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Mayhew v. Hickox: Balancing Maine's Public's Health with Personal Liberties During the Ebola "Crisis"

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I. INTRODUCTION

By the 1960s, methods in the detection and treatment (and consequently improvements in the survival rates) of infectious diseases had advanced so significantly that "[d]iseases seemed destined to all but disappear."[1] But the re-emergence of previously "eradicated" diseases, and the emergence of new diseases that seemed all-but-untreatable, such as Ebola virus, soon put to rest the euphoria of medical advancement.[2]

Ebola virus is one of the most dangerous infectious diseases to emerge in the twentieth century,[3] and through media sources, including movies, television shows, and news reporting, has become one of the most feared.[4] Despite public misunderstanding regarding the causes, symptoms, and treatment of the virus, and some political exaggeration of the dangers, these fears are not without merit, as Ebola virus is life-threatening and difficult to diagnose.[5] The disease is a real and recurring threat to public safety, especially in particular African countries: the Centers for Disease Control (CDC) has said that the 2014 Ebola epidemic is the largest Ebola epidemic in history.[6]

Ebola poses a very difficult public health problem partly because there is no known cure.[7] Though oral or intravenous rehydration and symptom-specific treatment improves the infected individual's chances for survival, the disease has a very low survival rate.[8] It is also extremely infectious, and while primarily spread through contact with blood or bodily fluids, has been known to infect through skin-to-skin contact.[9] Thus, the only sure method to prevent the spread of the disease is to prevent exposure through direct contact with infected individuals.[10]

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1. David Heymann, *Foreword* to TARA C. SMITH, EBOLA 6 (Tara Koellhoffer et al. eds., 2006).
2. *Id*.
3. *Id.*
4. TARA C. SMITH, EBOLA 8 (Tara Koellhoffer et al. eds., 2006) ("Much like the Black Plague or AIDS, Ebola is a disease that has transcended medicine to become a part of popular culture. And also like AIDS, the Ebola virus has captured the general public's respect and instilled fear in a remarkably short period of time . . . .").
5. *Id*. at 36 ("Because these symptoms are common to many diseases, it is very difficult to make a definitive diagnosis of Ebola infection at [early stages]. As the disease progresses, bloody diarrhea, a severe sore throat, and jaundice . . . are common symptoms.").
6. *Ebola*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/index.html (last updated Aug. 24, 2015).
7. *Ebola Virus Disease*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/fs103/en/ (last updated Sept. 2014).
8. *Id*.
9. SMITH, *supra* note 4, at 41-42.
10. *See id*.

For these reasons—difficulty of treatment and extreme virulence—the CDC has established guidelines for states to follow in order to prevent the spread of Ebola in the United States.[11] In Maine, these guidelines have been adopted by the Maine Center for Disease Control and Prevention (MCDC), operating under the Maine Department of Health and Human Services.[12] Unfortunately, these guidelines come into conflict with personal liberties, and although the courts have long supported states' rights through the police powers to mandate certain extreme measures against persons posing a public health risk,[13] the state's power is sometimes challenged in court.

Most recently, Maine's ability to impose travel, personal proximity, and person-to-person contact restrictions on a citizen of this state was challenged when a nurse, Kaci Hickox, who had been treating Ebola-infected patients in African countries returned home to Fort Kent after completing her work with Doctors Without Borders.[14] Though initially indicating that she would comply with MCDC requests as to isolating herself in her home and submitting to daily medical status monitoring, Hickox made a stir when she publicly spoke out against the restrictions.[15] The State filed a petition to limit Hickox's movement and activities, using CDC guidelines as the basis for restrictions.[16] Though a Temporary Order was granted by the Maine District Court (Fort Kent, Chief Judge LaVerdiere presiding), Hickox fought the Petition, and an Order Pending Hearing was granted, which removed many of the restrictions imposed by the Temporary Order and maintained only a few of the State's requested impositions.[17] Amid public outcry that spanned the state, indeed the nation, Hickox ultimately agreed to abide by the lesser restrictions for the entirety of the requested time period.[18]

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11. *See What You Need to Know About Ebola*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/pdf/what-need-to-know-ebola.pdf (last updated Apr. 28, 2015); *Preparing for Ebola – A Tiered Approach*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/healthcare-us/preparing/index.html (last updated Jan. 22, 2015); *Interim U.S. Guidance for Monitoring and Movement of Persons with Potential Ebola Virus Exposure*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/exposure/monitoring-and-movement-of-persons-with-exposure.html [hereinafter *CDC Guidance*] (last updated May 13, 2015).

12. *See Ebola: Information for Healthcare Workers and First Responders*, ME. CTR. FOR DISEASE CONTROL AND PREVENTION, http://www.maine.gov/dhhs/mecdc/infectious-disease/epi/zoonotic/ebola/providers.shtml? (last visited Sept. 4, 2015); *see also Maine CDC Adopted Rules*, ME. CTR. FOR DISEASE CONTROL AND PREVENTION, http://www.maine.gov/dhhs/mecdc/maine-cdc-rules.html (last visited Oct. 5, 2015).

13. *See, e.g.*, Zucht v. King, 260 U.S. 174, 175 (1922) (holding that public officials could exclude a child from a public school "because she did not have the required certificate [of vaccination] and refused to submit to vaccination.").

14. Julia Bayly, *Nurse Kaci Hickox Speaks at Fort Kent Home, Vows to fight 21-Day Isolation*, BANGOR DAILY NEWS (Oct. 29, 2014, 8:35 AM), http://bangordailynews.com/2014/10/29/news/aroostook/kaci-hickox-back-in-fort-kent-vows-to-fight-21-day-isolation/.

15. *Id*.

16. Verified Petition for Public Health Order at 5-6, *Mayhew v. Hickox*, No. CV-2014-36 (Me. Dist. Ct., Fort Kent, Oct. 31, 2014) [hereinafter *Petition*].

17. Order Pending Hearing at 3, *Mayhew v. Hickox*, No. CV-2014-36 (Me. Dist. Ct., Fort Kent, Oct. 31, 2014) [hereinafter *Order Pending Hearing*].

18. Judy Harrison, *Kaci Hickox, State Agree to Make Temporary Order Permanent; Hearings This Week Cancelled*, BANGOR DAILY NEWS (Nov. 3, 2014, 9:48 AM), http://bangordailynews.com/

Part II of this case note provides background information about the Ebola virus—etiology, pathology, symptoms, and treatment—and delineates the history of the Ebola "crisis" and the current West African outbreak. Part III then addresses public health law in the U.S. and in Maine, including relevant case law, the state delegation of public health authority, and available mechanisms for imposing restrictions on potentially infected individuals. In Part IV, this note discusses in greater detail the Kaci Hickox case, describing her very public court struggle against state-imposed quarantine.[19] Part IV further discusses the outcome of the state petition to quarantine Hickox, and the resulting court order. Finally, Part V analyzes the court's decision in light of the statutory public health provisions, and argues first that the court could have taken further measures in restricting Hickox's liberty during the short incubation period of Ebola, and next that the standard of proof required to establish the necessity of quarantine is too high to provide adequately for public safety.

