights, and the use of the military on domestic soil.<sup>607</sup> They also run directly counter to the experiences of the United Kingdom where quarantine authorities initially were exercised by the king, using the military. As the Constitutional structure changed, however, first the Privy Council and then Parliament gained control, at which point commercial interests lobbied national quarantine law out of existence, pushing it down to a state and local level.

### III. THE DEVOLUTION OF QUARANTINE LAW IN THE UNITED KINGDOM

British history is punctuated by devastating bouts with disease, the most feared of which were referred to as the “three exotics”: plague, yellow fever, and cholera. Of these, plague, caused by bacillus *Pasteurella pestis* or *Yersinia pestis*, is the oldest.<sup>608</sup> It also was the most influential in shaping Britain’s approach to disease. Records show that as early as 1349 plague hit England,

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application of the Fourth Amendment to military conduct with the United States; Memorandum from John Yoo. Deputy Assistant Attorney General forth Office of Legal Council, to Tim Flanigan (classified material) (“[T]he legality of the use of military force to prevent and deter terrorist activity inside the United States.”) (referenced by Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* 47 (2008); Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004.

<sup>607</sup> See George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 NEW ENG. J. MED. 1337-42 (2002); Julie Bruce, *Bioterrorism Meets Privacy: An analysis of the Model State Emergency Health Powers Act and the HIPAA Privacy Rule*, 12 ANNALS. HEALTH L. 75 (2003).

<sup>608</sup> PORTER, *supra* note 47. Yellow fever only appeared in late 18<sup>th</sup> century Europe, cholera some four decades later.

killing approximately one-third of the country's population.<sup>609</sup> Over the next 400 years epidemics swept through Europe, with profound political, social, and economic effects.<sup>610</sup>

The nature of this threat shaped English quarantine law in three important ways. First, plague was seen as an import, not bred in Britain or, for that matter, on the Continent.<sup>611</sup> Resultantly, maritime provisions, and authorities focused on the ports and borders, provided the country's primary defense.<sup>612</sup> England placed considerably less emphasis on domestic measures until yellow fever and cholera appeared. Second, concern about outbreaks abroad encouraged the government to make extensive use of its international network to obtain advance notice of inbound disease. The empire thus established global disease monitoring significantly prior to the United States. Third, and most importantly, although it was not known at time that fleas carried plague, observers noted that the disease tended to be transferred via porous goods. Orders thus tended to target wool, silk, cotton, and animal hides, subjecting them to weeks of repeated submersion in ocean water followed by airing. Individuals, moreover, could come into contact with others suffering from plague and not contract the disease. The contagion theory of transfer thus stood in great doubt—creating an opportunity for reformers to replace quarantine with an improved sanitation regime. A very different situation thus confronted England than that faced on the American side of the Atlantic.

### A. *Early English Provisions*

English trade with the Mediterranean ports heralded an increased risk for disease. In 1511 England began trading in the Levant seas.<sup>613</sup> Within seven

<sup>609</sup> DEREK FRASER, *THE EVOLUTION OF THE BRITISH WELFARE STATE: A HISTORY OF SOCIAL POLICY SINCE THE INDUSTRIAL REVOLUTION* 33 (3d ed., 2003); *See also* PORTER, *supra* note 374, at 40.

<sup>610</sup> *See, e.g.*, JOHN F. D. SHREWSBURY, *A HISTORY OF BUBONIC PLAGUE IN THE BRITISH ISLES*, (1971); Alan D. Dyer, *The Influence of Bubonic Plague in England 1500-1667*, *MEDICAL HISTORY* (1978), 308-326; PORTER, *supra* note 46.

<sup>611</sup> *See, e.g.*, PATRICK RUSSELL, *TREATISE ON THE PLAGUE* (1791), p. 333; RICHARD MEAD, *A SHORT DISCOURSE CONCERNING PESTILENTIAL CONTAGION, AND THE METHODS TO BE USED TO PREVENT IT* (1720) (blaming Asia for plague); *THE MEDICAL WORKS OF RICHARD MEAD, VOL. II* (1715) (blaming Africa for plague). Later observers hinted that fear and xenophobia underlie these claims. *See, e.g.*, THOMAS HANCOCK, *RESEARCHES INTO THE LAWS AND PHENOMENA OF PESTILENCE: INCLUDING A MEDICAL SKETCH AND REVIEW OF THE PLAGUE OF LONDON, IN 1665, AND REMARKS ON QUARANTINE* 198 (1821).

<sup>612</sup> Peter Froggatt, *The Chetney Hill Lazaret*, 79 *ARCHAEOLOGIA CANTIANA*, 1 (1964) (stating I use "maritime quarantine" in a manner consistent with Peter Froggatt's definition, which is "the enforced detention and segregation of vessels, persons, and merchandise, believed to be infected with certain epidemic diseases, for specified periods at or near ports of disembarkation.").

<sup>613</sup> CHARLES MACLEAN, *REMARKS ON THE BRITISH QUARANTINE LAWS* (1823), *available at*

years, the first recorded quarantine orders issued under Henry VIII—or, more accurately, Thomas Wolsey, the Lord Chancellor of England, in whose hands the king, at least initially, left matters of state.<sup>614</sup>

In keeping with the order, local authorities toed the line. Sir Thomas More, for instance, instituted the king's orders in Oxford, insisting on street cleaning and forbidding others from using the clothes and bedding from infected houses. More tried to prevent the transfer of disease by isolating the sick and marking those who were infected. Other towns followed suit. In provincial districts, plague houses were established outside town walls or victims were segregated in pest-houses. By 1550, such practices had become widespread.<sup>615</sup>

In 1576, another plague outbreak took place. Eighteenth century historian George Hadley attributed the spread of the disease to the authorities' failure to enforce quarantine laws, suggesting that such laws, at least, were in place.<sup>616</sup> Much attention was drawn to the ports. In 1580 the Lord Treasurer ordered the Port of London to prevent Portuguese ships from Lisbon, where there was a plague outbreak, from coming up river until they had been properly aired.<sup>617</sup> The Privy Council requested that the Lord Mayor of London help the port authority to prevent similarly diseased ships from proceeding into the country.<sup>618</sup> More orders almost immediately followed.<sup>619</sup>

Such orders must be assessed within their political and constitutional framework. Henry VII, who came to the throne when Richard III was slain during the Battle of Bosworth, established the Committee of the Privy Council as an executive advisory board, and the Star Chamber as a means to involve the Crown more deeply in judicial affairs.<sup>620</sup> Parliament may have been the supreme authority, "[b]ut Parliaments came and went."<sup>621</sup> The Privy Council managed the legislature by influencing elections and directing parliamentary business.

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<http://pds.lib.harvard.edu/pds/view/6735355?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>; See also RUSSELL, *supra* note 611, at 330 (noting that from 1581 English merchants had been established in Turkey).

<sup>614</sup> PORTER at 40.

<sup>615</sup> PORTER, *supra* note 46, at 41.

<sup>616</sup> BOOKER, *supra* note 48, at 1.

<sup>617</sup> Acts of the Privy Council at 61 (New Series 1580-81) (London 1896).

<sup>618</sup> BOOKER, *supra* note 48, at 1. The length of detention or manner of embargo are not known.

<sup>619</sup> RUSSELL, *supra* note 611, at 478. See also RUSSELL, *supra* note 611, at 478.

<sup>620</sup> See A.F. Pollard, Council, Star Chamber and Privy Council under the Tudors. II, The Star Chamber, 37 ENGLISH HISTORICAL REVIEW (1922), at 530; See also CORA L. SCOFIELD, THE COURT OF STAR CHAMBER, 27 (1900).

<sup>621</sup> SIR DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, 113 (9<sup>th</sup> ed., 1969).

The Privy Council had direct control over areas central to quarantine. Matters related to foreign relations, defense, and public safety, were reserved to the Council—as were concerns that impacted the state's coffers.<sup>622</sup> For “[t]he essential prerequisite for the effective exercise of royal authority was the improvement of the Crown's position.”<sup>623</sup> The crown's financial strength was determined by land, feudal dues, and, most importantly, customs, making the Council's control over external trade unquestioned. Monopolies and charters thus came within the Privy Council's control. It gradually annexed even internal trade from local merchant courts—leading to friction with Parliament and common law.<sup>624</sup> Added to this, were the Tudors' interest in maritime affairs and the declining importance in the 15<sup>th</sup> century of the Court of Admiralty, which led to the transfer of maritime matters to the Council.

It was unquestioned that the Privy Council would issue quarantine regulations. Henry VIII, and later, Elizabeth I, were particularly sensitive to England's position vis-à-vis Europe, where quarantine was linked to social and political sophistication.<sup>625</sup> To take their place among civilized nations meant, in part, to have quarantine laws. Elizabeth I thus ordered her chief minister, William Cecil, to adopt European plague controls and, via the Privy Council, to issue a new set of orders.<sup>626</sup> She similarly directed that the Privy Council issue the first order to compel sick persons to be confined.<sup>627</sup>

Proclamations, designed to communicate the monarch's commands, provided the main device via which the Privy Council exercised their authority. Issued under the Great Seal, such proclamations could be used to address deficiencies in common law and statutory law, which were neither sufficiently strong nor swift enough to address emerging issues faced by the state. The Privy Council thus supplemented the existing statutory and common law, “using for the purpose a prerogative which none denied or was concerned to seek limits for.”<sup>628</sup> Such proclamations had the full force of law, and, while they could not contradict an Act of Parliament, the *lex regia* of England rapidly expanded and had to be obeyed.<sup>629</sup> To the Council thus fell the responsibility of acting swiftly and directly in the public interest.

During the Tudor reign, only the Privy Council issued quarantine provisions.

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<sup>622</sup> HOLDSWORTH, IV., 70-105 (providing examples of work done by the Privy Council).

<sup>623</sup> KEIR, *supra* note 621, at 10.

<sup>624</sup> HOLDSWORTH, I, *supra* note 622, at 141.

<sup>625</sup> PORTER, *supra* note 46, at 41.

<sup>626</sup> The orders issued in 1578 and remained in place until the mid-17<sup>th</sup> century. *Id.*

<sup>627</sup> RUSSELL, *supra* note 611, at 478. *See also* MACLEAN, *supra* note 613, at 434.

<sup>628</sup> KEIR, *supra* note 621, at 115.

<sup>629</sup> *See* E.R. Adair, The Statute of Proclamations, 32 ENGLISH HISTORY REVIEW 34; *See also* Elton, The Statute of Proclamations, 75 ENGLISH HISTORY REVIEW, 208.

The proclamations tended to be inconsistent, in no small measures due to the competing interests pulling the council in different directions. Such orders reflected the tension between maritime law, war powers/national security, domestic police powers, and commercial/economic matters. And these orders had profound implications for distribution of power within the state, as the Privy Council's jurisdiction gradually expanded to include maritime matters, as well as all internal and external trade.<sup>630</sup>

The evolution of quarantine measures marks the shift from medieval to modern England. The use of Royal Prerogative generally—and quarantine in particular—did not just reflect England's constitutional structure. It shaped the constitutional conventions. The proclamations undermined the role of Parliament. They undermined the role of the courts. And they undermined local administration—which, during the time of Tudor England, was really a function of its judicial organization. The Privy Council relegated many local bodies “almost entirely to the conduct of administrative business.”<sup>631</sup> Simultaneously, the Privy Council helped to centralize power. While the monarch's authority was at its height when measures proceeded through Parliament, frequently, in case of quarantine, the Council did not deem it necessary. As the Council persisted in exercising its authority outside of Parliament, it became stronger, and Parliament was gradually, sidelined. In this manner, liberty of action for the public good became preserved outside of common law or the Parliament via Royal Prerogative—implemented through the Privy Council.<sup>632</sup>

Under the Stuarts, the conventions changed. During the final years of Queen Elizabeth's reign, her Royal Prerogatives regarding monopolies were increasingly called into question.<sup>633</sup> James I, having ruled the northern kingdom almost since birth, came to the Crown with a fully-developed theory of kingship—a form of enlightened absolutism.<sup>634</sup> Under his control, quarantine provisions became more coercive, codified in statute.

In 1603 a major plague outbreak occurred in England.<sup>635</sup> Seen as a threat to social stability, the disease caused panic and hunger and mass disruption of local communities.<sup>636</sup> James I immediately issued a detailed Order in Council

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<sup>630</sup> XVI HOLDSWORTH, I, *supra* note 622, at 141.

<sup>631</sup> KEIR, *supra* note 621, at 35.

<sup>632</sup> *Id.* at 154.

<sup>633</sup> *Id.* at 156-157.

<sup>634</sup> See James I, THE TRUE LAW OF FREE MONARCHIES; THE RECIPROCAL AND MUTUAL DUTY BETWIXT A FREE KING AND HIS NATURAL SUBJECTS (London, T. Creede 1598), *reprinted in* JOSEPH ROBSON TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, 1602-1625 187 (1930).

<sup>635</sup> See 5 ENCYCLOPEDIA BRITANNICA i2-A-i (8th ed. 1853-1860) (depicting a horrifying account of the epidemic).

<sup>636</sup> PORTER, *supra* note 46, at 41.

to combat the spread of infection.<sup>637</sup> It was clear that, even then, the contagion theory of disease with respect to plague was being questioned: Article 16 strictly prohibited “all ecclesiastics, and others, from publishing an opinion that the plague was not infectious, or that it was a vain thing not to resort to the infected.”<sup>638</sup> In concert with the order, the Privy Council directed that quarantine provisions established by London’s Lord Mayor be published.<sup>639</sup>

James I did not stop with the Order in Council. In 1604 he followed it with a new statute, which marked the first time that royal regulations on quarantine had been supported by an express legislative instrument.<sup>640</sup> The bill passed, following opposition and amendments in the House of Lords to exempt universities from being subject to its provisions. The legislation empowered the head officer of every town within England to confine individuals with the plague to their homes and to set a watchman to guard the ill.<sup>641</sup> It indemnified the watchmen should any harm come to the plague victim if he or she tried to escape.<sup>642</sup> Furthermore, it made it a felony to be found overseas with an infectious (meaning contagious) sore—although it was not clear what proof was required or who would judge it to be so.<sup>643</sup> The Act required the Justices of the Peace to meet every three weeks during an epidemic to report on the progress of the disease, and it allowed local authorities to raise taxes to take care of the sick.<sup>644</sup> All clothes and bedding of the plague victims was to be burned and funerals were to take place at dusk (to reduce the number in attendance).<sup>645</sup> Any criticism of orders issued isolating individuals was to be punished.<sup>646</sup>

The Act was initially limited to the first session of the following Parliament; however, it was subsequently continued and made permanent during Charles I’s reign, “from thenceforth until some other act of parliament be made touching its continuance or discontinuance.”<sup>647</sup> Far from stemming the advance of disease or quieting the unrest that had swept the country, these

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<sup>637</sup> MACLEAN, *supra* note 613, at 434–38.

<sup>638</sup> *Id.* at 435.

<sup>639</sup> *See id.*

<sup>640</sup> *Id.*; *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES 162–62 (discussing King James I’s policies regarding the plague of 1604).

<sup>641</sup> MACLEAN, *supra* note 559, at 435.

<sup>642</sup> *Id.*

<sup>643</sup> *Id.*; *See also*, 4 WILLIAM BLACKSTONE, COMMENTARIES 161 (discussing King James I’s policies regarding the plague of 1604).

<sup>644</sup> RUSSELL, *supra* note 557, at 480.

<sup>645</sup> *Id.*

<sup>646</sup> *Id.*

<sup>647</sup> MACLEAN, *supra* note 613, at 435.

provisions stimulated violent opposition and contributed to increasing disorder.<sup>648</sup>

### B. *The Politicization of Quarantine*

When James I's son, Henry, died, Charles I became successor to the throne. He was an ardent believer in the divine right of kingship.<sup>649</sup> Charles responded to mounting opposition by acting outside the common law and Parliament, and by making more extensive use of Royal Prerogative. Opponents emphasized that the crown's authority derived from Parliamentary sanction. The subtleties of the Tudor era lost, and "[u]nable to agree amicably as to the working of their government, men began to debate its very foundations."<sup>650</sup>

Quarantine provisions during this time became less formalized. At times the Privy Council did not even issue an order or proclamation; instead, it would simply write a letter directly to the farmers of the customs, directing them not to land goods, allow people to come ashore, or permit vessels to land.<sup>651</sup> At other times, formal orders in accordance with the Royal Prerogative issued. It was through such a device that in 1635 the Crown established the first stated period of quarantine.<sup>652</sup> Plague had broken out at The Hague, Amsterdam, and Leyden, prompting the Council to issue a proclamation regarding vessels from France and Holland, arriving from infected ports.<sup>653</sup> For twenty days, they were to remain isolated.<sup>654</sup>

At the time, eighty percent of all of England's foreign trade traveled through London.<sup>655</sup> England, moreover, was a key economic player worldwide. This meant that what England did with its trade restrictions mattered. Equally important was what other ports did to England. Accordingly, Charles II quickly realized that quarantine could undermine free trade—and be used as a devastating political weapon. The Spanish, for instance, 1662-63, claimed that plague had emerged at Tangier, where English ships were trading. Spain subsequently refused to allow English ships to land in Spain. Afraid that similar steps would be taken in other, more important ports—like Leghorn and Genoa, England had to work vigorously through its Venetian ambassador to counter

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<sup>648</sup> PORTER, *supra* note 46, at 41.

<sup>649</sup> KEIR, *supra* note 621, at 158.

<sup>650</sup> *Id.* at 160.

<sup>651</sup> BOOKER, *supra* note 48, at 4.

<sup>652</sup> *Id.* at 2.

<sup>653</sup> *Id.*; See also, 4 WILLIAM BLACKSTONE, COMMENTARIES 162-61 (discussing King James I's policies on the plagues).

<sup>654</sup> *Id.*

<sup>655</sup> 2 EPHRAIM LIPSON, THE ECONOMIC HISTORY OF ENGLAND: THE AGE OF MERCANTILISM 249-50 (1943).



the rumors.<sup>656</sup> Money exchanged hands.<sup>657</sup>

The Dutch, in turn, considered English quarantine provisions to be an over-reaction—just another English ploy against the Dutch, with whom England did not have great relations. It is hard to deny their allegations. On March 30, 1664, for instance, the States General sent a resolution to Charles asking for repeal of quarantine. The English ended up *increasing* the length of detention from thirty to forty days.<sup>658</sup> The Dutch ambassador protested that the ships were being stopped “under pretence” of infection, but actually to obstruct trade. “He insisted that the strictness be relaxed. Charles replied expressing sorrow for the affliction, but pointed out that England had been the last neighbor of the United Provinces to make restrictions, and commerce would now have to be suspended altogether.”<sup>659</sup> Diplomatic tension, not medical necessity, drove the decision.

In 1665 another devastating plague epidemic, famously described in the *Diary of Samuel Pepys*, again hit England.<sup>660</sup> In London alone, more than 70,000 people died, while all other diseases combined claimed fewer than 40,000 lives.<sup>661</sup> The toll eclipsed earlier outbreaks of plague, with more than twice the number succumbing than died during the 1625 epidemic.<sup>662</sup> The House of Commons appointed a committee to prepare new legislation to close gaps left by the Act of 1604. The effort failed. Although the bill passed the House of Commons, the House of Lords inserted amendments to protect their special interests. (The Lords wanted to prevent pest houses and burying grounds from being stationed near their homes, and they sought a special exemption to prevent peers’ homes from being shut up at the discretion of constables.) The Commons refused to agree to the changes and, following several conferences between the two houses, the end of the session terminated further consideration of the bill. The internal regulations from the 1604 statute remained in force. It was later proposed that the wealthy who

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<sup>656</sup> BOOKER, *supra* note 48, at 12.

<sup>657</sup> *Id.*

<sup>658</sup> Compare Privy Council Proclamation quarantining vessels from France/Holland coming from infected ports, Nov. 1, 1635; and Privy Council Order increased detention from 30 days to 40 days after States General asked for a repeal of the measures, Mar. 30, 1664.

<sup>659</sup> BOOKER, *supra* note 48, at 5.

<sup>660</sup> See IV THE DIARY OF SAMUEL PEPYS, CLERK OF THE ACTS AND SECRETARY TO THE ADMIRALTY 434, 438, 450-52 (Henry B. Wheatley ed. with additions) (photo reprint 1928) (London, G. Bell and Sons, LTD. 1895) (denoting plague references in the diary); IV THE DIARY OF SAMUEL PEPYS, CLERK OF THE ACTS AND SECRETARY TO THE ADMIRALTY 434, 438, 450-52 (Henry B. Wheatley ed. with additions) (photo reprint 1928) (London, G. Bell and Sons, LTD. 1895) (denoting plague references in the diary).

<sup>661</sup> HANCOCK, *supra* note 611, at 67, Table 1.

<sup>662</sup> *Id.*

took ill should simply retreat to their country homes.<sup>663</sup>

Playing on the political power of quarantine, a proposal to create a permanent quarantine office, from March 1665, began circulating. Arguments supporting it echoed one of the chief concerns of the Tudors: to adopt procedures that existed in “most other well governed Kingdomes and Republicks professing Christianity.”<sup>664</sup> But the proposal was ultimately about power and control. Of chief concern was not the medical benefit of such provisions, but the contingent (read: political and economic) advantages. Good relations between a quarantine office and the farmers of Customs would help to ensure that duties were paid. Importers would no longer win simply by being first to arrive; instead, by making it known which ships and cargoes were in detention, the Crown could control both importers and prices. The measures also would allow the Crown to more closely monitor individuals arriving in England, giving the state the ability to distinguish more readily between spies and regular travelers.<sup>665</sup>

Continental Europe, too, began wielding quarantine as a weapon. The Spanish stopped all trade with England, Scotland, and Ireland.<sup>666</sup> France prohibited all commerce with England. Britain retaliated in 1668, quarantining ships from parts of France with Plague. As historian John Booker observes, “the hard lesson was being taught, if not learnt, that in a state of war disease found various ways to side with the enemy.”<sup>667</sup>

The manner in which the Crown exercised quarantine reflected and contributed to serious constitutional questions: Did the law limit the monarch’s discretionary power? Could the Crown’s authority be abridged by statute? Could the King sidestep the Common Law courts on matters relating to Royal Prerogative? What were the limits of the crown’s prerogative in regard to foreign policy, maritime law, and both internal and external trade?<sup>668</sup> Sir Edward Coke came to see some of the most prominent cases of the time as seeking an answer to these crucial questions.<sup>669</sup> The English Restoration, starting in 1660, fell back upon the compromise that marked the Tudor regime:

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<sup>663</sup> RUSSELL, *supra* note 611, at 493.

<sup>664</sup> BOOKER, *supra* note 48, at 13.

<sup>665</sup> *Id.*

<sup>666</sup> *Id.* at 9.

<sup>667</sup> RUSSELL, *supra* note 611, at 441.

<sup>668</sup> See also KEIR, *supra*, note 567, at 160–61 (discussing the Constitutional questions prevalent at the time).

<sup>669</sup> See, e.g., *An Information Against Bates*, (1606) 145 Eng. Rep. 267 (exch.) (1220-1865); Mich. 4 Jac. Bates’ Case, Lane 22 (1606) (holding that the king has prerogative power to regulate trade as an aspect of foreign affairs); KEIR, *supra* note 567 at 198–99 (looking at the Ladd, Fuller and Chauncey cases); *Case of Proclamations*, EWHC (KB) J22, (1610) 77 Eng. Rep. 1352 (1378 – 1865); Mich. 8 Jac. 1 (1610) (defining some limitations on the rooyal preogativ at the time).

"A Crown reinvested at least in its essential prerogatives, a Parliament confirmed in its sovereignty and its privileges, once more appeared as the indelible marks of the English governmental system. But the conciliar authority which had so long held the central position in the State had been irreparably destroyed."<sup>670</sup> English Constitutional historians generally describe this period a battle between Parliament and the courts of Common Law. But equally repugnant to both was the discretionary authority of the Crown—perhaps nowhere more apparent than in quarantine.

### C. *Constitutional Limits*

The abolition of the conciliar courts confined the power of legislating by Proclamation within the limits imposed by the *Case of Proclamations*: "[T]he King cannot change any part of the common law, nor create any offence, by his proclamation, which was not an offence before, without parliament."<sup>671</sup> Sir Edward Coke, then Chief Justice of the Common Pleas explained, "the King hath no prerogative, but that which the law of the land allows him."<sup>672</sup> Constitutional scholars reflecting on this period conclude that "English constitutional law was therefore bound, sooner or later, to assume a bias, appropriate to the Common Law tradition, in favour of individual rights and property, and on the whole adverse to the claims of the State to a freedom of action determined by considerations of public policy."<sup>673</sup> Indeed, the Bill of Rights of 1689 required that in certain matters the Crown obtain the consent of the governed through Parliament.<sup>674</sup> The Triennial Act of 1694 secured a more active role for the legislature, requiring it to meet annually and hold elections once every three years.<sup>675</sup> And the Act of Settlement of 1701 established Parliamentary authority over succession to the throne itself.<sup>676</sup>

Quarantine authorities sat uneasily in this context, and from 1642 forward, the Privy Council's unfettered discretion in this realm became more limited.

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<sup>670</sup> KEIR, *supra* note 567, at 162.

<sup>671</sup> *Case of Proclamations*, (1610) 77 Eng. Rep. 1352 (K.B.); 12 Co. Rep. 74, 74, *available at* <http://www.bailii.org/ew/cases/EWHC/KB/1610/J22.html> (defining some limitations on the royal prerogative at the time).

<sup>672</sup> *Id.*

<sup>673</sup> KEIR, *supra* note 567, at 233–34.

<sup>674</sup> An Act Declaring the Rights & Liberties of the Subject & Settling the Succession of the Crown (Bill of Rights), 1688, 1 W. & M., c. 2 (Eng.); *See also* KEIR, *supra* note 567, at 268.

<sup>675</sup> An Act for the Frequent Meeting and Calling of Parliaments, 1694, 6 & 7 W. & M., c. 2 (Eng.) (requiring Parliament to meet annually and hold general elections once every three years); *See also* KEIR, *supra* note 567, at 268 (noting the same).

<sup>676</sup> Act of Settlement of 1701, 1701, 12 & 13 Will. 3, c. 2 (Eng.); *See also* KEIR, *supra* note 567, at 269–70.

The Privy Council continued to be involved in the intimate details of quarantine, but it turned to statutory validation.

In 1709, for example, plague erupted in the Baltic region. The disease quickly reached Danzig (East Prussia), a town with which England had frequent commercial exchange. By the end of 1710 the epidemic extended to Stralsund, with reports that it had broken out on the German North Sea coast, near Hamburg.<sup>677</sup> The Privy Council responded with a series of orders. In August 1709, the council issued an order preventing any goods, seamen or passengers from Danzig being landed in London or in English outports “until they be under the Care of the Officers of the customs who are to take Care...according to the Intention of this Order.”<sup>678</sup> The following month, the Privy Council issued a second order saying that landing could only occur at places “provided for airing the...Persons and goods for 40 Days appointed for performing their Quarantain”.<sup>679</sup> Nine days later, the council issued a third order—designating infected area as the “Baltick Seas”.<sup>680</sup> A fourth order followed on September 16, 1709, specifying where ships were to be held, stating that after 40 days, if no disease had presented itself, passengers could alight at the Customs officers’ discretion, and, after a week, the goods could be released.<sup>681</sup> Suspicious articles had to be reported to the Privy Council to await further instruction.<sup>682</sup> The same day, a fifth order issued.

It soon became clear that quarantine was not being performed correctly: those who had been quarantined were ignoring the orders, and local villages and authorities were refusing to allow the establishment of quarantine stations near their homes and businesses.<sup>683</sup> The Privy Council responded by issuing a proclamation in November 1709, threatening that failure to conform to orders would be treated with utmost severity of the law. It lamented that some of those detained, “have Presumed to come on Shoar, and have Appeared in the Publick Streets, and Mingled Themselves with Our Subjects”—others had been selling the goods that ought to have been aired. The order threatened that those refusing to conform would do so “upon Pain of being Proceeded against with the utmost Severity that the Law will Allow ...”

The difficulty with the Privy Council’s threat is that it had no teeth: the law did *not* carry severe penalties. Indeed, there was no statute at the time that would have made it an offense to break Privy Council orders regarding

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<sup>677</sup> BOOKER, *supra* note 48, at 40.

<sup>678</sup> See Privy Council Order of Aug. 22, 1709.

<sup>679</sup> See Privy Council Order of Sept. 5, 1709.

<sup>680</sup> See Privy Council Order of Sept. 14, 1709.

<sup>681</sup> See Privy Council Order of Sept. 16, 1709.

<sup>682</sup> *Id.*

<sup>683</sup> BOOKER, *supra* note 48, at 31.

quarantine. The council was thus driven to seek parliamentary support. The importance of Parliament as a check at the time ought not to be over-emphasized: the bill received Royal Assent “in less than eight days from the time the bill was ordered.”<sup>684</sup> In light of the Whig and Tory battles that marked political discourse, though, and the statute’s provisions—which essentially acknowledged Royal Prerogative—the result was remarkably swift: quarantine would be “in such...places for such time and in such manner as hath been or as shall be from time to time be directed...by Her Majesty or her successors.”<sup>685</sup> It speaks, perhaps to the great fear of disease and the newness of limits on royal prerogative.<sup>686</sup>

The resulting legislation became Britain’s central quarantine statute. It did not address matters internal to the country, instead expressly relating to cases of foreign infection.<sup>687</sup> Writing at the end of the 18<sup>th</sup> century, Russell suggested that statute strengthened Privy Council’s hand:

Considering the circumstances under which the bill was drawn up, it is the less to be wondered that it should have been very defective; but by expressly empowering the Crown, in case of any foreign places being infected, to issue such orders for quarantine as might appear necessary, it, at least, conferred a sanction in future on the Royal Proclamations, relating to quarantine, which they had not before; and rendered the breach of orders more immediately an object of legal punishment.<sup>688</sup>

Indeed, there were advantages to be gained by leaving the operation of quarantine in the hands of the Privy Council. Disease might require a swift and efficient response—one more likely to be gained through the council than through a parliamentary body. The sanctions created in the statute also increased the likelihood that people would comply with the council’s directives.

But while the legislation, in some ways, placed the Privy Council in a stronger position, its existence underscored growing parliamentary power in the constitutional evolution of the British state. It suggested that the Privy Council could not act without legislative sanction. Parliament held the purse strings. And punishment could not be taken too far: doing so would risk courts refusing to enforce the measures. The Attorney-General, for instance, wanted to make breaking quarantine a capital crime, for which the death penalty would be imposed. (Mediterranean ports at the time had adopted this

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<sup>684</sup> RUSSEL, *supra* note 557, at 441.

<sup>685</sup> An Act to Oblige Ships Coming from Places Infected More Effectually to Perform Their Quarentine, 1710, 9 Ann., c. 2, (Eng.) [hereinafter Queen Anne Act].

<sup>686</sup> BOOKER, *supra* note 48, at 31.

<sup>687</sup> Queen Anne Act, *supra* note 632.