II. EBOLA

A. The Disease

Ebola hemorrhagic fever, commonly known as Ebola virus or simply Ebola,[20] is an acute illness caused by a virus in the family Filoviridae.[21] Five species have been identified, of which Zaire ebolavirus is responsible for modern outbreaks in West Africa.[22] Fruit bats are the natural hosts,[23] though it has been suggested that primates are a more likely source of transmission to humans.[24] Human-to-human transmission occurs via direct contact with blood, secretions, organs, or other bodily fluids; or from direct contact with materials that have been contaminated with such fluids.[25] Skin-to-skin contact is less likely to cause infection, but contact between these fluids and broken skin or mucous membranes can result in transmission of the virus, particularly through the eyes, nose, and mouth.[26]

Once transmission has occurred, the virus has an incubation period of up to 21 days, meaning that the time from exposure resulting in infection until the onset of

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2014/11/03/news/aroostook/kaci-hickox-state-agree-to-make-temporary-order-permanent-hearings-this-week-canceled/.

19. *See CDC Guidance*, *supra* note 11. The CDC seems to distinguish "quarantine" from "isolation" and other quarantine-like safety measures, but the only distinguishing factor is that quarantine is defined as the isolation of a person "who is not yet ill." In all other respects – primarily separation of the individual from the general population – quarantine is identical to isolation as defined by the CDC. Therefore, I use the terms interchangeably throughout this case note to mean the separation of a potentially infected individual from the general public to prevent the spread of a communicable disease.

20. *Ebola Virus Disease*, *supra* note 7 (Ebola was named for the Ebola River, which bordered the village on the Congo in which the first recognized instances of the disease occurred).

21. *Id*.

22. *Id*.

23. *Id*.

24. SMITH, *supra* note 4, at 41.

25. *Ebola Virus Disease*, *supra* note 7.

26. SMITH, *supra* note 4, at 42.

symptoms can be between two and 21 days.[27] Infected individuals are not themselves contagious until symptoms appear.[28] The first symptoms typically include sudden fever, fatigue, muscle pain, headache, and sore throat, which are often mistaken for symptoms of other diseases, such as malaria.[29] Secondary symptoms indicate progression of the virus and extreme danger to the infected individual: vomiting, diarrhea, rashes, impaired organ function, and internal and external hemorrhaging.[30]

After a patient presents with symptoms, doctors seek to rule out infection by other diseases using methods such as electron microscopy and virus isolation by cell culture.[31] Testing is difficult because there are associated isolation protocols for any test samples, and all testing ought to be done "under maximum biological containment conditions."[32] Because not every hospital is equipped to perform necessary testing under adequate safety protocols, the CDC has developed stringent guidelines as to the transportation and handling of samples for Ebola testing.[33] There is no known cure, though oral or intravenous rehydration and symptom-specific treatment improves the infected individual's chances for survival.[34] Fatality rates of past outbreaks have varied from 25 percent to 90 percent, and average around 50 percent.[35] One researcher has said that "[w]ith the exception of AIDS, no known virus kills with the effectiveness that Ebola does."[36]

B. A History of Outbreaks

The first known outbreaks of the Ebola virus occurred in the Sudan and Democratic Republic of Congo.[37] During those outbreaks, there were a total of 602 known cases, and a total of 331 known deaths due to the virus.[38] Since 1976, there have been many cases of Ebola emerging in other African countries, including Uganda, Ivory Coast, Nigeria, Senegal, and Mali.[39] Several contaminations have

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27. *Ebola Virus Disease*, *supra* note 7.

28. *Id*.

29. *Id.*

30. *Id*., *see also* SMITH, *supra* note 4, at 36.

31. *Ebola Virus Disease*, *supra* note 7.

32. *Id*.

33. *Guidance for Collection, Transport and Submission of Specimens for Ebola Virus Testing*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/healthcare-us/laboratories/specimens.html (last updated Jan. 30, 2015).

34. *Ebola Virus Disease*, *supra* note 7.

35. *Id*.

36. SMITH, *supra* note 4, at 15. Smith notes that, at the time of her book's publication in 2006, Ebola had "caused fewer than 2,000 total human infections, resulting in approximately 1,100 deaths." For this reason, she "cannot help but wonder why Ebola has received a reputation as a terrible killer." However, updated statistics indicate a much higher total number of infected individuals, and a much higher death toll due to the disease. *See infra* note 42.

37. *Ebola Virus Disease*, *supra* note 7.

38. *Cases of Ebola Virus Disease in Africa*, *1976-2014*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/outbreaks/history/distribution-map.html (last updated Feb. 6, 2015).

39. *Outbreak Distribution Map*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/distribution-map.html#areas (last updated Feb. 6, 2015).

occurred in other countries, including England and Russia, however, these contaminations were contained to laboratories and did not result in any ex-laboratory infections.[40]

C. The Current Outbreak

During the period from 1977 to 2013, no more than 425 cases in a single year were confirmed, and no more than 250 deaths per year were attributed to the virus.[41] However, in 2014, significant numbers of individuals became infected, leading to more than 22,500 reported cases with more than 9,000 reported deaths due to the virus, impacting the countries of Liberia, Sierra Leone, and Guinea most intensely.[42] To date, the current West African Ebola outbreak is the largest in history, both by number of infected persons and number of deaths due to infection.[43]

There has been a promising response to the outbreak, at least on an international level: August 8, 2014, the World Health Organization (WHO) declared the West African Ebola virus outbreak to be a Public Health Emergency of International Concern, calling it an "extraordinary event," and recommending that all countries provide "accurate and relevant information on the Ebola outbreak and measures to reduce the risk of exposure," as well as advising countries to prepare "to facilitate the evacuation and repatriation of nationals (*e.g.* health workers) who have been exposed to Ebola."[44] There was some criticism of the WHO's response, particularly of the African regional office's limited staffing in those countries most impacted by Ebola.[45] But after several nations in West Africa declared states of emergency,[46] other international aid organizations led medical responses in the area, such as Doctors Without Borders, which as of the writing of this Note employs more than 90 international and 1,700 local staff to assist West African nations affected by the outbreak.[47]

The United States has not been unaffected by the Ebola epidemic in Africa. In September and October 2014 there were four cases of Ebola infection diagnosed

40. *Known Cases and Outbreaks of Ebola Virus Disease*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/outbreaks/history/chronology.html (last updated Feb. 6, 2015).

41. *Id*.

42. *Outbreak Distribution Map*, *supra* note 39.

43. *Ebola*, *supra* note 6.

44. *Statement on 1st Meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa*, WORLD HEALTH ORG., http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/ (Aug. 8, 2014).

45. *World Health Organisation: Too Big to Ail*, THE ECONOMIST (Dec. 13, 2014) http://www.economist.com/news/international/21636038-ebola-has-laid-bare-failings-worlds-health-authority-too-big-ail. This article further notes that WHO may not be to blame, as private voluntary donations now account for 80% of the WHO's funding, which has dropped 20% since 2011. *Id.*

46. James G. Hodge, Jr., et al., *Global Emergency Responses to the 2014 Ebola Outbreak*, 42 J.L. MED. & ETHICS 595, 595 (2014).

47. *Ebola*, DOCTORS WITHOUT BORDERS, http://www.doctorswithoutborders.org/our-work/medical-issues/ebola (last visited Oct. 17, 2015).

within the United States.[48] In September, a man traveling by plane from Liberia to the United States was diagnosed in Texas after developing symptoms, and consequently infected two healthcare workers who had provided him medical treatment at Texas Presbyterian Hospital in Dallas.[49] The patient died from his disease, but both healthcare workers recovered.[50] In October, a medical aid worker from Doctors Without Borders who returned from Guinea to New York City was diagnosed with Ebola; the worker later recovered and was discharged on November 11th from Bellevue Hospital.[51] By mid-November 2014, of a total of ten Ebola virus patients in the United States, two had died from the virus.[52]

The general public response—from governmental and media sources—in the United States has been a chimera of misinformation and shoot-before-you-ask proclamations.[53] Although the CDC developed guidelines for just about every scenario imaginable,[54] and put together easy-to-use brochures to disseminate information about Ebola, these resources were primarily made available to the public online.[55] Politicians did little to assuage public fears, some calling for complete bans on travel to and from West African countries affected by the Ebola outbreak.[56] Others called for mandatory quarantine facilities at airports to screen and detain travelers arriving from Ebola-affected countries.[57] And although the CDC information was widely available to state Departments of Health and Human Services, by October of 2014, New York and New Jersey had announced mandatory quarantine protocols for returning health care workers with direct Ebola exposure, "an action that many believed was overreaching and one that would deter some health workers from traveling to West Africa to help Ebola victims."[58]

The information that the CDC disseminated to various state departments of health and to state CDC satellites included information about the disease itself, as well as information about how to prevent the spread of the disease through a

48. *Cases of Ebola Diagnosed in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html (last updated Dec. 16, 2014).

49. *Id*.

50. *Id*. (showing that before diagnosis, the second healthcare worker had traveled by plane to Atlanta, Georgia, and all passengers and crew were found, alerted, and underwent CDC monitoring).

51. *Id*.

52. Martha Middleton, *The Law of Ebola*, 101-JAN A.B.A. J. 88, 89 (2015).

53. It has been said that "Ebola is not the first epidemic to catch the world off-guard. Advances in vaccines and antibiotics in the 20th century led some health experts to discount the threat of infectious disease." *Ebola: Fever Rising*, THE ECONOMIST (Aug. 16, 2014) http://www.economist.com/news/international/21612157-spread-ebola-west-africa-deeply-troubling-region-and-world-fever.
Nonetheless, every developed country in the world has had more than 40 years to design and implement Ebola responses and to spread accurate information about the disease, so it is disheartening to the Author of this Note to consider what the responses might be to another, deadlier, disease.

54. *See CDC Guidance*, *supra* note 19.

55. *Id*.

56. Lauren French, *Boehner to Obama: Ban Travel for Ebola*, POLITICO (Oct. 15, 2014, 6:58 PM), http://www.politico.com/story/2014/10/john-boehner-obama-flights-ebola-111924.html.

57. Cristina Marcos, *Texas Republican Calls for Ebola Quarantine Facility at Dallas Airport*, THE HILL (Oct. 15, 2014, 5:02 PM), http://thehill.com/blogs/floor-action/house/220866-texas-republican-calls-for-ebola-quarantine-facility-at-dallas.

58. MIDDLETON, *supra* note 52, at 94.

variety of public and individualized health measures.[59] The CDC divided Ebola exposure into five risk categories, ranging from symptomatic individuals with high risk, to individuals with no identifiable risk.[60] Quarantine or full isolation was recommended for any individual displaying symptoms of Ebola, consistent with the extremely virulent nature of the disease and the method of transmission via bodily fluids.[61] In categories of lesser risk or for asymptomatic individuals, the CDC recommended "direct active monitoring," which includes daily reporting of measured temperature and symptoms to a public health authority, and discussion with a public health authority of plans to work, travel, take public transportation, etc.[62] The CDC also recommended varying degrees of isolation and controlled movement (limits on means of travel) based on which lesser risk category applied to the exposed individual.[63] These recommendations remain in effect to this day, and are often updated based on new best practices and risk factors.[64]

III. THE INTERSECTION OF PUBLIC HEALTH AND PRIVATE RIGHTS

A. Historical Court Treatment of Public Health Measures

Quarantine has been recognized as a valid use of police powers since at least the early 20th century. In one early case, *Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health*,[65] the U.S. Supreme Court addressed the issue of whether a public health board, acting under authority of the state, could forbid a ship from landing in a town or city under quarantine for communicable disease.[66] In that case, even though the plaintiff argued that the public health board had enforced the quarantine restriction against only that particular ship, the restriction was a valid exercise of police powers.[67] The Court upheld the power of the state to enact laws giving various municipalities the power to quarantine in order to protect public health.[68] The Court noted that until Congress creates federal quarantine laws under a power such as the Commerce Clause,[69] state quarantine laws survive a constitutional challenge.[70]

While *Compagnie Francaise* dealt with a state's power to quarantine in order to prevent entry of individuals to at-risk areas, a state's power over individuals who create a public health risk has also been upheld. In the seminal public health law

59. *See CDC Guidance*, *supra* note 19.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. 186 U.S. 380 (1902).
66. *Id.* at 380.
67. *Id.* at 384.
68. *Id.* at 388.
69. As far as the Commerce Clause relates to quarantine: A state "action is not necessarily invalid because it may affect commerce with foreign nations or among the states, but it may not unnecessarily interfere with such commerce, and it cannot, under the pretense of adopting health regulations laws, regulate or prohibit commerce in a way, or to an extent, not required for the preservation or promotion of public health." 39 AM. JUR. 2D *Health* § 2 (2015).
70. *Compagnie Francaise*, 186 U.S. at 388.

case *Jacobsen v. Massachusetts*,[71] a Commonwealth of Massachusetts law allowed boards of health of cities throughout Massachusetts to require vaccination and revaccination of citizens, "if necessary for the public health or safety," and instituted a five-dollar fine for noncompliance.[72] Subsequently, the board of health of Cambridge, Massachusetts established a regulation requiring all citizens to receive the smallpox vaccine.[73] Jacobsen refused to comply, and was arraigned; he plead not guilty, and appealed his jury conviction.[74]

Unlike the arguments put forth in *Compagnie Francaise*, which were grounded in federalism, Jacobsen argued that the law invaded his personal liberty "to care for his own body and health in such a way as to him seems best."[75] The Supreme Court reasoned that "liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will," and held that the vaccination statute was a valid exercise of the police powers of the Commonwealth; therefore, the Cambridge ordinance was also valid.[76] However, the Court made clear that it would not allow a state to go so far as to intervene in an individual's medical care, cautioning that there may arrive cases "so arbitrary and oppressive . . . as to justify the interference of the courts to prevent wrong and oppression."[77] The Court did not explicitly define its limitations on state intervention.[78]

Various states have similarly upheld the police power to quarantine when necessary for public health. For example, the Supreme Court of Washington held that a patient may be confined and forced to comply with treatment when necessary for public health.[79] In *In re Washington*, a patient diagnosed with pulmonary tuberculosis did not comply with medical advice regarding treatment and personal confinement, and was arrested after failing to follow a court order regarding her treatment regimen.[80] The court noted, "[t]his country has long recognized that the Constitution does not bar enforced quarantine."[81] Therefore a court order forcing confinement and treatment was upheld.[82]

In sum, state laws that allow for the restriction of individual rights in favor of public health have been broadly upheld over a variety of challenges:

> Power to make quarantine regulations is one of the most frequent powers conferred on boards of health. Such regulations constitute a proper exercise of the police power, provided they do not abridge rights protected by the Fourteenth Amendment. The federal constitution does not bar enforced quarantine.[83]

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71. 197 U.S. 11, 27 (1905).
72. *Id.* at 12.
73. *Id*.
74. *Id.* at 13.
75. *Id*.
76. *Id*. at 28, 39.
77. *Id.* at 38.
78. *Id*.
79. *In re* Washington, 716 N.W.2d 176, 184 (Wis. Ct. App. 2006), aff'd in part, disapproved in part on other grounds, 735 N.W.2d 111 (Wis. 2007).
80. *Id.* at 179.
81. *Id*. at 182.
82. *Id*. at 184.
83. 39 AM. JUR. 2D *Health* § 60 (2015) (internal citations omitted).