<sup>688</sup> RUSSELL, *supra* note 611, at 442.

approach.) The Privy Council strongly objected on the grounds that with such severe penalties, no one would be prosecuted for the offence. Parliament instead prescribed imprisonment and a fine for any violation.<sup>689</sup> Captains allowing passengers to come ashore would forfeit the vessel.<sup>690</sup> Customs officers fell subject to a fine of £100, with half the amount allocated to informers.<sup>691</sup> Anyone visiting the vessel during quarantine would be required to remain for the balance of the time allotted.<sup>692</sup> The legislation also required a 24-hour watch system to be established by the local magistrates, with the airing of goods to be governed by proclamation.<sup>693</sup>

#### *D. Commercial Interests Take Hold*

Ironically, in strengthening the impact of quarantine orders, the Queen Ann Act heralded an end to the quarantine regime. The provisions, and their enforcement, earned the enmity of Britain's commercial interests as well as its trading neighbors abroad, helping to generate momentum to dispense with such provisions. Glimmers of this began to emerge soon after the passage of the statute.

In the Baltic crisis, for instance, merchant adventurers trading with Hamburg began lobbying the Privy Council to repeal a new proclamation that extended quarantine measures to Hamburg.<sup>694</sup> Soon thereafter, the Eastland Company, trading with Danzig, began lobbying the Privy Council (with the help of some Members of Parliament) to repeal the order. Although plague had disappeared, the Privy Council issued a new order in August 1713. Finally, in April 1714, after diplomatic representations to the Queen, and further lobbying, the Privy Council lifted the restrictions.<sup>695</sup>

Part of the problem was that the Privy Council was out of its depth: it was not a scientific body. From 1720 to 1723, the Marseilles Plague, for example, proved devastating. Almost half the population of Marseilles died from it.<sup>696</sup> What made this extraordinary was that Marseilles' measures were considered amongst the most sophisticated in all of Europe. But French efforts to establish a *cordon sanitaire* failed. Disquiet spread. The Privy Council, slow to

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<sup>689</sup> Queen Anne Act, *supra* note 686.

<sup>690</sup> *Id.*

<sup>691</sup> *Id.*

<sup>692</sup> *Id.*

<sup>693</sup> *Id.*

<sup>694</sup> Privy Council Proclamation, Requiring Quarentine [sic.] to be Performed by Ships coming from the Baltick Sea, and other Places &c., Sept. 6, 1711 (on file with author). The Privy Council did not lift the orders until June 1712. Privy Council Proclamation, June 1712.

<sup>695</sup> BOOKER, *supra* note 48, at 44.

<sup>696</sup> See RUSSELL, *supra* note 611, at 442; Booker, *supra* note 48, at 85-88.

respond, then issued frenzy of orders and proclamations, followed by three new statutes.

News of the epidemic hit London on August 10, 1720. King George I, who was in Hanover at the time, directed customs to give “proper directions” to the outports to stop any Mediterranean ships from putting ashore,<sup>697</sup> which bought time to draft a proclamation. With French provisions having failed to stem the tide of the disease, the Privy Council sought professional advice. The council consulted with Dr. Richard Mead, a prominent physician.<sup>698</sup> The Lords Justice requested that he publish his thoughts on the history of the plague and make recommendations for the best means of preventing its introduction into England.

Mead’s writings became a mainstay in the British quarantine system. He posited that porous and fibrous materials were more likely to carry plague and argued that it could be transmitted between humans through the air.<sup>699</sup> For ships carrying the more virulent form of plague, Mead recommended burning everything on board, as well as the ship.<sup>700</sup> Smuggling presented a particular concern.<sup>701</sup> Once an outbreak occurred, treatment should emphasize “compassionate care”, not discipline and punishment.<sup>702</sup> The worst course of action, Mead suggested, would be to shut up houses, thus creating “seminaries of contagion.”<sup>703</sup> *Cordon sanitaire*, on the other hand, would be acceptable—but not to prevent all people from leaving a city, as it had been exercised in France. Mead saw this as “an unnecessary Severity, not to call it a Cruelty.”<sup>704</sup> Instead, after twenty days’ quarantine, citizens should be allowed to leave.<sup>705</sup>

Within a year, seven editions of *Mead’s Discourse* had been published. The eighth, with further additions, came out the following year.<sup>706</sup> This work proved highly influential. The advantage of publishing it in conjunction with the Privy Council orders was that it added medical weight to its decisions. The drawback of basing the quarantine system on it, however, was that other medical personnel might disagree with Mead. Indeed, the treatise opened an intense and contentious public debate on contagion that continued for more

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<sup>697</sup> BOOKER, *supra* note 48, at 88.

<sup>698</sup> For biographical information on Richard Mead see ANITA GUERRINA, MEAD, RICHARD (1673–1754), in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004) *available at* <http://www.oxforddnb.com/view/article/18467?docPos=5>.

<sup>699</sup> RICHARD MEAD, DISCOURSE ON THE PLAGUE (London, 9<sup>th</sup> ed. 1744).

<sup>700</sup> *Id.*

<sup>701</sup> *Id.*

<sup>702</sup> *Id.* at 101.

<sup>703</sup> *Id.* at 104.

<sup>704</sup> *Id.* at 142.

<sup>705</sup> *Id.*

<sup>706</sup> MEAD, *supra* note 647.

than a century. George Pye, for instance, almost immediately responded with his own discourse, announcing that quarantines were useless, that they gave smugglers an incentive, and that they imposed “a very great Injury to a trading Nation”.<sup>707</sup> Their social impact could hardly be ignored, he noted, for they “propagate and keep up Fears and Frights amongst the People.”<sup>708</sup> Patrick Russell, a prominent 18<sup>th</sup> century physician and naturalist, and Gavin Milroy, a well-known, early 19<sup>th</sup> century physician and epidemiologist, also were sharply critical of Mead.<sup>709</sup> Thomas Hancock pointed out Mead’s many contradictions.<sup>710</sup> Others attacked Mead’s insistence that air, and not contact alone, spreads plague, as well as the role of cotton in carrying the disease—which raised questions as to why there had not been outbreaks of plague previously, with significant amounts of cotton coming to England from the Levant.<sup>711</sup>

As for the immediate concern, due to the Marseilles’ plague, consistent with Mead’s analysis, the Privy Council resurrected the orders issued during the Baltic Crisis and expanded the goods for which special permission would have to be sought for importation.<sup>712</sup> Sufficiently concerned about the threat posed by this particularly virulent epidemic, the Privy Council issued documents inveighing that its orders be taken seriously.<sup>713</sup> The Council quarantined all ships arriving from the Mediterranean, the Levant, the Isle of Man, and the Channel Islands, announcing that anyone assisting smugglers would incur the King’s “Highest Displeasure” and severe penalties.<sup>714</sup>

The incident brought to the surface a gap in the Privy Council’s authority. The Queen Anne Act only related to infection coming from abroad—not disease on domestic soil. The Privy Council, however, also wanted to stop plague from spreading once it reached Great Britain. This gap forced the Privy

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<sup>707</sup> GEORGE PYE, A DISCOURSE OF THE PLAGUE; WHEREIN DR. MEAD’S NOTATIONS ARE CONSIDER’D AND REFUTED (London, J. Darby 1721).

<sup>708</sup> *Id.*

<sup>709</sup> RUSSELL, *supra* note 611 (also stating that Mead was too critical of James I); *See also* GAVIN MILROY, THE INTERNATIONAL ASPECTS OF QUARANTINE LEGISLATION, TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCES 871 (London, 1863) (noting that Mead had no personal experience with lazarettos or plague and that his medical views were based on hearsay). *See e.g.*, Lives of the Fellows of the Royal College of Physicians of London, 1826-1925, Vol. IV, compiled by G.H. Brown (London, 1955) [Munk’s Roll, 1955, p.71-72]; Dictionary of National Biography, Vol. XXXVIII, Sidney Lee (ed.) (London, 1894) [DNB, 1894, at 22-23]; Obituary - Gavin Milroy, 1 THE LANCET 425(1886); Obituary - Gavin Milroy, 1 BRITISH MEDICAL JOURNAL 425,425-426 (1886).

<sup>710</sup> HANCOCK, *supra* note 611.

<sup>711</sup> *See, e.g.*, BOOKER, *supra* note 48, at 43.

<sup>712</sup> BOOKER, *supra* note 48, at 88.

<sup>713</sup> *See* Proclamation of Aug. 25, 1720.

<sup>714</sup> *See* Privy Council Order of Oct. 27, 1720.



Council back to Parliament.<sup>715</sup>

In December 1720, the Attorney General and the Solicitor-General jointly introduced a new bill, which temporarily replaced the Queen Anne Act as the main quarantine statute.<sup>716</sup> The legislation extended quarantine authorities to domestic infection, giving the Crown the power to remove people from their homes and to draw lines around infected areas.<sup>717</sup> Neighboring parishes became equally responsible for patrolling the lines.<sup>718</sup> Violence could be used to recover individuals breaking quarantine, with penalties for violation to include death without clergy present.<sup>719</sup>

The merchants, strongly opposed to the bill, lobbied hard against it. The Levant Company submitted a petition "To the honorable the Commons of Great Britain in Parliament assembled," drawing attention to the adverse impact quarantine would have on domestic trade.<sup>720</sup> Quarantine applied to all ships from Turkey, regardless of whether the port from which they departed was infected.<sup>721</sup> The petition suggested that where HM ambassador at Constantinople gave the ship a clean bill of health, the vessel should not be placed in quarantine—particularly where journey took a minimum of three months, often even more than that, and sickness had not broken out on board.<sup>722</sup> It further pointed out that the law affected goods of interest to Parliamentarians.<sup>723</sup> The Crown largely ignored the representations as biased: the company was too interested a party in the outcome.

The Levant Company, though, was not the only opposition. The city of London also petitioned against the bill.<sup>724</sup> The impact on individual rights and the economic costs drew particular concern.<sup>725</sup> The House of Lords, however, rejected the city's petition by a vote of 63 to 22, leading to a fight in Parliament.<sup>726</sup> The rights involved were of great consequence. Such flippant dismissal of petitions, moreover, might discourage future representations to

<sup>715</sup> See 19 JOURNAL OF THE HOUSE OF COMMONS 1721 at 398 ff; and JOURNAL OF THE HOUSE OF LORDS, 1721, at 383 ff.

<sup>716</sup> An act for repealing an act (Queen Anne's) for the better preventing the plague being brought from foreign parts into Great Britain, or Ireland, or the Isles of Guernsey, &c. &c., and to hinder the spreading of infection", 7 Geo. I, c. 3, Jan. 25, 1721.

<sup>717</sup> Quarantine Act, VII George; UL Rare books room, Gg.3.12(7), at 1-2.

<sup>718</sup> *Id.*

<sup>719</sup> *Id.*

<sup>720</sup> MACLEAN, *supra* note 613, at 421 (hereinafter Levant Company Petition).

<sup>721</sup> *Id.*

<sup>722</sup> *Id.*

<sup>723</sup> Levant Company Petition, reprinted in MACLEAN, *supra* note 613, at 421.

<sup>724</sup> The Petition of the City of London to the House of Lords, Dec. 6, 1721, UL Rare books room, Gg.3.12.(7).

<sup>725</sup> *Id.* at 2; See also 21 JOURNAL OF THE HOUSE OF LORDS, at 622-23.

<sup>726</sup> *Id.*

Parliament, with long-term implications for the rights of British subjects.<sup>727</sup> And *cordons sanitaire* were simply impractical: they would take too many soldiers to enforce, particularly around London and Westminster.<sup>728</sup>

The Lords subsequently introduced a bill to repeal the clauses in the Quarantine Act that empowered the Crown to impose *cordon sanitaire* and to remove individuals from their homes.<sup>729</sup> Of particular concern was the role the military, not civil magistrates, were to play:

Because such Powers as these are utterly unknown to our *Constitution*, and repugnant, we conceive, to the Lenity of our mild and free Government, a tender Regard to which was shewn by the Act Jac. I which took care only to confine infected Persons within their *own Houses*, and to support them under that *Confinement*, and lodg'd the Execution of such Powers solely in the *Civil Magistrate*; whereas the Powers by us excepted against, as they are of a more extraordinary Kind, so they will probably (and some of them must necessarily) be executed by *Military Force*: And the *violent and inhuman* Methods which on these Occasions may, as we apprehend, be practiced, will, we fear, rather draw down the Infliction of a new Judgment from Heaven, than contribute anyways to remove that, which shall then have befallen us.<sup>730</sup>

Worse yet, such methods were being copied from France, “a Kingdom whose Pattern, in such Cases, *Great Britain* should not follow; the Government there, being conducted by *Arbitrary Power* and supported by *Standing Armies*.”<sup>731</sup> Even in France, the measures had been “as *unsuccessful* as they were *unprecedented*.”<sup>732</sup> Removing such authorities would not leave the Crown without any options; other authorities existed. The offending clauses, however, would do untold mischief, not least in keeping “the Minds of the People perpetually *alarm'd* with those Apprehensions under which they now labour.”<sup>733</sup>

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<sup>727</sup> See also 21 JOURNAL OF THE HOUSE OF LORDS, at 3.

<sup>728</sup> *Id.*

<sup>729</sup> 13 Dec. 1721, Gg.3.12(7), at 3-4.

<sup>730</sup> *Id.*

<sup>731</sup> *Id.* Russell later argued, “That the government in France was conducted by arbitrary power, might be true; and it was the business of the legislature in Britain, in framing the act, to guard the execution of it, agreeably to the principles of a free government. But, under proper and express limitations, the British constitution, seemed to be no more affected by the clauses in question, than it is by the present quarantine laws, in respect to ships, most of which laws were borrowed from arbitrary governments. The influence of these clauses was indeed more extensive as the object in view was of more general importance to the kingdom, but the principle, in respect to the British constitution, would appear to be the same, in both cases.” See also RUSSELL, *supra* note 611, at 504.

<sup>732</sup> *Id.*

<sup>733</sup> *Id.* Russell later wrote of the Lords’ representations, “The arguments produced in the above Protest of the Lords, may be presumed to have been among the strongest that were employed

The Lords ultimately resolved the question in the negative, 39 to 20, leaving the interim measure intact.<sup>734</sup> Within a month, a similar motion was introduced into the House of Commons, which divided 115 to 95, in favor of giving leave to allow a bill to be brought forward to repeal portions of the previous act.<sup>735</sup> The bill passed in January, receiving Royal Assent on February 12, 1721.<sup>736</sup> It recognized that “the execution of the powers and authorities mentioned in the said recited clauses” had been found “very grievous to the subjects of this kingdom.”<sup>737</sup> Concern about implications of the law for the rights of British subjects endured. A century later, anti-contagionist crusader Dr. Charles MacLean opined,

The arbitrary power of shutting sick people up in their houses, given by the act of James I., and that of removing them by compulsion from their habitations, conferred by the 7<sup>th</sup> of Geo. I., were equally a violation of the principles of public liberty, and of the British constitution, which would have been unjustifiable if contagion had been proved to exist, and these measures had been proved to be a remedy. Such a despotism no circumstances could justify. But, to enact laws so arbitrary, without previous proof of the existence of the alleged evil, or of the efficiency of the proposed remedy, must be admitted to be the most extraordinary legislation.<sup>738</sup>

In his *Discourse on the Plague*, Richard Mead emphasized not just human-to-human transmission of the plague, but its transfer via goods. The Crown consequently sought greater authority in the commercial realm. A statute passed on the same day of the repeal of §§2 and 4 of the quarantine act gave the King the authority, for one year, to prohibit commerce with any country infected with plague.<sup>739</sup> Its purpose was to allow the country to respond quickly to any resurgence of plague in France. The legislation was extreme and attracted strong opposition from shipping interests. It essentially gave the Crown, through the Privy Council, an almost unlimited power over trade.<sup>740</sup> In

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against the objectionable clauses of the act. They are highly deserving of attention, and, may suggest amendments in framing any future act.”; *See also Id.* at 503.