Challenges to quarantine in the modern day are therefore few and far between. The dearth of such challenges could be a reflection on the control modern science has over diseases, such as influenza or smallpox, which once led entire cities to strictly enforce vaccinations.[84] Or, it could reflect broad recognition that confinement of individuals for public health or safety falls under traditional police powers.[85] Likely, it is a function of both.

B. Varying Jurisdictional Approaches

States tend to differ in the mechanisms by which they confer power to enforce public health measures. "In this country, states have the broadest legal authority to investigate and control public health outbreaks and protect the safety of citizens under their general police power."[86] Each state has a Department of Health or Health and Human Services, which is usually vested with the responsibility of protecting the "health, safety and well-being of [its] citizens."[87] What differs is how the powers of the Department of Health and Human Services (DHHS) are divested to other entities within the state.

Some states invest the same authority in county boards of health and health departments as they grant to the state-level Department of Health. [88] Arizona, for example, follows this model.[89] The result is similar to that in *Jacobsen*, allowing individual boards of health (*e.g.*, for a county or town) to establish enforceable ordinances that require specific actions in support of public health.[90] Yet even where a state statute provides that "any city, town, or village [may] adopt and enforce additional local law, ordinances, or regulations" concerning public health, a county health board cannot exceed its authority as an administrative agency by usurping legislative functions.[91]

In other states, the "public health and safety laws contemplate a comprehensive state health planning system" in which the state DHHS takes the reins, or county or municipal authorities, and boards of health simply direct or provide services to the public.[92] Michigan is one state that follows this model.[93] In

84. Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

85. *In re* Washington, 716 N.W.2d at 184.

86. Middleton, *supra* note 52, at 89.

87. *See, e.g.*, *About DHHS*, NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES, http://www.dhhs.state.nh.us/about/index.htm (last visited Sept. 4, 2015).

88. 39 AM. JUR. 2D *Health* § 6 (2015).

89. *See* Marsoner v. Pima Cnty., 803 P.2d 897 (Ariz. 1991) (en banc) (holding that the county board of supervisors had the same authority under Arizona state law to establish an ordinance designed to limit the spread of AIDS that the state would have).

90. *Id*. *See also* Johnson v. Jefferson Cnty. Bd. of Health, 662 P.2d 463 (Colo. 1983) (en banc) (stating that a "county board of health has the responsibility of determining general policies to be followed by [a] public health officer in administering and enforcing public health laws . . . ." (internal quotations omitted)).

91. Dutchess/Putnam Restaurant and Tavern Ass'n. v. Putnam Cnty. Dept. of Health, 178 F.Supp. 2d 396, 405 (S.D.N.Y. 2001) (holding that a Putnam County Dept. of Health regulation prohibiting smoking in certain public spaces violated the constitution of the State of New York).

92. 39 AM. JUR. 2D *Health* § 6 (2015).

93. *See* Rock v. Carney, 185 N.W. 798 (Mich. 1921) (holding that a town board of health could not "give itself power and then execute the power").

these states, only DHHS may create policy, but town boards of health are in place to implement it.[94] When reviewing rules implemented by boards of health in such jurisdictions, courts will frequently address whether the rule is related to the promotion of public health, is not discriminatory, and is reasonable in light of the health risk addressed.[95] And "[a]lthough a legislative body arguably may direct that distinctions be based on factors other than public health when authorizing promulgation of rules by health boards," a health board cannot invent or establish new factors on its own accord.[96] Thus, either the DHHS or the legislative body itself must designate public health policy in such jurisdictions.

C. Maine's Approach to Public Health

Maine follows the second, top-down approach—the legislature has tasked the DHHS with creating and implementing rules regarding public health policy in Maine.[97] Unlike the states following the first approach, public boards of health in Maine do not have the authority to establish policies for dealing with public health emergencies.[98] In fact, this power lies only with DHHS: "In the event of an actual or threatened epidemic or public health threat, the department may declare that a health emergency exists and may adopt emergency rules for the protection of public health."[99] The power is broad. Adopted rules may include procedures regarding contaminated property, the establishment of treatment facilities, and, most relevant to health care workers exposed to Ebola virus, "procedures for the isolation and placement of infected persons for the purposes of care and treatment or infection control"—quarantine procedures.[100]

When DHHS has cause to believe that an individual has a communicable disease requiring isolation, the department must follow very specific procedures established by Maine statute to force the infected person into treatment or any degree of isolation. DHHS may petition the District Court for an order directing examination of a potentially infected person,[101] or obtain an order from the District or Superior Court providing for comprehensive medical assessment, monitoring measures, or part or full-time monitoring.[102] Before a full hearing is held on the petition, and upon a showing via affidavit that by clear and convincing evidence the

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94. *Id*. at 288.

95. *See, e.g.*, City of Roanoke Rapids v. Peedin, 478 S.E.2d 528, 587 (N.C. Ct. App. 1996) (concluding that a board of health acts within its powers when its regulation "(1) is related to the promotion or protection of health, (2) is reasonable in light of the health risk addressed, (3) is not violative of any law or constitutional provision, (4) is not discriminatory, and (5) does not make distinctions based upon policy concerns traditionally reserved for legislative bodies," but holding that the regulation at bar exceeded the Public Health Board's rulemaking authority).

96. 39 AM. JUR. 2D *Health* § 18 (2015) (citing City of Roanoke Rapids, 478 S.E.2d at 535).

97. *See* 22-A M.R.S.A. §§ 201-203 (establishing the DHHS, outlining the guiding principles, and delineating the programs and services the DHHS will offer). See http://www.maine.gov/sos/cec/rules/10/chaps10.htm#148 for a comprehensive list of all DHHS rules and policies.

98. *See* 22 M.R.S.A. § 802(3) (2004 & Supp. 2014) (granting rulemaking authority to DHHS to carry out its responsibilities under the statute).

99. *Id*. § 802(2).

100. *Id*. § 802(2)(A) - (C).

101. *Id.* § 809.

102. *Id.* § 812.

individual "requires immediate custody in order to avoid a clear and immediate public health threat," the court may grant temporary custody of the individual.[103] The court thus has the discretion to grant temporary custody.[104] After the hearing on the petition, however, if the court finds by clear and convincing evidence that the infected person poses a public health threat, "the court *shall* issue the requested order" using the least restrictive measures necessary to "effectively protect the public health."[105] Therefore when the court finds that a public health threat exists, it must direct any measures that would be required to protect the public safety.[106]

Under this scheme, the DHHS thus has the authority to request of the District or Superior Court that an individual posing a public health threat be placed under custody until the risk has passed. The court may grant, as a preliminary matter, any of the requested measures it finds immediately necessary to protect public health, and later, after hearing on the petition, *must* grant the order using the least restrictive measures necessary if the threat is shown by clear and convincing evidence.[107] It was under this statutory device that the State in *Mayhew v. Hickox* sought to detain and monitor Kaci Hickox while she posed a risk of developing Ebola virus symptoms.

IV. MAYHEW V. HICKOX

A. Background

Kaci Hickox is a nurse who spent significant time in Sierra Leone as a nurse for Doctors Without Borders treating patients infected with the Ebola virus.[108] In October of 2014 she returned to the United States and was placed under mandatory quarantine in New Jersey.[109] New Jersey's health protocols were more stringent than CDC recommendations, and included: immediately transporting the patient to a "Tier 2" hospital for evaluation by emergency medical services personnel wearing personal protective equipment (in the case of Ebola patients, head-to-toe sealed hazmat suits); prohibiting the patient's movement; contacting the patient's local health department for active monitoring for 21 days; and "conditional release based upon a person's compliance and adherence to local health department's instructions."[110] Hickox was immediately outspoken and highly critical of her treatment at the hands of New Jersey health officials, claiming that it was

103. *Id.* § 810.

104. *Id*.

105. *Id.* § 812(1) (emphasis added).

106. *Id*.

107. *Id.*

108. Elizabeth Cohen et al., *Nurse Describes Ebola Quarantine Ordeal*, CNN http://www.cnn.com/2014/10/26/health/new-jersey-quarantined-nurse/ (last updated Oct. 27, 2014).

109. *Id*. On October 22, 2014, New Jersey Governor Chris Christie issued Executive Order No. 164 (2014), creating mandatory screening protocols for individuals returning from West African countries affected by the Ebola outbreak. *New Jersey Mandatory Quarantine and Screening Protocols*, N.J. DEPT. OF HEALTH, http://www.state.nj.us/health/news/2014/approved/20141031b.html (last visited Oct. 5, 2015).

110. *Compare New Jersey Mandatory Quarantine and Screening Protocols*, N.J. DEPT. OF HEALTH, http://www.state.nj.us/health/news/2014/approved/20141031b.html (last visited Feb. 7, 2014), *with CDC Guidance*, *supra* note 19.

unnecessary and that her "basic human rights [had] been violated."[111] During her New Jersey quarantine she twice tested negative for Ebola.[112]

Hickox was allowed to travel back to Maine after she showed no symptoms under New Jersey quarantine for a full 24 hours.[113] New Jersey provided private transportation and Hickox had no contact with members of the general public during the trip back to Maine.[114] At the time, her boyfriend, Ted Wilbur, a nursing student at the University of Maine, indicated to the press that Hickox intended to comply with any Maine CDC policies, including the 21-day quarantine.[115] Although Maine public officials did not provide specific information, MCDC released a statement indicating that "all known travelers returning from West Africa to Maine [were] cooperating with State health officials."[116]

Unfortunately, after her return to Fort Kent, the situation became one of Maine's most memorable public spectacles of the year. Hickox vowed to fight the quarantine: "I am not going to sit around and be bullied by politicians and forced to stay in my home when I am not a risk to the American public."[117] Despite admonition from MCDC and a general public outcry, she went so far as to take a bike ride with Wilbur on the morning of October 30th.[118] Even reporters who lauded her desire to challenge the quarantine had mixed feelings about "whether Hickox's bike ride was a wise and principled move, or an unnecessary provocation."[119]

B. The Public Health Order Petition and Disposition

The State soon filed a petition to limit Hickox's movement, activities, and exposure to the public, as well as to maintain CDC monitoring.[120] In toto, the State's petition requested:

> a. Direct Active Monitoring;
> b. Any travel will be coordinated with the public health authorities to ensure uninterrupted direct active monitoring;

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111. Cohen et al., *supra* note 108.

112. *Id*.

113. Shayna Jacobs, et al., *Nurse Kaci Hickox Heading for Maine After Leaving New Jersey Ebola Quarantine*, NEW YORK DAILY NEWS, http://www.nydailynews.com/life-style/health/nurse-kaci-hickox-released-n-quarantine-officials-article-1.1988481 (last updated Oct. 27, 2014).

114. Julia Bayly & Jackie Farwell, *Nurse Who Treated Ebola Patients Returning to Maine,* BANGOR DAILY NEWS, (October 29, 2014), https://bangordailynews.com/2014/10/27/news/aroostook/nurse-who-treated-ebola-patients-returning-to-fort-kent/print/.

115. *Id.*

116. *Id*.

117. Bayly, *supra* note 14 (internal quotations omitted). But it should be noted that before any court order was entered, Hickox largely seemed to remain compliant with CDC guidelines—at the least, she appeared to be submitting to monitoring by epidemiologists as directed by the CDC.

118. Russell Berman, *The Renegade Nurse*, THE ATLANTIC, (October 30, 2014), http://www.theatlantic.com/politics/archive/2014/10/Kaci-Hickox-Ebola-Quarantine-Maine-New-Jersey/382168/.

119. *Id*.

120. Julia Bayly & Jackie Farwell, *State Petitions to Require Monitoring, Travel Limits on Nurse Kaci Hickox*, BANGOR DAILY NEWS, http://bangordailynews.com/2014/10/31/news/aroostook/state-petition-requires-monitoring-travel-limits-on-nurse-kaci-hickox/ (last updated Oct. 31, 2014).

> c. Controlled movement to include exclusion from long-distance commercial conveyances or local public conveyances;
> d. Exclusion from public places and congregate gatherings;
> e. Exclusion from workplaces for the duration of a public health order (except to receive necessary healthcare);
> f. Non-congregate public activities while maintaining a 3-foot distance from others is permitted (i.e., walking or jogging in a park);
> g. Other activities should be assessed as needs and circumstances change to determine whether these activities may be undertaken;
> h. The Respondent will not leave the municipality of Fort Kent without direct consultation with public health authorities; and
> i. Federal public health travel restrictions may be implemented based on an assessment of the particular circumstance, if Respondent wants to leave the state.[121]

All of the State's monitoring and custody requests conformed to CDC interim guidelines for restricting movement of individuals with Hickox's level of exposure to Ebola.[122]

Before the hearing on the petition, Chief Judge LaVerdiere, sitting in Fort Kent District Court, issued a Temporary Order on October 30, 2014 (complying with 22 M.R.S.A. § 811) requiring (1) Hickox's submission to direct active monitoring; (2) coordination of her travel with public health authorities; (3) non-utilization of certain public transportation; (4) avoidance of public places; (5) avoidance of workplaces; (6) maintaining a 3-foot distance from others; (7) not leaving Fort Kent without consulting with public health authorities.[123] Like the State's requested relief, this Temporary Order substantially corresponded to the CDC Ebola guidelines.

Seeking to enforce these extensive restrictions for the full 21-day incubation period, the State continued to argue that Hickox posed a significant public health risk.[124] However, Chief Judge LaVerdiere lessened the restrictions of the Temporary Order in his Order Pending Hearing on October 31, 2014, citing 22 M.R.S.A. § 811(3) (2014), that the court is authorized to "make such orders as it deems necessary to protect other individuals from the dangers of infection" pending a hearing on a public health order.[125] LaVerdiere found that an order was necessary, but lessened Hickox's restrictions to (1) direct active monitoring; (2) coordination of travel with public health authorities; and (3) immediate notification to public health officials upon development of any Ebola symptoms.[126]

A final hearing on the State's petition was never held.[127] Though scheduled

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121. *Petition*, *supra* note 16, at 5-6.

122. *Id*. at 5.

123. Temporary Order at 1-2, Mayhew v. Hickox, (Me. Dist. Ct., Fort Kent, Oct. 30, 2014) [hereinafter *Temporary Order*].

124. The hearing was not open to the public and no transcript is available; therefore, the only assumption to be made is that the State continued to argue on the basis of the Verified Petition. For the State's arguments regarding the public health risk posed by Hickox, see *Petition*, *supra* note 16, at 1-5.