<sup>734</sup> *See* 21 JOURNAL OF THE HOUSE OF LORDS 3, 622-30.

<sup>735</sup> *See* 19 JOURNAL OF THE HOUSE OF COMMONS, 712.

<sup>736</sup> An Act for repealing such Clauses in the Act passed in the 7<sup>th</sup> Year of his Majesty's Reign (relating to Quarantine and the Plague) as gives Power to remove Persons from their Habitations, or to make Lines about Places infected, 7 Geo. I, c. 8, Feb. 12, 1722. (repealing §§ 2,4 of the previous statute).

<sup>737</sup> *Id.*

<sup>738</sup> MACLEAN, *supra* note 613, at 437.

<sup>739</sup> 7 & 8 Geo. I, c. 10, Feb. 12, 1722. An Act to enable his Majesty Effectually to Prohibit Commerce, for the Space of One Year, with any country that is, or shall be, infected with the plague and for shortening the continuance of an Act passed in the 7<sup>th</sup> year of his Majesty.

<sup>740</sup> *See* MACLEAN, *supra* note 613, at 423.

return, Parliament limited the provision to one year and attached a rider, which shaved a year off of the general quarantine law that had been passed in 1721, ensuring that the authorities would cease as of March 1723—a full year before originally decreed.<sup>741</sup>

Mead's emphasis on smuggling also took statutory form. After the House of Lords rejected a similar bill, the Crown managed to push temporary provisions through the House.<sup>742</sup> The new statute, in addition to increasing the penalties associated with smuggling, increased tonnage duties, expanded penalties to including burning the ship or selling the products on board, and prevented the importation of alcohol.<sup>743</sup> Its effect was to strengthen the Privy Council's hand with respect to Parliamentary sanction.

While this legislation was evolving, the Privy Council took steps to use the powers at their disposal. The council gave warships to Customs officers to command and stationed guards along the coastlines.<sup>744</sup> When the council ordered two ships from Cyprus to be burned, the matter—which quickly evolved into a major diplomatic row and threatened trade with the Levant—reached Parliament.

The Levant Company increased their pressure on the political representatives. Commercial entities frequently had to petition to get their wares out of quarantine. The administrative burden on them was not insignificant: the Privy Council required bills of lading, bills of health letters of advice, invoices, and business correspondence; where such documents could not readily be produced, the goods would be sent to the airing houses where damp conditions often ruined the cargo.<sup>745</sup> Under such pressure, there was little impetus to continue to support the more stringent provisions. All three of the statutes introduced in response to the Marseilles plague were temporary. Upon their expiration, Queen Anne's act came back into force.<sup>746</sup>

### *E. The Beginning of the End*

Within a few years, the Privy Council again faced the threat of plague. Accordingly, in May 1728 the Privy Council issued an order, requiring 40 days'

<sup>741</sup> 8 Geo. 1, c. 8, s. 6, shortening An Act for repealing an Act and for Better Preventing the Plague being Brought from Foreign Parts into Great Britain or Ireland, or the Isles of Guernsey, &c., and to hinder the Spreading of Infection. *See also* 7 Geo. I, c. 3, Jan. 25, 1721.

<sup>742</sup> 7 & 8 Geo. I, c. 18, Mar. 7, 1722. (amending 7 Geo. I, c. 3). An Act to prevent the Clandestine Running of Goods, and the Danger of Infection thereby, and to prevent ships breaking their Quarantine.

<sup>743</sup> *Id.*

<sup>744</sup> BOOKER, *supra* note 48.

<sup>745</sup> *Id.* at 110-11.

<sup>746</sup> 7 Geo. I, c. 3 expired and 9 Anne, c. 2 came back into force, Mar. 25, 1723.

quarantine of all ships from the Ionian Islands and Morea, and within five days, a new bill was before Parliament.<sup>747</sup> The legislation revived many of the same clauses from the Marseilles statutes, with a few alterations: the power of prohibiting commerce for one year was included directly in the statute, as was the authority of the Crown to prohibit British subjects from trade with specific countries or regions.<sup>748</sup> Violations would be considered a felony, with ships and goods forfeit and importers fined thrice the value of the ship or goods received.<sup>749</sup> Although intended to be temporary, an ongoing threat of plague forced their renewal in 1733.<sup>750</sup>

The hold of the merchants over Parliament was growing. This statute was the last act to insist that goods be opened and aired for a period of quarantine; it also omitted any mention of enumerated goods.<sup>751</sup> Nevertheless, Privy Council Proclamations and Orders in July of that year listed quarantinable items.<sup>752</sup> It is not clear whether these orders were *ultra vires* the governing legislation, or whether Parliament was simply trying to dodge political bullets—i.e., leaving it to the council to make unpopular commercial decisions. Merchants were particularly unhappy about the Privy Council's orders. Petitions for relief to minimize the length of quarantine and airing of cargo followed. There was particular concern that British trade was being crippled, leaving its rivals free to profit. The Levant Company thus petitioned for an end to quarantine for ships with clean bills of health, so that trade “may be upon as easy terms as that of our Neighbours”—i.e., the Dutch.<sup>753</sup> Despite deep

<sup>747</sup> May 9, 1728, leave given to bring in bill; May 10, Second Reading and committed to a committee; passed on 24<sup>th</sup>, agreed to by Lords without Amendment, received Royal Assent May 28, 1728.

<sup>748</sup> 1 Geo. II, c. 13, May 28, 1728. An act for the better preventing the plague being brought from foreign parts into Great Britain, or Ireland, or the Isles of Guernsey, &c. &c., and to hinder the spreading of infection; *See also* Journal of the House of Commons, Vol. 21, at 157, 166-9, 172, 177-9, 181-2.

<sup>749</sup> *Id.*

<sup>750</sup> 6 Geo. II, c. 34, June 14, 1733; An Act for reviving so much of the Act made in the First Year of his Majesty's Reign, entitled, &c.—as relates to the performing quarantine, and the preventing the spreading of infection, and to enable his Majesty to prohibit commerce with any country or place infected with the plague, for a certain time therein limited. In 1735 6 Geo. II, c. 34 expired and 9 Anne, c. 2 came back into force. Bill ordered June 4<sup>th</sup>, presented, read twice, and committed same day; reported and ordered to be engrossed the next day, and passed on the 6<sup>th</sup>. No amendments by Lords, Royal Assent on the 13<sup>th</sup>. Was to continue in force for two years, from June 2, 1733, and from then to the next Session of Parliament.

<sup>751</sup> *Id.*

<sup>752</sup> *See, e.g.*, Privy Council Order and Proclamation of July 4, 1728 (declaring 40 days' quarantine against Levant, particularly Smyrna, and islands of the Archipelago, as well as Morea and Ionian Islands); Privy Council Order of July 9, 1728 (extending quarantine to Channel Islands and the Isle of Man).

<sup>753</sup> BOOKER, *supra* note 48, at 153.

suspicion of the accuracy of such bills of health, the Privy Council caved, issuing an order in February 1730, allowing all ships with clean bills to be released from quarantine.<sup>754</sup>

As for the statutory authorities, the renewal act of 1733 was the last time that Parliament gave the monarch the authority to prohibit contact with infected regions. The authority was never used.<sup>755</sup> It is notable here that, in contrast, this period coincides with the beginning of the introduction and use of such authorities in the American colonies.

The following decades witnessed continued outbreaks of plague, in the context of which the 1710 statute provided the base and sporadic Privy Council orders issued.<sup>756</sup> In 1752 Parliament again turned to discussion of quarantine, as the House of Commons resolved to form a committee “to consider the most proper and effectual manner of performing Quarantine.”<sup>757</sup> This was the first time that quarantine measures had been considered by Parliament outside the demands of an immediate emergency.<sup>758</sup>

In January of 1753 Viscount Barrington and five other Members of the House of Commons were appointed to bring forward a quarantine bill.<sup>759</sup> Barrington’s role, in particular, could hardly be overlooked: as a commissioner of the Admiralty, his interest signaled concern that the Navy might be less than satisfied with the Privy Council’s actions. The statute focused on the foreign importation of disease—not its domestic spread.<sup>760</sup> It required that infected ships dock in the Isles of Sicily, whence customs would contact the mainland. The ship would remain there until released by the Crown, under penalty of death.<sup>761</sup> The statute limited the impact on commercial goods, ensuring that there would be no airing subsequent to quarantine and imposing treble damages, as well as the full costs, on any officer who “shall embezzle, or shall willingly damage, any goods performing quarantine under his discretion.”<sup>762</sup>

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<sup>754</sup> *Id.* at 154.

<sup>755</sup> NA PRO 30/8/259, vols. 340, 343, cited in BOOKER, *supra* note 48, at 156, n.39.

<sup>756</sup> See RUSSELL, *supra* note 611, at 446.

<sup>757</sup> 26 JOURNAL OF THE HOUSE OF COMMONS, at 432, 447.

<sup>758</sup> See RUSSELL, *supra* note 611, at 447-48.

<sup>759</sup> 26 JOURNAL OF THE HOUSE OF COMMONS at 532.

<sup>760</sup> See 26 Geo. II, c. 6, April 17, 1753. An act to oblige ships more effectually to perform their quarantine, and for the better preventing the plague being brought from foreign parts into Great Britain or Ireland, or the isles of Guernsey, Jersey, Alderney, Sark, or Man Note the absence of “and for preventing the spreading of infection” in the title, in contrast with earlier initiatives.

<sup>761</sup> *Id.* An act to oblige ships more effectually to perform their quarantine; and for the better preventing the plague being brought from foreign parts into Great Britain or Ireland, or the isles of Guernsey, Jersey, Alderney, Sark, or Man.

<sup>762</sup> *Id.*

Further, the act's implementation was delayed one year, to allow companies the time necessary to obtain the documentation required to avoid quarantine, where applicable.<sup>763</sup> Accompanying parliamentary consideration of the bill, moreover, was a second initiative, which sought to relax conditions for the Levant Company, without throwing trade open entirely.<sup>764</sup>

With the monarch and the Privy Council forced to work more closely with Parliament, it was perhaps inevitable that British shipping interests—well represented in the legislature—would carry ever-greater sway in subsequently diminishing the impact of quarantine regulations. By the 1763 Peace of Paris, England had “undisputed command of the seas”.<sup>765</sup> Quarantine provisions ran directly counter to the country's economic interests. “All that prevented trade from growing,” merchants argued to the Board of Trade, was “the quarantine imposed in Britain.”<sup>766</sup> Subsequent measures sought to address the problem.<sup>767</sup>

Parliament was sensitive to the political and economic repercussions of limiting trade. The advent of free market ideals, promulgated through the writings of Adam Smith and others, brought ever more attention to trade restrictions. But disease presented a very real threat—one that had decimated the country in earlier times. Giving the Privy Council full reign, however, raised the specter of Royal Prerogative. Parliament's short-term response was to split the difference: to issue governing statutes, thereby establishing its authority and the limits of Royal Prerogative, while granting the Privy Council the flexibility necessary to respond to disease—and, in the process, dodging any political fallout that may ensue.

#### i. Gradual Transformation of the Quarantine Regime

Quarantine provisions themselves came to reflect the Enlightenment ideals that shaped the 18<sup>th</sup> century, as society began questioning the traditional institutions. In contrast to the Tudor age, when quarantine was seen as the height of European political sophistication, it gradually came to be seen as backwards. Two treatises in particular had a profound influence. The first, by

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<sup>763</sup> *Id.*

<sup>764</sup> See 26 Geo. II, c. 12, May 15, 1753. An Act for Enlarging and Regulating the Trade Into the Levant Seas, NB: Starting to see free market ideas/Adam Smith take hold.

<sup>765</sup> KEIR, *supra*, note 621, at 291.

<sup>766</sup> See NA PC 1/8/20; communication from British consul at Leghorn, backed by 25 local merchants, to Henry Seymour Conway (successor to Lord Halifax), 1788; See also BOOKER, *supra* note 48, at 196.

<sup>767</sup> See, e.g., 39 Geo. III, c. 99, July 12, 1799. An act to encourage the trade into the Levant seas, by providing a more convenient mode of performing quarantine, &c.

John Howard, pointed out how politics interfered with the execution of quarantine.<sup>768</sup> His work underscored the expense and injustice that permeated British trade with the Mediterranean.<sup>769</sup>

The second, by Patrick Russell, carefully dissected the clinical aspects of plague, the method of cure, the doctrine of contagion, and operation of lazarettos.<sup>770</sup> Russell argued that, as a domestic matter, the constitutional authorities were unclear: the line between Royal Prerogative for international ships arriving and Parliamentary control for the spread of the disease blurred. Russell contemplated the role of the civil magistrate.<sup>771</sup> He looked carefully at the police powers to be exercised in relation to the different stages of plague, calling for the establishment of a Council of Health, with discretionary authority.<sup>772</sup> Such a body would resolve many of the weaknesses of the Privy Council, pushing the decision to quarantine down to a local level and providing a greater medical and scientific basis for the decision.<sup>773</sup> It also would be superior to the current quarantine regulations used by shipping companies—who could hardly be considered disinterested.<sup>774</sup>

Russell's recommendations reflected the broader movement towards the professionalism of advice rendered to the government, as well as the growing role of medical personnel in setting policies affecting public health. In 1799 Parliament passed a statute to allow the Privy Council to convene a body of experts to consider and prepare regulations to govern quarantine.<sup>775</sup> The body reported in 1800, recommending that a Board of Health be established, which could consult with all British consuls in foreign parts and which should have original responsibility for any domestic measures.<sup>776</sup>

The Privy Council adopted many of the committee's recommendations, but it rebuffed the proposed creation of a board of health to which its quarantine authorities would be transferred.<sup>777</sup> Instead, the committee would continue in a consultative capacity. By insulating the committee from the commercial interests that had provided a check on the Privy Council, though, its recommendations became heavily weighted towards public health—in effect,

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<sup>768</sup> John Howard, *An Account of the Principal Lazarettos in Europe*, 1789.

<sup>769</sup> *Id.*

<sup>770</sup> RUSSELL, *supra* note 611.

<sup>771</sup> *Id.* 508-9.

<sup>772</sup> *Id.* at 506-7.

<sup>773</sup> *Id.*; *See also*, comment on Russell in MACLEAN, *supra* note 613, at 429.

<sup>774</sup> RUSSELL, *supra* note 611, at 344-350.

<sup>775</sup> 39 Geo. III, c. 99, July 12, 1799. An act to encourage the trade into the Levant seas, by providing a more convenient mode of performing quarantine, &c.

<sup>776</sup> *See* MACLEAN, *supra* note 613, at 431.

<sup>777</sup> NA PC 2/153/453-51; *See also* Order in Council July 29, 1800.



prompting even more extreme measures.<sup>778</sup> In 1806, the Board of Health, having had no real authority, dissolved.<sup>779</sup>

In the interim, Parliament expanded the statutory base for quarantine to include diseases other than plague. Of chief concern was the advent of yellow fever, occasioned by trade with the Americas.<sup>780</sup> In moving the 1805 bill, George Rose explained that while the 1800 act had been to impose quarantine on ships coming from plague regions, "other epidemical diseases...might be dangerous to the health of this county."<sup>781</sup> The Privy Council developed questionnaires to obtain information from each vessel arriving in the United Kingdom.<sup>782</sup> Ships coming from regions where such diseases raged, even if they carried clean bills of health, would be required to perform quarantine.<sup>783</sup>

As in the United States, theories of contagion were not universally accepted.<sup>784</sup> Charles MacLean argued that no disease attack individuals twice—a position formally rejected in 1818 by a Select committee of the House of Commons, as well as the Royal College of Physicians.<sup>785</sup> Undeterred by the Parliamentarians' skepticism, MacLean began his *Remarks on the British Quarantine Laws*, "The code of Quarantine laws in England, and of Sanitary laws in the nations of the continent of Europe, is, perhaps, without exception,

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<sup>778</sup> See, e.g., *Journal of the House of Commons*, vol. 55, at 245, 497; *Journal of the House of Commons*, Vol. 55, pp. 498, 575; NA PC 2/154/43.