125. *Order Pending Hearing*, *supra* note 17, at 18.

126. *Id*. at 3.

127. Judy Harrison, *Kaci Hickox, State Agree to Make Temporary Order Permanent; Hearings This Week Cancelled*, BANGOR DAILY NEWS, http://bangordailynews.com/2014/11/03/news/aroostook/kaci-

for November 4 and 5, 2014, Hickox reached an agreement with the State and with public health officials that would leave the restrictions established in the Order Pending Hearing in place through November 10, 2014, which would be the final day of her at-risk period.[128] Thus ended her legal struggle, but the larger political and social ramifications, as well as media commentary, did not cease.[129]

C. The Fallout

Despite the State's recommendation for a much more restrictive order (based on CDC guidance) Hickox was essentially allowed to go free with simple monitoring and travel/symptom notification requirements. Fort Kent residents, including business owners, were not hesitant to speak out about their dissatisfaction with the outcome of Hickox's fight over her quarantine, though the town manager tried to put a positive spin on things.[130] Hickox's boyfriend, Ted Wilbur, withdrew from his nursing program, "accusing campus officials of failing to address concerns he had about returning to classes," indicating that he had been warned about possible harassment and discrimination from other students (though he did not return to classes and did not actually claim to encounter any harassment or discrimination from classmates).[131]

Speaking out about the ordeal, Hickox and Wilbur stood up for her actions, saying that it was "an act of civil disobedience" intended to force the State to get a court order, so that her liberties were not violated without following the letter of the law (as Hickox and Wilbur perceived the law).[132] The two made the choice to leave Fort Kent and move to Southern Maine,[133] and one need only conduct a straw poll on any morning in any Portland coffee shop to find a strong opinion about Hickox, her refusal to comply with CDC restrictions, and her subsequent move to Southern Maine.

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hickox-state-agree-to-make-temporary-order-permanent-hearings-this-week-canceled/ (last updated Nov. 3, 2014).

128. *Id.*

129. And did not for several months. *See, e.g.*, *Kaci Hickox, Maine Nurse Who Defied Quarantine, Details Ebola Mission*, BANGOR DAILY NEWS, http://bangordailynews.com/2015/01/06/health/kaci-hickox-maine-nurse-who-defied-quarantine-speaks-out-about-ebola-mission/ (last updated Jan. 6, 2015); *Kaci Hickox: 'Stop Calling Me the 'Ebola Nurse' – Now!'*, TIME (Nov. 14, 2014), http://time.com/3588930/kaci-hickox-ebola-nurse/.

130. Julia Bayly, *Fort Kent Residents Divided on Feelings Over Kaci Hickox*, BANGOR DAILY NEWS, http://bangordailynews.com/2014/10/31/news/aroostook/fort-kent-residents-divided-on-feelings-over-kaci-hickox/ (last updated Nov. 1, 2014).

131. Julia Bayly, *Kaci Hickox, Boyfriend Open up About the Forced Quarantine Battle, Leaving Fort Kent*, BANGOR DAILY NEWS (Nov. 9, 2014), http://bangordailynews.com/2014/11/09/news/aroostook/nurse-kaci-hickox-boyfriend-open-up-about-the-forced-quarantine-battle-leaving-fort-kent/.

132. *Id*. It should be mentioned that Hickox and Wilbur are not wrong on this point—it is the DHHS's, and therefore the State's, responsibility to petition the courts for temporary custody when it is in the interest of public health. But if Hickox knew of the danger of infection, and of the serious risks posed by public exposure to the disease, one might argue she should have simply acquiesced to certain restrictions (especially considering the brevity of the restrictions) as she ultimately decided to do, albeit after a publicly contentious court battle.

133. *Id.*

V. THE COURT'S FAILURE TO ENFORCE ADEQUATE RESTRICTIONS

Under 22 M.R.S.A. section 810, clear and convincing evidence of an immediate public health threat is required in order for the District Court to grant temporary custody, emergency care, treatment, or evaluation.[134] If temporary custody (or any of the other measures) *are* granted, another hearing is held within seventy-two hours for the court to determine whether custody shall continue.[135] Although the initial custody determination is at the court's discretion, the next determination is not: If the court finds by clear and convincing evidence that the public health threat exists, the court *shall* order the "least restrictive measures necessary to effectively protect public health."[136] In the first custody determination, the District Court used its discretion to grant, nearly in full, the State's requests for isolation and monitoring.[137] However, in the second determination, it found only three restrictions necessary: (1) "Direct Active Monitoring" by CDC officials; (2) coordination of travel with public health authorities; and (3) immediate notification of public health authorities upon development of any symptoms. Given the extreme risk posed by even minor exposure to Ebola, the questions are begged whether the court made the correct finding, and whether the burden of proof might be set too high by the controlling statute.

A. How the State Met the Burden

Though it is difficult to say for certain without access to the full transcript,[138] the State seems to have met the burden in this case. Chief Judge LaVerdiere certainly did not think so, emphasizing in his last order that "Respondent currently does not show any symptoms of Ebola and is therefore not infectious."[139] But his argument implies that he was considering only whether Hickox posed a current, at-that-moment danger to the public. Section 810, under which the court made its first Temporary Order, allows the court to order custody "in order to avoid a clear and immediate public health threat," impliedly including an immediate *future* threat, which Hickox clearly posed. But because the court did not give proper weight to the ramifications of a possible sudden onset of Ebola virus symptoms, the court did not place enough restrictions on Hickox's freedom in its Order Pending Hearing.

In the Temporary Order, Chief Judge LaVerdiere in fact granted seven of the State's nine requests. The only two *not* granted were the State's requests (g), that Hickox discuss any plans for activities other than travel, work, and engaging in non-congregate public activities; and (i), that public health travel restrictions be

134. 22 M.R.S.A. § 810 (2004) ("Upon the department's submission of an affidavit showing by clear and convincing evidence that the person or property which is the subject of the petition requires immediate custody in order to avoid a clear and immediate public health threat, a judge of the District Court or justice of the Superior Court may grant temporary custody of the subject of the petition to the department and may order specific emergency care, treatment or evaluation.").

135. *Id.* § 810(2).

136. *Id.* § 812(1).

137. *See Temporary Order*, *supra* note 123, at 1.

138. Again, the full transcript is unavailable due to the closed proceedings.

139. *Order Pending Hearing*, *supra* note 17, at 3 (emphasis in original).

implemented if Hickox indicated a desire to leave the state.[140] There was likely not any need to grant these two missing restrictions given the extent of the restrictions that were actually imposed, including daily MCDC direct active monitoring. Because Hickox was required by the Temporary Order to refrain from "any public places . . . or areas of congregate gatherings,"[141] restrictions such as discussing plans for activities other than travel with public health authorities would simply place an additional burden on her that authorities know, in advance, where she might go and with whom she might have contact. Combined with direct active monitoring, by which she would be checked twice daily for symptoms, such a restriction would seem to be excessive. Similarly, because Hickox was under such close scrutiny by police and reporters, it is highly unlikely that she would be able to travel out of state without public health authorities' immediate knowledge, rendering travel restrictions other than the one actually imposed (to refrain from public transportation)[142] redundant.

However, the court's Order Pending Hearing eschewed many of the restrictions requested by the State, which, only days prior, the court had determined to be valid requests in the name of public health. Chief Judge LaVerdiere retained requirements that Hickox engage in direct active monitoring, coordinate her travel with public health authorities, and added a new restriction: that she immediately notify public health authorities if any symptoms were to appear.[143] The inclusion of this last restriction is particularly puzzling, because CDC guidelines for direct active monitoring includes that the affected individual "immediately notify the public health authority if [she] develop[s] fever or other symptoms."[144] The Order Pending Hearing thus eliminated three of the most crucial restrictions that the State requested—exclusion from public spaces and congregate gatherings; exclusion from workplaces; and maintaining a 3-foot distance from other persons—while inventing a redundant one.[145]

If the court had placed appropriate weight on the State's evidence, it could easily have imposed the missing restrictions. The affidavit of Sheila Pinette, Director of Maine CDC, was the basis for the State's entire petition, and laid out very explicitly why the entire list of CDC-guideline-based restrictions should have been granted. Pinette specified that anyone "infected with Ebola virus can start to show symptoms of the disease (become infectious) at any point during the incubation period."[146] Pinette also pointed out that Hickox was most at risk for symptoms during the second week after her most recent exposure (October 20, 2014), a time period that began October 28, 2014 – two days prior to the petition being filed; at the time of the court's order, Hickox was *most likely* to develop symptoms and become infectious.[147] Pinette noted that Hickox's roommate in

140. *Compare Temporary Order*, *supra* note 123, at 1, *with Petition*, *supra* note 16, at 5-6.
141. *Temporary Order*, *supra* note 123, at 1.
142. *Id*.
143. *Order Pending Hearing*, *supra* note 17, at 3.
144. *CDC Guidance*, *supra* note 19, at 3.
145. *Petition*, *supra* note 16, at 5-6.
146. *Id*. at 3.
147. *Id.* at 3-4.

Africa became infected with Ebola, without even knowing how.[148] Further, Pinette's affidavit stated that "nurses providing daily direct patient care are at greater risk and may require more precautions" than other care providers, and that Hickox had intensive, direct daily contact with Ebola victims.[149]

At the time Hickox was battling the Temporary Order, she was at her highest risk of developing symptoms. Symptoms could appear at any time, without warning, and be easily mistaken for a common cold or flu. Transmitting bodily fluids – a simple sneeze or cut followed by a handshake, for example – could pass on her infection. Based on the possible sudden onset of symptoms, Hickox's level and timing of exposure, and the overall virulence of the disease, the court ought to have found that the State met the clear and convincing evidentiary burden. Hickox posed a real, immediate threat to public health.

It is questionable whether the clear and convincing evidence standard even applied in the Order Pending Hearing analysis. Chief Judge LaVerdiere claimed to have decided the Order Pending Hearing under the operation of section 811(3), that the court "may make such orders as it deems necessary to protect other individuals from the dangers of infection." Unlike section 810, under which he granted the initial seven restrictions, there is no language in section 811 requiring that Hickox be an "immediate" threat or that the court make the determination under any evidentiary standard.[150] Therefore it was purely the court's assessment that she was not as significant a public threat as the State argued, and purely the court's assessment that five restrictions granted by the Temporary Order be removed. The court did note that if Hickox developed any symptoms at any point during her incubation period, it would "become necessary to isolate the Respondent from others to prevent the potential spread of this devastating disease."[151] Based on the information available in the Petition, Chief Judge LaVerdiere could have gone further with the restrictions.

B. Restrictions the Court Should Have Imposed

Stricter measures ought to have been taken to ensure that the potentially infected Hickox did not come into contact with any members of the public. While an infected individual is not infectious until presenting symptoms, Ebola symptoms present at first like the symptoms of many common maladies, and have a very sudden onset. In this case, in which an individual had been exposed to a pathogen of extreme lethality and was going to be placed under quarantine measures for only twenty-one days, the public's need to be safe from harm ought to have outweighed the individual's liberty of movement.

Removing one's liberty for the greater public good is not a decision to be made lightly. The situation of quarantine "raises unique questions: [h]ow are income, sustenance, and health care provided to a person in quarantine? Who cares for

148. *Id*. at 3.

149. *Id.* at 4.

150. 22 M.R.S.A. § 810 requires that, to award emergency temporary custody, there be a "clear and immediate public health threat." By contrast, § 811(3) requires only that the court find the imposed measures "necessary" to protect other individuals from becoming infected.

151. *Temporary Order*, *supra* note 123, at 1.

children of those in quarantine?"[152] But these questions were either not implied or moot in the instant case. First, the quarantine was, and would have been temporary – only until 21 days had passed symptom-free, or she showed signs of the illness. Further, her boyfriend was with her, and she was under CDC direct active monitoring in her own home – not simply isolated in a prison or hospital. Therefore, the only remaining concerns were those of Hickox's legal rights, which she had full opportunity to challenge in court. As one scholar has written:

> [Q]uarantines that impose no gratuitous hardships and that are applied pursuant to orderly and non-discriminatory procedures are theoretically possible and also practically available. And such well-run quarantines, especially when they are employed to combat epidemic diseases, cannot plausibly be said to violate the civil rights of the quarantined. Even the staunchest civil libertarian must accept that one person's liberty may be restricted when this is necessary for preventing harm to another.[153]

Further, the CDC guidelines require that shelter, food, and wage compensation be considered when imposing quarantine, and that "[p]ersons under public health orders should be treated with respect and dignity."[154] Hickox was not placed into a tiny, sterile box with minimal comforts as upon her initial arrival in New Jersey; nor was she held at gunpoint; nor forcefully restrained in any way: she was asked to comply with reasonable temporary restrictions on her travel and person-to-person contact in order to avoid a potential Ebola epidemic, and allowed to remain within her own home with her live-in boyfriend.

Hickox, as a health care provider herself, probably should have seen the ways in which her refusal to comply with the CDC immediately (that is, prior to the Order Pending Hearing) risked severe harm to the public. She likely proffered similar arguments as the individual in *Jacobson* – that she posed no immediate threat, that there is no consensus on the best way to protect large populations from infection – but the differences are striking. *Jacobson* involved a disease for which a vaccine was available. Any citizen in *Jacobson* who failed to comply with a vaccine mandate would threaten herd immunity. By contrast, Hickox's apparent refusal to comply with quarantine measures threatened to infect a population with a disease against which there is no immunity, for which there is no cure, and against which there are no effective treatments. There is little question that a temporary quarantine would be the most effective guarantee of public health in such a situation, but the court did not grant all of the measures that would prove most effective at preventing the spread of the disease.

One author points out that "quarantines commonly compete with other methods of disease control," including vaccination.[155] Because there is no vaccine and no cure, the *only* guaranteed method of preventing infection from Ebola is isolation and preventing skin-to-skin or skin-to-fluid contact. If the court found

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152. Alfred DeMaria, Jr., *The Globalization of Infectious Diseases: Questions Posed by the Behavioral, Social, Economic, and Environmental Context of Emerging Infections*, 11 NEW ENG. J. INT'L & COMP. L. 37, 56 (2004).

153. Daniel Markovits, *Quarantines and Distributive Justice*, 33 J.L. MED. & ETHICS 323, 323 (2005).

154. *CDC Guidance*, *supra* note 19.

155. Markovits, *supra* note 153, at 324.

that Hickox had the level of exposure to Ebola as claimed by the CDC,[156] then, as the court noted, "Maine Law authorizes [the] court to make such orders as it deems necessary to protect other individuals from the dangers of infection."[157] The court ought to have found it necessary to uphold more of the restrictions from the Temporary Order, including avoiding public transportation, a ban from public spaces, and maintaining a 3-ft distance from other persons. *Only* these measures would meet the safety needs of the public.