<sup>779</sup> BOOKER, *supra* note 48, at 303.

<sup>780</sup> See 45 Geo. III, c. 10, Mar. 12, 1805. An Act for making farther [sic] provision for the effectual performance of Quarantine, Remained in force until 1822; See also printed copy in the British Library at 748.f.13(2) & at Kew at NA PC 2/167/227-68; 46 Geo. III, c. 98, July 16, 1806. Amendments to 1805 statute in An Act for making additional and further Provisions for ... Quarantine in Great Britain.

<sup>781</sup> Hansard's, *Parliamentary Debates*, vol. 3, p. 222.

<sup>782</sup> Order in Council of Apr. 5, 1805, reprinted in DEW'S ON DUTIES OF CUSTOMS, UL Rare Books, Ant.c.28.2309, at 243-4.

<sup>783</sup> *Id.* at 240-3 (reprinting April 5, 1805 Privy Council Order). For a summary of quarantine regulations in place as of 1818, see A Digest of the Duties of Customs & Excise payable upon all foreign articles imported into and exported from Great Britain: duties outwards, and counter valuing duties between Great Britain and Ireland, Customs and Excise bounties...Quarantine laws...brought up to 1<sup>st</sup> Dec. 1818. London: 1818. UL Rare books Ant.c.28.2309.

<sup>784</sup> See, e.g., Dr. Anthony White, London: 1846, at 2, UL Rare Books, IX.23.18. A Treatise on the Plague, more especially on the police management of that disease, Illustrated by the plan of operations successfully carried into effect in the late plague of Corfu, with hints on quarantine; See also Ackerknecht, *Anticontagionism Between 1821 and 1867*; BULL. OF THE HIST. OF MED., 22, 562-93 (1948); R. Cooter, *Anticontagionism and History's Medical Record*, in THE PROBLEM OF MEDICAL KNOWLEDGE—EXAMINING THE SOCIAL CONSTRUCTION OF MEDICINE, 87-108 (P. Wright and A. Treacher eds, 1982).

<sup>785</sup> MACLEAN, *supra* note 613, at 439; See also Catherine Kelly, "Not from the College, but Through the Public and the Legislature", Charles Maclean and the Relocation of Medical Debate in the Early Nineteenth Century, BULL. HIST. MED. 2008, 82(3): 545-569.

the most gigantic, extraordinary, and mischievous superstructure, that has ever been raised by man, upon a purely imaginary foundation.”<sup>786</sup>

The ensuing debate was fierce. Non-contagion theory was dangerous: it put the nation at risk.<sup>787</sup> Foreign powers would refuse trade with an infected country.<sup>788</sup> Pamphlets ridiculed MacLean.<sup>789</sup> He replied with the none-too-subtle: *Evils of Quarantine Laws, and Non-Existence of Pestilential Contagion*. (MacLean’s position was somewhat weakened when, within five days of arriving in the Levant, he fell subject to the plague.<sup>790</sup>)

The fact that England was primarily concerned about plague proved crucial. It was not clear that plague transferred between individuals. Although it was not known at the time, the disease was carried by fleas (and rodents) and transferred when the animals bit the individual. This explained why there were various instances in which individuals had come into contact with each other and the disease had not transferred—incidents sufficient to call into question whether airborne human-to-human transmission occurred. It also explained why immersing goods in water and then placing them in the open air diminished their contagiousness: it killed the fleas, thus preventing individuals who subsequently came into contact with the furs, fabrics, and other materials from contracting the disease.

Even as contagionists and non-contagionists captured the public debate, a series of works began to show the connection between dirt and disease.<sup>791</sup> The real problem, scientists argued, was sanitation:

It must surely be manifest, that foreign contagion, now usually considered the substantial germ, without with the most fearful combination of indigenous causes, famine, filth, misery, corrupt food, vitiated air and sickly seasons, can never produce a pestilence, dwindles in national important almost to a shadow in comparison. And it can scarcely be doubted that the attempt to defend ourselves by quarantine regulations, while such causes existed, would be like binding in chains a ferocious animal at a distance, when another ten-times more fierce was fondled at our doors, and suffered to roam about at pleasure.<sup>792</sup>

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<sup>786</sup> *Id.* at 416.

<sup>787</sup> WILLIAM MACMICHAEL, A BRIEF SKETCH OF THE PROGRESS OF OPINION UPON THE SUBJECT OF CONTAGION: WITH SOME REMARKS ON QUARANTINE (1825). UL Rare books, VII.25.47.

<sup>788</sup> Augustus Bozzi Granville. LETTER TO THE RT. HON. W. HUSKISSON, MP, PRESIDENT OF THE BOARD OF TRADE, ON THE QUARANTINE BILL, by A.B. Granville, M.D., London: 1825, p. 394. UL Rare Books Zz.18.25.

<sup>789</sup> AN ANTIDOTE TO THE THEORIES OF THE NON-CONTAGIONISTS, RESPECTING THE PLAGUE. BY AN OLD LEVANter. (1825). UL Rare books, VII.25.47.

<sup>790</sup> HANCOCK, *supra* note 611, at 12.

<sup>791</sup> See HANCOCK, *supra* note 611. WILLIAM HEBERDEN, OBSERVATIONS ON THE INCREASE AND DECREASE OF DIFFERENT DISEASES, PARTICULARLY THE PLAGUE (1801) and THOMAS HANCOCK, DISSERTATION ON THE LAWS OF EPIDEMIC DISEASES (QUAEDAM DE MORBID EPIDEMICIS GENERAIA COMPLECTENS) (1806).

<sup>792</sup> HANCOCK, *supra* note 611, at 232.

These scientific positions created an alternative to quarantine: i.e., if quarantine was detrimental to the economic health of the country, while being questionable in its effectiveness—as highlighted in the contagionist debate; and if there were alternatives available which might be more effective—without the detrimental impact on trade—then Parliament needed to consider it.

Accordingly, on March 10, 1825, the House dissolved itself into a committee to consider all acts in force related to quarantine.<sup>793</sup> John Smith, one of MacLean's supporters, was given leave to read a petition from MacLean that attacked the quarantine system, calling for a withdrawal of all quarantine laws—or an investigation into pestilential contagion.<sup>794</sup> The House passed a new statute, which included many of the previous powers, but softened the penalties associated with violations of the law, commuting, for instance, capital punishment to a £100 fine.<sup>795</sup> Most importantly, it allowed ships with a clean bill of health and healthy crew, upon arriving from Mediterranean or any African or Turkish ports, to be released immediately upon docking, after formalities were observed.<sup>796</sup>

Within five years Britain was to face yet another epidemic, but this time from a new disease: cholera. Diplomatic intelligence reported that it had swept through the Volga valley. Accordingly, On November 11, 1830, the Privy Council introduced an order quarantining ships arriving in Britain from Russia.<sup>797</sup> Merchants saw these provisions as troublesome and, instead of petitioning the Privy Council directly (an act that historically had been a colossal waste of time) they went straight to Parliament.<sup>798</sup> Agitation in the commons was quickly followed by new Orders in Council, requiring that quarantine laws be strictly enforced.<sup>799</sup> The Privy Council announced the formation of a new consultative Board of Health to respond to the crisis.

The board, chaired by the President of the College of Physicians, again demonstrated the insertion of science and medicine into the quarantine debate and the professionalization of advice provided to the government. But just because scientists were now being consulted did not mean that the advice they would provide would be accurate. The *Lancet*, a revolutionary medical

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<sup>793</sup> 80 JOURNAL OF THE HOUSE OF COMMONS, at 185.

<sup>794</sup> Hansards, vol. 12, at 993-6.

<sup>795</sup> See 6 Geo. IV, c. 78, June 27, 1825. An Act to repeal the several Laws relating to the Performance of Quarantine, and to make other Provisions in lieu thereof; See also 80 JOURNAL OF THE HOUSE OF COMMONS, at 489-603.

<sup>796</sup> Quarantine Act, 1825; 6 Geo. III, c. 78, II & III.

<sup>797</sup> See Privy Council Order, Nov. 11, 1830.

<sup>798</sup> BOOKER, *supra* note 48, at 463.

<sup>799</sup> See Privy Council Order of May 23, 1831; Privy Council Order of June 20, 1831.

journal launched in 1823, lamented, “It is probable that a set of men more ill-informed on the subject upon which they will be called upon to report, could not be found in the ranks of the profession.”<sup>800</sup> And the board’s advice, when it did come, was not particularly welcome to the Privy Council: it recommended the creation of a system, constructed from the Local Boards of Health, by which the compulsory evacuation of the sick would be carried out, and the isolation of the upper classes ensured. Historian John Booker reflected,

For the Privy Council, these recommendations were hardly welcome, raising all manner of questions including constitutional authority, overlap with subsisting parochial and municipal government, social discrimination, and the liberty of the individual. Furthermore, the council’s own powers of control and coercion beyond the imposition of quarantine could only legally take effect once an epidemic had erupted.<sup>801</sup>

In October 1831 British subjects began dying within hours of the onset of symptoms. The Privy Council immediately issued regulations imposing strict quarantine at the ports—including, for the first time since the 16<sup>th</sup> century, between ports within England.<sup>802</sup> It determined though that a *cordon sanitaire* around North-East England was neither practicable nor judicious.<sup>803</sup> Parliament acquiesced by passing an emergency law to give the Privy Council more leeway.<sup>804</sup> The council went after quarantine with abandon: between 1826 and 1829, there had been 772 ships from foreign ports quarantined, but in 1831 alone, some 2,556 found themselves so restricted.<sup>805</sup>

Despite their severity, these measures proved unsuccessful. Upwards of 30,000 British subjects died in the first wave.<sup>806</sup> Their failure put another nail in the coffin of quarantine as an effective response to disease. William Fergusson, the Inspector General of Hospitals, roundly denounced the practice: “[W]e might as well pretend to arrest the influx of the swallows in summer, and the woodcocks in the winter season, by cordons of troops and quarantine regulations, as by such means to stay the influence of an atmospheric

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<sup>800</sup> The Lancet, vol. 16 (409), at 434.

<sup>801</sup> BOOKER, *supra* note 48, at 467.

<sup>802</sup> Maglen, *supra* note 47, at 418; *See also* BOOKER, *supra* note 48, at 470.

<sup>803</sup> *Id.*

<sup>804</sup> Act of Parliament, 2 Will. IV, c. 10, Feb. 20, 1832.

<sup>805</sup> BOOKER, *supra* note 48, at 472; *See also* Maglen, *supra* note 47, at 418.

<sup>806</sup> *See* F.B. Smith, *The People’s Health, 1830-1910* (London, 1979, p. 230 (reporting the death of 31,000 people); *See also* Report on the Mortality of Cholera in England, 1848-9, xlvii (London, 1852) (placing the number at 30,900 who died 1831-32 in England); *See also* HENRY JEPHSON, *THE SANITARY EVOLUTION OF LONDON* 2-3 (1907) (reporting 5,000 deaths in London).

poison.”<sup>807</sup> The solution instead lay:

[I]n our moral courage, in our improved civilization, in the perfecting of our medical and health police, in the generous charitable spirit of the higher orders, assisting the poorer classes of the community, in the better condition of those classes themselves, compared with the poor of other countries, and in the devoted courage and assistance of the medical profession every where.<sup>808</sup>

It would be ludicrous to use quarantine to step epidemic catarrh or influenza; so why should it work for other diseases?<sup>809</sup>

Thomas Forster, writing contemporaneous with Fergusson, considered the failure with regard to cholera to tilt the scales against quarantine writ large:

A question of great importance has for some years divided the opinion of medical as well as commercial men, respecting the source of Pestilence and the utility of Quarantine. The point at issue seems to be this—Whether pestilential diseases, such as Cholera Morbus, Plague, and others, be of such a nature that Quarantine and Sanitary Cordons can constitute a defence against their introduction into any county; or whether, on the contrary, they depend on morbidic conditions of the air, which, during particular seasons, and for certain limited portions of time, visit various countries, like other atmospheric phenomena, and are incapable of being arrested by any human means? I am strongly of the latter opinion, and though under certain circumstances diseases may be extended to predisposed persons, by confinement in close apartments with those who are already infected; yet it seems to me, that facts do not warrant the belief that travelers, ships, or bales of goods, can convey such diseases into ports or countries where the specific malaria does not exist.<sup>810</sup>

Medical treatises began calling for the abolition of quarantine law altogether.<sup>811</sup>

Outbreaks of the disease in 1832, 1848, 1854, and 1866 followed.<sup>812</sup> The

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<sup>807</sup> See WILLIAM FERGUSSON, MD, FRSE, INSPECTOR GENERAL OF HOSPITALS; LETTERS UPON CHOLERA MORBUS, WITH OBSERVATIONS UPON CONTAGION, QUARANTINE, AND DISINFECTING FUMIGATIONS. (1832), at 10. See also Letter written in Windsor, Nov. 26, 1831, UL Rare books Room, VII.27.3.

<sup>808</sup> *Id.* at 10.

<sup>809</sup> *Id.* at 24.

<sup>810</sup> THOMAS FORSTER, FACTS AND ENQUIRIES RESPECTING THE SOURCE OF EPIDEMIA: WITH AN HISTORICAL CATALOGUE OF THE NUMEROUS VISITATIONS OF PLAGUE, PESTILENCE, AND FAMINE, FROM THE EARLIEST PERIOD OF THE WORLD TO THE PRESENT DAY, TO WHICH ARE ADDED, OBSERVATIONS ON QUARANTINE AND SANITARY RULES. (1832), iii, UL Rare Books Hunter.c.81.69.

<sup>811</sup> See, e.g., CAPTAIN WILLIAM WHITE, (BENGAL ARMY), THE EVILS OF QUARANTINE LAWS, AND NON-EXISTENCE OF PESTILENTIAL CONTAGION: THE PRIVY COUNCIL, AND COLLEGE OF PHYSICIANS; THE MEANS OF PREVENTION AND METHOD OF CURE OF THE CHOLERA MORBUS, AND THE ATROCITIES OF THE CHOLERA PANIC, 176, (1837), UL Rare Books VII.28.18.

<sup>812</sup> Maglen, *supra* note 47, at 419.

last, in particular, killed seven in every 10,000 people.<sup>813</sup> Quarantine again proved ineffective, leading the formal government report to denounce lazarettos as superstitious—“as contemptible in the eyes of science as they are injurious to commerce.”<sup>814</sup>

The government responded to the devastation and what appeared to be a growing scientific consensus against the use of quarantine by asking John Bowring, a medical doctor, to examine the operation of quarantine in the Levant—the nexus of British quarantine policy for centuries—and to consider the impact of quarantine regulations on Britain’s international relationships and commercial interests.<sup>815</sup> Bowring’s findings proved devastating:

The pecuniary cost may be estimated by millions of pounds sterling in delays, demurrage, loss of interest, deterioration of merchandise, increased expenses, fluctuations of markets, and other calculable elements; but the sacrifice of happiness, the weariness, the wasted time, the annoyance, the sufferings inflicted by quarantine legislation—these admit of no calculation—they exceed all measure. Nothing but their being a security against danger the most alarming, nothing but their being undoubted protections for the public health could warrant their infliction; and the result of my experience is not only that they are useless for the ends they profess to accomplish; but that they are absolutely pernicious—that they increase the evils against which they are designed to guard, and add to the miseries which it is their avowed object to modify or to remove.<sup>816</sup>

Even worse was the degree to which quarantine measures had become a tool of diplomacy and state policy. “Under the plea of a regard for the public health,” Bowring wrote, “all letters are opened—all travelers are arrested and imprisoned—all commodities are subject to regulations the most unintelligible, costly and vexatious.”<sup>817</sup> He was not unaware of the threat posed by disease but of the threat posed by the weaponization of disease. He reported information related to Turkish use of plague as a means of war.<sup>818</sup> But transfer of disease by animals also occurred without any intent behind them. And the power of the lazarettos sat uneasily in a democratic state dedicated to the rule of law.<sup>819</sup>

Across Europe, governments were beginning to discuss significant

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<sup>813</sup> R. Thorne Thorne, *On Sea-Borne Cholera: British Measures of Prevention v. European Measures of Restriction*, *BRITISH MEDICAL JOURNAL*, 135, 140 (Aug. 13, 1887).

<sup>814</sup> Report on the Mortality of Cholera in England, 1848-9 (London 1852).

<sup>815</sup> Edinburgh, 1838, 1-2, UL Rare Books VII.28.18. John Bowring, *Observations on the Oriental Plague and on Quarantines, as a means of arresting its progress, addressed to the British Association of Science, assembled at Newcastle, in August, 1838*.

<sup>816</sup> *Id.* at 2.

<sup>817</sup> *Id.* at 11.

<sup>818</sup> Bowring, *supra* note 815.

<sup>819</sup> *Id.* at 12.

modifications to their quarantine laws.<sup>820</sup> In 1838 the French proposed to Britain to promote the creation of a Congress of Delegates from Europe, with the Mediterranean port. Like the regional conferences in the United States, the purpose was to construct a uniform system of quarantine regulations. England readily agreed.<sup>821</sup> Bowring's conclusion received support from British diplomats in Malta and elsewhere.<sup>822</sup> The report was not without its critics.<sup>823</sup> But it found fertile ground in a Parliament besieged by commercial interests and doubtful as to the effectiveness of quarantine law.

## ii. Broader Context

At the risk of gross oversimplification, a handful of factors can be emphasized in looking at the complex economic and political conditions that helped to shape British quarantine law in the late 18<sup>th</sup> and early 19<sup>th</sup> century. A sudden surge in agricultural productivity helped to drive the industrial revolution.<sup>824</sup> This meant the greater movement of people and goods and an increased emphasis on economic growth. Transportation flows accelerated, and the population flocked to the cities.<sup>825</sup> The resultant population density brought issues of sanitation to the fore. Calls for reform proliferated.<sup>826</sup>

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<sup>820</sup> *Id.* at 5.

<sup>821</sup> Milroy, *supra* note 709, at 12.

<sup>822</sup> *Id.* at 14.

<sup>823</sup> *See, e.g.*, JOHN MURRAH, THE PLAGUE AND QUARANTINE. REMARKS ON SOME EPIDEMIC AND ENDEMIC DISEASES (INCLUDING THE PLAGUE OF THE LEVANT), AND THE MEANS OF DISINFECTION: WITH A DESCRIPTION OF THE PRESERVATIVE PHIAL, ALSO A POSTSCRIPT ON DR. BOWRING'S PAMPHLET (1839), UL Rare Books Pam.6.83.31.

<sup>824</sup> *See* MARK OVERTON, AGRICULTURAL REVOLUTION IN ENGLAND 1500-1850 (2002); THOMAS S. ASHTON, THE INDUSTRIAL REVOLUTION (1760-1830) (1948).

<sup>825</sup> *See, e.g.*, P.J.G RANSOM, THE VICTORIAN RAILWAY AND HOW IT EVOLVED, (1990); HENRY BOOTH, AN ACCOUNT OF THE LIVERPOOL AND MANCHESTER RAILWAY, (1830) (Reprint of the original edition by Frank Cass, 1969); J.H. CLAPHAM, AN ECONOMIC HISTORY OF MODERN BRITAIN: THE EARLY RAILWAY AGE, 1820-1850 (1926). London went from just under one million inhabitants to 2.3 million inhabitants during the first half of the 19<sup>th</sup> century; UK The National Archives, Abstracts of the Answers and Returns: Enumeration: 1801 (140), VI.813, (112), VII.1; Population Tables I: Numbers of Inhabitants: 1852-53 (1631-1632), LXXXV,1,LXXXVI,1. Warwick more than doubled from just over 215,000 to nearly 480,000. Even large villages grew. Bedford, for instance, had hit nearly 130,000 by 1851.

<sup>826</sup> *See, e.g.*, THE HEALTH AND SICKNESS OF TOWN POPULATIONS, CONSIDERED WITH REFERENCE TO PROPOSED SANATORY LEGISLATION, AND TO THE ESTABLISHMENT OF A COMPREHENSIVE SYSTEM OF MEDICAL POLICE, AND DISTRICT DISPENSARIES WITH APPENDICES AND STATISTICAL TABLES (1846); William A. Guy, On the Health of Towns, as Influenced by Defective Cleansing and Drainage; and on the application of the Refuse of Towns to Agricultural Purposes. Being a Lecture delivered at the Russell Institution (1846); Hector Gavin, M.D., Health of Towns, and of London Associations. Unhealthiness of London and the Necessity of Remedial Measures; being a lecture delivered at the Western and

Simultaneously, democratic changes swept the country. The reforms of 1832 targeted the abuse of “influence” and sought to eliminate the Crown’s control over Parliament.<sup>827</sup> The king could no longer choose ministers at his discretion, and the House of Lords lost its ascendancy. The electorate grew in strength. Personal sovereignty, then parliamentary sovereignty, yielded to the sovereignty of the people.<sup>828</sup> Larger and less manageable constituencies began determining the outcome of elections. The government was thus increasingly forced to address not just national defense and foreign relations, but a range of issues that accompanied urbanization.<sup>829</sup> New demands arose for local administration, as well as political equality. Expensive, antiquated institutions and procedures fell from favor and became the target of critique: “The opinions which became fashionable in this age required that every institution should justify its existence on practical grounds.”<sup>830</sup>

Further influencing the transition were the ideas of Adam Smith, who, in the *Wealth of Nations*, emphasized that national greatness required minimum restraints. Thus, under William Huskisson (President of the Board of Trade, 1825-1827) and then William Gladstone (President of the Board of Trade, 1841-1845), the board took a leading role in the tariff revisions required for free trade. As competition from abroad heightened, Britain needed “plentiful supplies of raw material, cheap food, and unimpeded access to every part of an expanding world-market where they might buy and sell as widely as possible...”<sup>831</sup> The country had to be able to compete more effectively.

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Eastern Literary and Scientific Institutions, Leicester Square (1847); HEALTH OF TOWNS ASSOCIATION. REPORT OF THE COMMITTEE TO THE MEMBERS OF THE ASSOCIATION ON LORD LINCOLN’S SEWERAGE, DRAINAGE, &C., OF TOWNS’ BILL (1846); Viscount Morpeth, Sanitary Reform. Speech in the House of commons, Tuesday, 30<sup>th</sup> Mar. 1847, on Moving for Leave to Bring in a Bill for Improving the Health of Towns in England; London: 1847; John Loude Taberner; The Past, the Present, and the Probable future Supply of Water to London, Letter to the Right Hon. Viscount Morpeth, M.P, Chief Commissioner of HM Woods and Forests (1847); John Marshall, Surgeon, Vaccination considered in relation to the public health: with inquiries and suggestions thereon. A letter addressed to the Right Honourable the Lord Viscount Morpeth, (1847); William Strange, M.D., An address to the middle and working classes on the causes and prevention of the excessive sickness and mortality prevalent in large towns. (1845); John Charles Hall, M.D. Facts which prove the immediate Necessity for the Enactment of Sanitary Measures, to remove those causes which at present increase most fearfully the Bills of Mortality, and seriously affect the Health of Towns (1847).

<sup>827</sup> KEIR, *supra*, note 621, at 374.

<sup>828</sup> *Id.*

<sup>829</sup> See, e.g., EDWARD JENKINS, THE LEGAL ASPECTS OF SANITARY REFORM 81-82 (1867) (discussing the centralization of public health).

<sup>830</sup> *Id.* at 370.

<sup>831</sup> *Id.* at 368.



Quarantine stood in the way.<sup>832</sup> And, as already recognized, there was substantial question about the scientific grounds for using such regulations. Thus Gavin Milroy wrote of the body of quarantine law in 1846,

The absurdly foolish and most ridiculous principles which they embody, the vexatious and oppressive restrictions which they impose, the wretchedness and suffering which they almost necessarily give rise to, and the great increase of mortality which, we have reason to believe, they often occasion, are surely sufficient grounds for the scrutinizing investigation that is so generally demanded."<sup>833</sup>

The government, however, could not just destroy the old quarantine regulations. They had to be replaced by something that would help the state to counter the threat of disease. The answer came in the form of sanitary laws. The Registrar-general explained, "internal sanitary arrangements, and not quarantine and sanitary lines, are the safeguards of nations' against the invasion of epidemic diseases."<sup>834</sup> Better sanitation, not archaic quarantine, was befitting of an enlightened age.<sup>835</sup>

Since the 16<sup>th</sup> century, there had been calls for better sanitation.<sup>836</sup> It was not until the 19<sup>th</sup> century, however, that the call for reform took hold. Edwin Chadwick lead the charge: "[T]he annual loss of life from filth and bad ventilation," he wrote, "are greater than the loss from death or wounds in any wars in which the country has been engaged in modern times."<sup>837</sup> Poor water, poor sewage, and poor ventilation lay at the root of disease.<sup>838</sup> The Royal Commission on the Health of Towns endorsed Chadwick's account, while reports of the Metropolitan Sewers Commission drew a bleak picture:

I have...seen in such places human beings living and sleeping in sunk rooms with filth from overflowing cesspools exuding through and running down the walls and over the floors...The effects of the stench, effluvia, and poisonous gases constantly

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<sup>832</sup> *Id.* at 490-96.

<sup>833</sup> GAVIN MILROY, QUARANTINE AND THE PLAGUE: BEING A SUMMARY OF THE REPORT ON THESE SUBJECTS RECENTLY ADDRESSED TO THE ROYAL ACADEMY OF MEDICINE IN FRANCE: WITH INTRODUCTORY OBSERVATIONS, EXTRACTS FROM PARLIAMENTARY CORRESPONDENCE, AND NOTES. (1846), UL Rare books reading room, VII.25.16.

<sup>834</sup> GAVIN MILROY, THE CHOLERA NOT TO BE ARRESTED BY QUARANTINE: A BRIEF HISTORICAL SKETCH OF THE GREAT EPIDEMIC OF 1817 AND ITS INVASIONS OF EUROPE IN 1831-32 & 1847; PRACTICAL REMARKS ON THE TREATMENT, PREVENTIVE AND CURATIVE, OF THE DISEASE, (1847), UL Rare books Room, VII.30.26, at 38-39.

<sup>835</sup> *Id.* at 39.

<sup>836</sup> *See, e.g.*, JHON CAIUS, A BOKE OR CONSEILL AGAINST THE DISEASE COMMONLY CALLED THE SEATE OR SEATYNG SICKNESSE (1552).

<sup>837</sup> EDWIN CHADWICK: REPORT ON THE SANITARY CONDITION OF THE LABOURING POPULATION OF GREAT BRITAIN (1842); *See also* PORTER, *supra* note 46, at 82; FRASER, *supra* note 609, at 78.

<sup>838</sup> CHADWICK, *supra* note 838.

evolving from these foul accumulations were apparent in the haggard, wan, and swarthy countenances, and enfeebled limbs, or the poor creatures whom I found residing over and amongst these dens of pollution and wretchedness.<sup>839</sup>

The solution to filth and disease was better sanitation. The General Board of Health, seen as the solution to the latter, became firmly opposed to the use of quarantine, considering it “a barbarous encumbrance, interrupting commerce, obstructing international intercourse, periling life, and wasting, and worse than wasting, large sums of public money.”<sup>840</sup> Southwood Smith, a prominent voice in the sanitation movement, similarly rejected quarantine. In 1866 he wrote:

The sanitary regulation of the ships themselves—a measure of the utmost importance to the seafaring classes of the community—would accomplish far more than could be hoped for or pretended to be accomplished by any known system of quarantine, and would have, moreover, a beneficial effect upon popular opinion by removing the fallacious appearances which favour the belief in imported disease, while they divert attention from the true causes of disease, the removable and preventable causes that exist on the spot.<sup>841</sup>

Thus, in 1868 when a severe smallpox epidemic and a renewed threat of cholera swept the country, the government appointed a Royal Sanitary Commission to look into public health. The Commission recommended a complete overhaul of the country’s administration, and the formation of a responsible public health authority in each district, controlled by a central department under a minister. Eventually, the Local Authorities would take over quarantine responsibilities in the ports.<sup>842</sup> Legislation in 1866, 1871, 1872, and 1875 defined the constitution of the central and local authorities—the last laying down the rules that still form the foundation of public health law in the United Kingdom.<sup>843</sup> The 1871 Act established a “phantom” board, called the Local Government Board and provided a salary for its president.<sup>844</sup> Its purpose was to place the supervision of all the laws relating to public health, the relief of the poor, and local government, into one body. The 1872 act created an alternative system of port prophylaxis; quarantine would be

<sup>839</sup> J. Phillips, Metropolitan Sewers Commission, 63, (1847); *See also* JEPHSON, *supra* note 806, at 19.

<sup>840</sup> General Board of Health—Report on Quarantine, Parliamentary Papers, 1849 (1070), XXIV, 17.

<sup>841</sup> SOUTHWOOD SMITH, *THE COMMON NATURE OF EPIDEMICS, AND THEIR RELATION TO CLIMATE AND CIVILIZATION* (1866), UL Rare Books V.22.28.

<sup>842</sup> Second Report of the Royal Sanitary Commission, Vol. I The Report, Parliamentary Papers C.281, XXXVI.I, 133 (1871); *See also* Maglen, *supra* note 47, at 421.

<sup>843</sup> Sanitation Act, 29 & 30 Vict., c. 90; Local Government Board Act, 34 & 35 Vict., c. 70, 14 Aug, 1871; Public Health Act, 1872; Public Health Act, 38 & 39 Vict., c. 55, 1875. *See also* ARTHUR NEWSHOLME, *THE MINISTRY OF HEALTH* (1925).

<sup>844</sup> Local Government Board Act, 34 & 35 Vict., c. 70, 14 Aug, 1871.

maintained for the “exotics”, while the new sanitary system extended to endemic diseases.<sup>845</sup>

The statutory authority of the Privy Council in regard to quarantine continued. But as a practical matter, dual policies had evolved: quarantine could either be administered via the central government through the Privy Council, or it could be conducted by medical inspection run by local authorities with the support of the Local Government Board.<sup>846</sup> The Privy Council had substantially reduced its footprint. By 1878, all but one of the quarantine grounds had been abandoned.<sup>847</sup> However, at times the Privy Council still acted, but it did so to much derision. In March of 1879, for instance, the council, having wind of a fresh outbreak of plague, suddenly issued an order imposing quarantine on all arrivals from the Baltic, the Black Sea, the Sea of Azoff, and the Sea of Marmara. The *Lancet* crowed that the “epidemic lunacy” of Europe had resulted “in reviving obsolete methods of quarantine, maritime and inland, against the compromised country [Russia], and against the uncompromised countries of each other.”<sup>848</sup> It announced the proposal “absurdly impracticable.”<sup>849</sup>

However archaic and impractical the authority might have been, as a legal matter, the Privy Council still had jurisdiction over the United Kingdom and the Local Government Board maintained domestic authority in England and Wales. The question was one of overlapping authority at the ports. The Law Lords ruled in November 1887 that the Local Government Board had no power over customs functions. The question would have to be put to Parliament. The resulting Public Health Act of 1896 repealed the Quarantine Act of 1825 and removed the Privy Council’s involvement in the same.<sup>850</sup> In its place, Westminster retained authority in the Local Government Board—in part to head off criticism from abroad that Britain had left itself without any defense.

#### F. *Rejecting Quarantine: 20<sup>th</sup> Century*

Britain’s concern about the impact of quarantine law on trade did not end with the elimination of domestic provisions. At the turn of the century, English ships still ruled the seas. Approximately 64% of all pilgrims arriving in

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<sup>845</sup> Maglen, *supra* note 47, at 413-428. But see Hardy, *supra* note 48, at 260; McDonald, *supra* note 48, at 28 (denying the dual theory of quarantine).

<sup>846</sup> BOOKER, *supra* note 48, at 539.

<sup>847</sup> *Id.* at 542.

<sup>848</sup> 1 *The Lancet* 688-689, (1880) cited in BOOKER, *supra* note 48, at 543, n.209.

<sup>849</sup> *Id.*

<sup>850</sup> Public Health Act, 1896, *supra* note 33.

the Hedjaz by sea were carried on British vessels.<sup>851</sup> The ships carried Indian, Afghan, Turkish, Chinese, Persian, Somali, African, Yemeni, Arab, and other pilgrims, thus gaining for Britain insight into the happenings at many ports.<sup>852</sup> When plague broke out and Jeddah imposed quarantine, the British shipping industry balked. Such provisions were considered “senseless.”<sup>853</sup> British emissaries made repeated representations to the Ottomans, protesting the use of quarantine.<sup>854</sup> At the same time, diplomats sent dispatches to the Secretary of State for Foreign Affairs, describing the state of the disease in each port; he who would forward the dispatches to the President of the Local Government Board.<sup>855</sup> The system kept even the local authorities abreast of global health developments.

Quarantine, rejected for plague—which had been its *raison d’être*—was viewed as even more inapposite for other disease. Thus the leading medical doctor, Arthur Hopkirk, wrote in 1913,

There is really but little to be said as to the possibility of preventing influenza epidemics, because experience has shown that the disease invariably starts from some mysterious and undiscoverable nidus, and also that, once started, little can be done to prevent its dissemination, partly on account of the general predisposition of human beings to the malady, and partly because of the rapidity with which the infection is carried along all available lines of human intercourse.”<sup>856</sup>

The solution instead would be to focus on teaching schoolchildren about personal and domestic cleanliness.<sup>857</sup>

When the Spanish Flu hit English shores in 1918-19, the United Kingdom did not resort to the use of quarantine.<sup>858</sup> The decision did not depend upon

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<sup>851</sup> Letter from F. G. Clemow to W. B. Townley, H.M. Chargé d’Affaires, Feb. 28, 1905, U.K. National Archives, MH 19/279. In 1905, there were 75,000 sea-borne Pilgrims.

<sup>852</sup> *Id.*

<sup>853</sup> Letter from E.D. Dickson to Sir N. R. O’Conor, Mar. 6, 1899, U.K. National Archives, MH 19/279.

<sup>854</sup> NA/MH 19 279: Quarantine concern with Ottoman provisions 1900.

<sup>855</sup> See, e.g., Letter from N.R. O’Conor to Marquess of Salisbury, K.G., May 1, 1899, U.K.

National Archives, MH 19/279; Letter from N.R. O’Conor to Marquess of Salisbury, K.G., Mar.

22, 1899, U.K. National Archives, MH 19/279; Dickson, *supra* note 853; Letter from N.R.

O’Conor, Constantinople, to Marquess of Salisbury, K.G., Mar. 9, 1899, U.K. National Archives,

MH 19/279; Clemow, *supra* note 851; Letter from E.D. Dickson, Constantinople, to P. Currie,

GCB, Apr. 9, 1898, U.K. National Archives, MH 19/279; Letter from Philip Currie,

Constantinople, to H.M. Principal Secretary of State for Foreign Affairs, Apr. 13, 1898, U.K.

National Archives, MH 19/278; Letter from E.D. Dickson, Constantinople, to P. Currie, GCB, Apr.

9, 1898, U.K. National Archives, MH 19/279; Letter from Dr. E.D. Dickson to Sir N.R. O’Conor,

Mar. 1, 1899, U.K. National Archives, MH 19/279.

<sup>856</sup> ARTHUR F. HOPKIRK, INFLUENZA: ITS HISTORY, NATURE, CAUSE, AND TREATMENT 186, UL, XI.14.21, (1913).

<sup>857</sup> *Id.* at 187-88.

<sup>858</sup> See, e.g., Niall Philip Alan Sean Johnson, Aspects of the Historical Geography of the 1918-19

the disease being a civil, not a military concern. Indeed, Lord Hankey, the Cabinet Secretary, initially suspected that the disease was a biological weapons attack.<sup>859</sup> And the death toll was substantial: within 46 weeks, some 3 ½ million cases had erupted.<sup>860</sup> According to the Registrar General, in the course of the epidemic nearly a quarter of a million died; many were young adults. Even these statistics are considered low.<sup>861</sup> But quarantine was eschewed as impractical and ineffective.<sup>862</sup>

Throughout the inter-war period, the United Kingdom continued to be extremely concerned about Russian and German development of biological weapons. The threat prompted the political establishment to generate its own weapons program, enlisting the aid of senior scientists. But the National Archives yield no evidence to suggest that at any point in the 20<sup>th</sup> century the political establishment contemplated the re-introduction of broad national quarantine authority as a way to respond to either to naturally-occurring disease or to biological weapons.<sup>863</sup>

Influenza Pandemic in Britain (Ph.D. thesis, University of Cambridge, 2001), at 149.

<sup>859</sup> See, e.g., Letter from H.O. Statebury, Whitehall, to the Under Secretary of State, Colonial Office, 21350.M1.1919, Mar. 21, 1919, CO 123/298; Notebook 1, 52; Ministry of Health, 1927, 11.

<sup>860</sup> MINISTRY OF HEALTH, REPORTS ON PUBLIC HEALTH AND MEDICAL SUBJECTS NO. 4: REPORT ON THE PANDEMIC OF INFLUENZA 1918-19 548, 557 (1920).

<sup>861</sup> FRED R. VAN HARTESVELDT, THE 1918-19 PANDEMIC OF INFLUENZA: THE URBAN IMPACT IN THE WESTERN WORLD 3 Notebook 1, 17 (1992).

<sup>862</sup> School records show, for instance, that some areas were hit incredibly hard. For instance, at Rossall School in Fleetwood, 320 out of 440 boys (72.1%) infected; including 57 out of 59 in the prep School. PRO FD 1 537, 31 Jan. 1919, letter from Dr. A.H. Penistan. At Old Blundell's School in Tiverton, Devon: 180 out of 250 boarders (72%) caught influenza. PRO FD 1 537, 26 Jan 1919, letter from Dr. G. Perry [Rossall, Felsted, Old Blundell's cited in Johnson, Thesis, p. 358. In Felsted School, Essex, between 143 and 162 cases out of ~250 boys (57.2%-64.8%) PRO FD 1 537, 6 Feb 1919, letter from Dr. J. Trmlett Wills. Leys School, Cambridge, had to be closed. Letter to Fletcher from Dr. W.H. Bown, Medical Officer, Leys School, Cambridge, Mar. 1, 1919, FD 1/537. Notebook 1, p. 35. School closure as one of the most commonly reported aspects of the pandemic. This was characteristic of all three waves. PRO FD 1 537 Report received by the MRC on 5 Feb. 1919. Schools sometimes closed for up to 3 weeks. See The Times 26 June 1918, 7; 3 Jul. 1918, 3; 4 Jul. 1918, 3; 5 Jul. 1918, 3; 8 Jul. 1918, 3; 9 Jul. 1918, 3; 11 Jul. 1918, 3; 27 Sept. 1918; 14 Oct. 1918, 3; 17 Oct. 1918, 3; 22 Oct. 1918, 3; 23 Oct. 1918, 3; 26 Oct. 1918, 7; 28 Oct. 1918, 3; 30 Oct. 1918, 9; 31 Oct. 1918, 7; 31 Oct. 1918, 8; 1 Nov. 1918, 7; 4 Nov. 1918, 5; 6 Nov. 1918, 3; 7 Nov. 1918, 3; 11 Nov. 1918, 5; 26 Nov. 1918, 3; 27 Nov. 1918, 5; 4 Dec. 1918, 4; 5 Dec. 1918 5; 7 Jan. 1919, 3; 14 Jan. 1919, 5; 7 Feb. 1919, 5; 10 Feb. 1919, 5; 11 Feb. 1919, 11; 20 Feb. 1919, 8; 21 Feb. 1919, 7; 24 Feb. 1919, 7; 1 Mar. 1919, 7; 8 Mar. 1919, 9; 11 Mar. 1919, 9; and 31 Mar. 1919.

<sup>863</sup> Statement based on author research at the National Archives, London.

### G. Current Quarantine Law

Britain removed an explicit quarantine power from its public health laws in 1896, when the Public Health Act of 1896 repealed the Quarantine Act of 1825.<sup>864</sup> The law remained largely unchanged until the Public Health (Control of Disease) Act 1984 and the Public Health (Infectious Disease) Regulations of 1988. These provisions emphasize the local nature of quarantine. They allow for local authorities to obtain orders from a Justice of the Peace to order the medical examination of an individual or group of persons, and the removal of an individual or group to a hospital, if that individual is reasonably believed to have a notifiable disease, or, if not ill from the disease, to be carrying an organism that causes the disease.<sup>865</sup> The Justice of the Peace can then order that person to be involuntarily detained where permitting him to leave would endanger public safety.<sup>866</sup>

The Public Health (Control of Diseases) Act of 1984 initially included six notifiable diseases: cholera, plague, relapsing fever, smallpox, typhus and food poisoning.<sup>867</sup> The Public Health (Infectious Diseases) Regulations 1988 added 25 more.<sup>868</sup> Under the 1984 statute, a local officer can request that an individual refrain from going to work, require that children exposed to infection to be excluded from school, and place restrictions on places of child entertainment. Criminal offences apply for exposing others to the risk of infection.<sup>869</sup> This legislation does not include detention powers for new or emerging disease.

For health laws at ports of entry, three sets of regulations issued under the 1984 legislation.<sup>870</sup> Here again, local authorities—not the central government—bear the main responsibility.<sup>871</sup> In March 2006, a major review of ports, airports, international train stations led the Health Protection Agency (HPA) to agree to take the lead to provide medical input into arrangements for port health.<sup>872</sup> The costs are shared by local authorities, the National Health

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<sup>864</sup> Public Health Act, 1896, *supra* note 33.

<sup>865</sup> Public Health (Control of Disease) Act of 1984, §§ 35, 36.

<sup>866</sup> *Id.* at § 37.

<sup>867</sup> *Id.* at §§ 10, 11.

<sup>868</sup> Public Health (Infectious Diseases) Regulations 1988, No. 1546, Sept. 6, 1988, §§ 6, 9.

<sup>869</sup> Public Health (Control of Disease) Act of 1984, § 11.

<sup>870</sup> Public Health (Aircraft) Regulations 1979; Public Health (Ships) Regulations 1979; Public Health (International Trains) Regulations 1994.

<sup>871</sup> But note that medical personnel are provided for local authorities by the Health Protection Agency.

<sup>872</sup> Health Protection Agency, Port Health and Medical Inspection Review Report from the Project Team, Mar. 2006, *available at* [http://www.hpa.org.uk/web/HPAwebFile/HPAweb\\_C/1197021714421](http://www.hpa.org.uk/web/HPAwebFile/HPAweb_C/1197021714421).

Service, and HPA, with audits conducted by the Healthcare Commission.

Additional medical examinations are possible under the Immigration Act of 1971, which allows the government to refuse entry on medical or public health threat grounds.<sup>873</sup> Where entry is granted, the Nationality, Immigration and Asylum Act 2002 provides a statutory basis for information regarding sickness to be transferred to the NHS or HPA.<sup>874</sup> HM Customs' longstanding policy is to refer individuals for medical examination whenever they seem unwell, give health as a reason for coming to the UK, claim asylum, or come from a country that is high-risk for tuberculosis (TB) and are seeking entry for more than 6 months.<sup>875</sup> Approximately 270,000 people per year fall within the last category, which has prompted at least two airports (Heathrow and Gatwick) to install x-ray machines to check for TB at the time of arrival.<sup>876</sup>

i. Health and Social Care Act of 2008: England and Wales

Recently, the Public Health Act of 1984 was subjected to extensive review.<sup>877</sup> In 2008, Part 2 of the statute was repealed/replaced by the Health and Social Care Act of 2008.<sup>878</sup> The changes suggest that there may be some movement with regard to quarantine, but the fundamental control of domestic measures remains in local hands.

This statute amended the Public Health (Control of Disease) Act of 1984, by authorizing the creation of regulations that designate how and when the quarantine of persons may be conducted. Pursuant to this authority, the Secretary of State created Regulation #9 of The Health Protection (Part 2A) Regulations 2010, which briefly mentions quarantined persons.<sup>879</sup> In regard to international travel, regulations can relate to preventing danger to public health from vessels arriving in or leaving England or Wales. The Secretary has the authority to include provision for medical examination, detention, isolation, quarantine of persons, provision of information from those persons,

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<sup>873</sup> Immigration Act of 1971, c. 77.

<sup>874</sup> Nationality, Immigration and Asylum Act 2002, c. 41, § 133.

<sup>875</sup> Health Activity Relating to People at Ports, Airports and International Train Stations in England, Department of Health, Health Protection Agency, Home Office, August 2006, at 3-4, available at [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_4137781.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4137781.pdf).

<sup>876</sup> *Id.* at 4.

<sup>877</sup> See [www.dh.gov.uk](http://www.dh.gov.uk).

<sup>878</sup> Health and Social Care Act of 2008, July 21, 2008, c. 14.

<sup>879</sup> Specifically, § 129 inserts §§ 45A-45T into the 1984 statute. §§ 45B and C confer powers on Secretary of State to make provision by Regulations with respect to health protection measures for international travel § 45(B) and domestic affairs § 45(C).

inspection/retention, destruction of things.<sup>880</sup> On the domestic side, regulations can impose duties on registered medical practitioners and others to record certain illnesses and to notify the government as to their appearance.<sup>881</sup> With regard to the domestic realm, regulations can restrict persons, things or premises where public health is threatened.<sup>882</sup> Such acts may include excluding a child from school, prohibiting events or gatherings.<sup>883</sup> The Secretary can further impose special restrictions, such as requiring an individual to undergo decontamination, wear protective clothing, or undergo health monitoring.<sup>884</sup>

Unlike the provisions that apply to international travel, however, the regulations may *not* require that an individual submit to medical examination, be removed to or detained in a hospital or other suitable place, or be kept in isolation or quarantine *absent an Order from a Justice of the Peace on application from a Local Authority*.<sup>885</sup> Such orders are referred to as Part 2A Orders, enforceable by criminal prosecution.<sup>886</sup> In other words, Part 2A orders are grounded in the local domain, and they reflect more than a century of placing such authorities in the hands of local government. Where considered “necessary”, Part 2A orders may be issued without notice.<sup>887</sup> The statute establishes the standard required: the Justice of the Peace must be satisfied that (i) the person/thing in question is infected/contaminated; (ii) infection or contamination presents/could present significant harm to human health; (iii) risk of infection or contamination to other humans exists; and (iv) it is necessary to make the order to remove or reduce the risk.<sup>888</sup>

Parliamentary scrutiny of the Regulations takes place either via affirmative resolution or annulment by negative resolution; but prior Parliamentary approval is not required where the person making the instrument considers it necessary to make the order prior to a draft having been laid. Such orders are subject to annulment after 28 days, unless approved by each House of Parliament for England or the National Assembly for Wales.<sup>889</sup>

The statute broadly defines the diseases to which Part 2A Orders apply: “Any reference to infection or contamination is a reference to infection or contamination which presents or could present significant harm to human

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<sup>880</sup> Health and Social Care Act of 2008, July 21, 2008, c. 14, §§ 45B(1) and (2).

<sup>881</sup> *Id.* at § 45C(4).

<sup>882</sup> *Id.* at § 45(c)(3)(c).

<sup>883</sup> *Id.* at § 45(c)(4).

<sup>884</sup> *Id.* at §§ 45G(2)(e)-(k), 45(H)(2) and 45(I)(2).

<sup>885</sup> *Id.* at § 45(d)(3).

<sup>886</sup> *Id.* at § 45(O)(1)-(2).

<sup>887</sup> *Id.* at § 45(M).

<sup>888</sup> *Id.* at § 45(G)(3) and (H)(1).

<sup>889</sup> *Id.* at § 45R.



health.”<sup>890</sup> Commentators suggest that this does include pandemic influenza.<sup>891</sup> The statute adopts a flexible approach for amending the list of diseases in the future.

While the scope of the provisions is considerably wider than what Britain previously maintained, it is also more complex. The statute also focuses on response once the threat has become clear, not prior to threat. As one scholarly article explains, “While there are provisions for monitoring and notifying outbreaks, there is far less consideration for joined-up working beyond the very local response.”<sup>892</sup>

## ii. Public Health Etc. (Scotland) Act 2008

The Health and Social Care Act of 2008 does not apply to Scotland, which passed its own Public Health Act prior to Westminster’s adoption of the statute.<sup>893</sup> The main purpose of the Scottish statute was to modernize the legislative framework governing health protection, since most of the statutory authorities dated back to late 19<sup>th</sup> century.<sup>894</sup> The Scottish Executive convened the Public Health Legislation Review Group to consider the legislation and whether new provisions were necessary. The review group released its proposals in October 2006, with an analysis subsequently published in March 2007.

The legislation clarifies the roles and responsibilities of Scottish Ministers, the NHS boards, and local authorities.<sup>895</sup> It also devises a new system of statutory notification for diseases (notifiable diseases, notifiable organisms and health risk states—including offences in regard to notifiable organisms).<sup>896</sup> The act provides a framework for public health investigations, giving health officials powers related to entry to premises, the power to ask questions, the authority

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<sup>890</sup> *Id.* at § 45(A).

<sup>891</sup> Graeme T. Laurie and Kathryn G. Hunter, Mapping, Assessing and Improving Legal Preparedness for Pandemic Flu in the United Kingdom, 10 *MEDICAL LAW INTERNATIONAL* 111 (2009).

<sup>892</sup> Laurie et al., *supra* note 891, at 111.

<sup>893</sup> Introduced in Parliament Oct. 25, 2007. Bill passed following Stage 3 parliamentary debate, 12 June 2008. See Scottish Parliament Information Centre, Public Health etc (Scotland) Bill, available at <http://www.scottish.parliament.uk/s3/bills/03-PublicHealth/PublicHealthetcScotlandBill.pdf>.

<sup>894</sup> See Notification Act 1889 (repealing in whole the Infectious Disease Cleansing of Persons Act 1897, Public Health (Scotland) Act 1897, Public Health (Scotland) Amendment Act 1907, Public Health (Scotland) Act 1945, Health Services and Public Health Act 1968).

<sup>895</sup> Public Health (Scotland) Act 2008, asp 5, Part 1, available at [http://www.opsi.gov.uk/legislation/scotland/acts2008/pdf/asp\\_20080005\\_en.pdf](http://www.opsi.gov.uk/legislation/scotland/acts2008/pdf/asp_20080005_en.pdf).

<sup>896</sup> Public Health (Scotland) Act 2008, asp 5, Part 2, Schedule 1(1).

to issue public health investigation warrants.<sup>897</sup> As perhaps would be expected, given the long and contentious history of quarantine, debate during consideration of the bill focused on how such measures would be given effect. Transparency in the issuance of compulsion, exclusion, and restriction orders,<sup>898</sup> mechanisms for appeal in the case of compulsory medical examinations,<sup>899</sup> and the manner in which orders could be altered all received heightened scrutiny during the debates.<sup>900</sup>

Much of the statute's focus is administrative: it clarifies, for instance, the public health functions of the health boards, specifying their duty to give explanation, medical examinations, exclusion orders and restriction orders, quarantine, removal to and detention in hospital, quarantine and detention, variation and extension of orders, review of orders, compensation, recall of orders granted in absence, appeal, and breach of orders and offences.<sup>901</sup> It also lays out the public health functions of the local authorities.<sup>902</sup> Other sections deal with mortuaries, international travel, sun beds, and statutory nuisances.<sup>903</sup>

### iii. Civil Contingencies Act of 2004

It might be possible for the British government to implement quarantine under its more general emergency powers. The Civil Contingencies Act of 2004 provides the main vehicle for managing emergencies. The legislation repealed previous civil defense measures and replaced them with modernized provisions meant to take account of contemporary threats, such as terrorism, environmental degradation, and pandemic disease.<sup>904</sup> Recourse to this legislation, however, is considered a last resort.<sup>905</sup>

<sup>897</sup> Public Health (Scotland) Act 2008, asp 5, Part 3.

<sup>898</sup> See SPHSC, 2008b, col 826-830 amendment 58-64, 72, 74, 80, 81, 86, 92, 93, 130 and 134 (addressing the appeal of such orders when made in the absence of the target).

<sup>899</sup> SPHSC, 2008b, col 830-833.

<sup>900</sup> *Id.* (addressing amendments 99, 102, 119 and 123; Amendments 104, 109, 116-118, 120-122, 124-129, 132, 133 and 135 regarding the extension of quarantine and hospital detention orders; and 152-156, 238, 243, 246, 158, and 159 Concern also accompanied obstruction offences. See Amendments).

<sup>901</sup> *Id.* at Part 4.

<sup>902</sup> *Id.* at Part 5.

<sup>903</sup> *Id.* at Parts 6-9.

<sup>904</sup> See CABINET OFFICE, CIVIL CONTINGENCIES ACT: A SHORT GUIDE (REVISED), available at <http://www.ukresilience.gov.uk/media/ukresilience/assets/15mayshortguide.pdf>.

<sup>905</sup> See <http://www.ukresilience.gov.uk/response/emergencypowers.aspx> (UK Resilience explains that use of the statute is "...a last resort in the most serious of emergencies where existing legislation is insufficient to respond in the most effective way. If the situation or event is so serious as to warrant consideration of use of the powers then the deciding factor will be

The first part of this statute addresses domestic preparedness concerns, creating a framework for local responders' roles and responsibilities. The second part establishes a framework for the use of special legislative measures. The trigger is what constitutes an "emergency", defined as:

- (a) An event or situation which threatens serious damage to human welfare *in the United Kingdom or in a Part or region*
- (b) An event or situation which threatens serious damage to the environment *of the United Kingdom or of a Part or region*, or
- (c) War, or terrorism, which threatens serious damage to the security of the United Kingdom<sup>906</sup>

The scope of the emergency contemplated by Parts 1 and 2 differs. For the former, the event must threaten "serious damage to human welfare or the environment in *a place* in the United Kingdom."<sup>907</sup> This provision is designed for first responders. For the latter, the language "of the United Kingdom or of a Part or region" refers to Scotland, Wales, or Northern Ireland. This is a higher threshold to meet, as it applies not just to any town or city, but to a larger geographic area.<sup>908</sup>

Both Parts 1 and 2 consider an event to threaten damage to human welfare where it involves, causes or may cause: loss of human life; human illness or injury; homelessness; damage to property; disruption in the supply money, food, water, energy or fuel; disruption of systems of communication; disruption of facilities for transport; or disruption of services related to health.<sup>909</sup>

For Part 2 powers, the Queen, or in extraordinary situations a Senior Minister,<sup>910</sup> has an almost unrestricted power to make emergency regulations

whether existing powers, that could be used to deal with it, are insufficient or ineffective. If they are sufficient then emergency powers cannot be used, no matter how serious the emergency."); *See also* Update of Emergency Response and Recovery (consultation paper, closed in April 2009 (writing, "There must be no expectation that the Government will agree to use emergency powers and planning and response arrangements should assume that they will not be used.").

<sup>906</sup> Civil Contingencies Act of 2004 §19(1) (Emphasis in the original); *See also* Civil Contingencies Act Enhancement Program, Update of Emergency Response and Recovery Guidance, Paper E, Consultation Report, issued in June 2009, *available at* <http://www.cabinetoffice.gov.uk/media/231587/err-consultation-report.pdf>; Civil Contingencies Act Enhancement Programme (CCAEP), Program Initiation Document, Oct. 24, 2008, *available at* [http://www.cabinetoffice.gov.uk/media/131900/ccaep\\_p1d.pdf](http://www.cabinetoffice.gov.uk/media/131900/ccaep_p1d.pdf).

<sup>907</sup> Civil Contingencies Act 2004, c. 36, § 1.

<sup>908</sup> *See* explanatory notes to the CCA.

<sup>909</sup> Civil Contingencies Act of 2004, c. 36.

<sup>910</sup> *See* Civil Contingencies Act of 2004, § 2 (a)(b) & § 4(a)(b). If it would not be possible to obtain an Order in Council from the Queen, without a delay that might (a) cause serious

provided that it would not be possible without serious delay to arrange for an Order in Council, and that s/he is satisfied that certain conditions are met: (a) an emergency has occurred or is about to occur, (b) the regulation is necessary to prevent, control or mitigate an aspect of the emergency, *and*(c) the provision be urgent.<sup>911</sup> A Senior Minister of the Crown includes the Prime Minister, any of her Majesty's Principal Secretaries of State, and the Commissioners of her Majesty's Treasury. In defining the scope that these emergency regulations can take, the Act provides as non-exclusive examples that regulations can restrict movement to or from specified places or restrict travel at specified times.<sup>912</sup>

Current government policy is to rely in the first instance upon voluntary compliance with governmental advice, with recourse to emergency powers only if necessary. It is unlikely that the act would be used to impose quarantine. Not only would it be a stretch of the current legal authorities, but, as discussed in the introduction of this paper, government policy documents repeatedly make it clear that quarantine itself is not a viable option.

#### IV. CONSTITUTIONAL FRAMING

The United States and United Kingdom frame the threat posed by pandemic disease and biological weapons within a national security rubric. For both countries, the threats are linked in terms of institutions and response. But the United States and the United Kingdom have very different approaches, as a matter of law and policy, when it comes to the central government's imposition of quarantine and isolation in response to the twin threats.

This article has suggested one explanation for this divergence is deeply historical. And it reflects important constitutional differences that continue to shape the two countries' approaches. American colonists routinely employed quarantine provisions to respond to epidemic and pandemic disease. Such measures tended to be temporary, reactive, and local in nature. At times they ran afoul of England's commercial interests, in which case the Privy Council simply disallowed them. The colonies nevertheless persisted. Following the

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damage or (b) seriously obstruct the prevention, control or mitigation of serious damage, then a Senior Minister of the Crown can declare an emergency. Note that in practice, the decision to use emergency powers under Part 2 falls to the UK central government and the relevant Lead Government Department; under §1(4)(a) (Part 1), a Minister of the Crown or, in relation to Scotland, the Scottish Ministers, are to provide by Order that a particular event or situation comes within (or does not come within) the definition of emergency; *See also* Laurie,*supra* note 891, at 113.

<sup>911</sup> *See* Civil Contingencies Act of 2004, c. 36, § 21 (2)-(4).

<sup>912</sup> *See* Civil Contingencies Act of 2004, c. 36, §21(3)(d)-(g).

Revolutionary War, states integrated quarantine authorities into their statutes and (in some cases) constitutions. Some measures were so local that they authorized towns to exclude individuals and goods from anywhere in the United States. Those who fell ill could be forcibly kept in their homes (or removed) by local authorities. Congress and the Supreme Court, in turn, considered quarantine well within the police powers of the state. Inter-state and U.S. foreign relations commerce might be implicated, but more important were the states' ability to defend its citizens from disease. The failure of some states to ensure the health of vessels leaving U.S. ports, however, earned America the enmity of key European trading partners. Congress began to pay more attention to what states were doing—or failing to do—and the consequent economic effect on the country as a whole.

Smallpox proved devastating during the Civil War, in the course of which Confederate soldiers and sympathizers used the disease as a weapon. But in the aftermath of the war, authority did not immediately shift to the federal government. Instead, Congressional initiatives expanded federal power within narrow limits—namely, the Marine Hospital Service, and consular reporting overseas. In a critical innovation, the legislature empowered the federal government to assume control of ports, where states were willing to sell. Quarantine facilities were expensive. Thus began the quiet transfer of state ports and, with them, state authorities, to the federal domain. Immersed in their new role, the federal government appeared to do a better job of stemming disease than the states. Regional initiatives, seeking uniform standards between states and along the U.S. border, broadened the call for a national approach to quarantine. In concert with the regional meetings, the medical and industrial fields began to call for federal regulation.

Into this mix stepped the courts: while quarantine fell firmly within state police powers, Congress might have room to preempt state law where commerce bore the cost. Encouraged by *Morgan's Steamship*, the legislature gave the Secretary of the Treasury the authority to develop rules and regulations to prevent the interstate spread of disease. An important Solicitor General determination spurred Congress to act not just inter-state, but, where state or local measures were deemed ineffective or non-existent, at a state or local level. New measures required bills of health to be obtained by all vessels sailing for the United States from abroad, and a stronger epidemiological surveillance program required U.S. consuls abroad to make weekly reports. By the early 20<sup>th</sup> century, while the federal government had made advances in the realm of quarantine, it had yet to preempt the states. Indeed, states still regularly exercised their quarantine authorities. Direct confrontation, however, proved unnecessary. The Spending Clause paved the way for federal control of local ports. In 1944, Congress empowered the Secretary of Health and Human

Services to make and enforce any regulations to prevent the introduction of disease into the United States, or the transfer of disease between the states. Broadly conceived, these provisions have yet to fall subject to Constitutional challenge. The Stafford Act, in turn, empowers the federal government to act subject to a Governor's request. Efforts to continue to expand federal authority continue, with the discussion now contemplating the precise manner in which the military could be used to impose quarantine in the event of either pandemic disease or terrorist attack.

The United Kingdom has followed almost the opposite trajectory—one deeply influenced by the constitutional structure of the state and the realities of responding to plague. The Tudors issued orders through the Privy Council, using the military to enforce them. Under the Stuarts, conventions changed, with quarantine provisions becoming both more coercive and increasingly political. The abolition of the conciliar courts restricted the broader contours of Privy Council proclamations, tilting English common law towards greater protection of individual rights and increased skepticism towards the exercise of Royal Prerogative—a context within which the Privy Council's exercise of quarantine became more constrained. It had to first obtain Parliamentary imprimatur, via statute, before being considered a valid exercise of the Crown's authority. Parliamentary authorization, however, brought with it a greater impact—which, ironically, helped to bring about the demise of the Privy Council's involvement. Commercial interests, increasingly organized and displeased with the Privy Council's orders, began making their case to Parliament. They were considerably helped in their efforts by medical treatises that began questioning the contagion theory of disease—specifically in relation to plague. The broader context also played a role: the increasing professionalization of the British civil service and the deference granted to science proved critical. Simultaneously, the greater attention played to sanitation offered a viable alternative to quarantine. By the late 19<sup>th</sup> century, the country had eschewed the use of the same. Current British emergency measures might be extended to quarantine, but they do not overtly recognize such powers and the use of quarantine is rejected in the country's policy documents.

The current state of play in both countries, and the potential historical explanation raise myriad questions: Should pandemic disease and biological weapons be treated in like manner? Ought both types of threats fall within a national security rubric? To what extent are the legal changes merely cosmetic? What constitutional concerns are raised by the most recent measures? These and further questions remain rich for further discussion.