C. A Burden Too Great to Bear

Black's Law Dictionary defines "clear and convincing evidence" as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."[158] As unhelpful as it is unspecific, this definition provides little guidance. Were it a simple matter of showing, with reasonable certainty, that infection of just one other person would occur based on even a minor interaction with Hickox, the District Court would likely have imposed several restrictions in addition to simple compliance with monitoring and alerts as to travel and symptom development. But as discussed above, based on the State's evidence, the court *could* have found that Hickox posed such a risk.

The court was likely following the slightly more stringent standard as defined by the Law Court. Recently, the Law Court defined clear and convincing evidence as "evidence that provides the fact-finder with an abiding conviction that the truth of the proponent's contentions is highly probable."[159] Provided with this standard of proof it is easier to see, yet still difficult to fathom, how and why the court reduced Hickox's restrictions. Either Chief Judge LaVerdiere must not have been instilled with an "abiding conviction" that it was necessary to provide more restrictions than simply direct active monitoring, travel coordination with public health officials, and reporting the onset of any symptoms, or he was unconvinced that the State's contentions were "highly probable." Other than the direct active monitoring, these restrictions amounted to little more than a phone call to state officials in the event that Hickox decided to leave Fort Kent or developed Ebola symptoms.

While a high burden of proof ought to be associated with restrictions of personal liberties, especially freedoms of travel and association, it may prove too high a burden to actually do what it is supposed to do. The statute, after all, is aimed at the protection of public health, and not the protection of personal liberties. Time and again, the U.S. Supreme Court has upheld similar statutes restricting similar rights.[160] Notably, the *Jacobson* Court did not define the sorts of cases in which personal liberties would be too infringed for the Court to invalidate a state law restricting individual freedoms when in conflict with public health or safety.[161]

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156. And the court must have, because it certainly deemed *some* measures necessary to prevent the public from infection.

157. *Order Pending Hearing*, *supra* note 17, at 1.

158. *Clear and Convicing Evidence* BLACK'S LAW DICTIONARY (9th ed. 2009).

159. Grondin v. Hanscom, 2014 ME 148, ¶ 11, 106 A.3d 1150.

160. *See* Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health, 186 U.S. 380, 389 (1902).

161. Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905).

In *Jacobson*, the Court said that it was "not prepared to hold that a minority . . . enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state."[162] One could easily imagine that such is the result here. Despite no *actual* harm having occurred, and keeping in mind that hindsight is 20/20, the guidance of the state authorities empowered to protect public health, as well as the various doctors and knowledgeable medical entities that created such guidance, seems to have been thwarted by an individual who disagreed on a personal level with her treatment under the law. In such an instance it is easy to imagine that the evidentiary bar has been set too high, especially considering the weight of authority behind the one side of the argument, as well as the need for public safety.

On the other hand, the U.S. Supreme Court has held that the clear and convincing evidence standard is "necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty."[163] The Court has said that "the risk of error from using a [lesser standard] is substantial; and the countervailing governmental interest favoring that standard is slight."[164] However, in such instances, the Court typically balances the liberty of a single individual against another individual, or the liberty of a single individual against the government's interest in depriving that individual of liberty.[165] *State v. Hickox*, by contrast, represents the application of a statute that balances the liberty of an individual against the health and safety of an entire town, if not state, if not country. Further, the Court has held that the clear and convincing evidence standard is appropriate in cases that deprive individuals of liberty indefinitely, whereas Hickox was under direct active monitoring in Maine for a mere two weeks.

Finally, 22 M.R.S.A. section 812 provides that only the "least restrictive measures necessary" are to be issued as the final order for custody (or other protective measures).[166] Perhaps the requirements that any final order of custody be under the least restrictive measures necessary to protect the public ought to be balanced with a lower standard of evidence, which would allow the court to assess those measures in a light more favorable to public safety. Other Maine statutes use the clear and convincing standard, including: termination of parental rights proceedings,[167] grounds for bail revocation,[168] and removal proceedings for district attorneys.[169] Just like the above-cited U.S. Supreme Court cases, these statutes require balancing the rights of an individual against governmental interests, or

162. *Id*. at 37.

163. Santosky v. Kramer, 455 U.S. 745, 756 (1982) (holding that a preponderance standard was insufficient in a state parental rights termination proceeding).

164. *Id*. at 758.

165. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 424 (1979) (holding that the standard of proof for civil commitment of a mentally ill person must be at least a preponderance of the evidence); Woodby v. INS, 385 U.S. 276, 285 (holding that "clear, unequivocal, and convincing evidence" is the standard of proof for deportation proceedings).

166. 22 M.R.S.A. § 812(1) (2004 & Supp. 2014).

167. *Id*. § 4054.

168. 15 M.R.S.A. § 1096 (2003 & Supp. 2014).

169. 30-A M.R.S.A. § 257 (2011 & Supp. 2014).

balancing the rights of two individuals. What these statutes do not require, unlike custody orders for the public health, is balancing the rights of an individual against the rights of the public.

Especially when considering the potential risk of failure to prevent outbreaks of infectious diseases, quarantine measures become more attractive. One scholar notes that the expected aggregate costs of quarantine are less than half of the expected aggregate costs of vaccination, and less than one quarter of the expected aggregate costs of failure to respond.[170] As there is no vaccination alternative to Ebola, a simple cost-benefit analysis indicates that quarantine is the most economically effective solution. Other scholars outright recommend strengthening isolation and quarantine laws, noting that "[u]nless draconian health screening techniques are routinely implemented at each port of entry . . . there will always be opportunities for people who are ill to cross our borders undetected."[171]

One way Maine could strengthen its public health law would be to remove the clear and convincing evidentiary barrier to isolation of individuals posing a public health risk. Other states have less narrow requirements for creating quarantine. Alabama, for example, allows the governor, "whenever he deems it necessary," to declare a quarantine, which is then enforced by the State Board of Health.[172] And Texas, which has created a felony for quarantine violation,[173] makes Maine's current procedures look quite lenient. Removing the clear and convincing burden, and replacing it either with purely discretionary language or with a standard or balancing test that more accurately reflects the interests at stake in quarantine cases, would help Maine protect the public from outbreak of infectious diseases such as Ebola virus.

VI. CONCLUSION

Balancing public rights with private ones is a very difficult tightrope to walk, but it must be done on a daily basis. In extreme cases, such as *Mayhew v. Hickox*, this tightrope is taken to the courts, which must decide whether and how much private liberty to restrict to achieve the goal of public health. Maine's statutory scheme presents a hurdle that, while not insurmountable, is not quite balanced in the public favor. By requiring that a court impose the least restrictive measures necessary to protect public health, 22 M.R.S.A. § 810 and 812 at first blush seem to effectively balance the needs of the public and individual liberty, but closer examination shows that in some situations the result skews in favor of individual liberty at the expense of public health.

The result is that an individual lawfully asserting his or her rights under sections 810 or 812 is unduly protected by the clear and convincing evidence standard, regardless of the level of threat that individual poses to the public. In

170. Markovits, *supra* note 153, at 325.

171. Joseph B. Topinka, *Yaw, Pitch, and Roll*, 30 J. OF LEGAL MEDICINE 51, 51 (2009).

172. ALA. CODE § 22-12-4 (1975).

173. TEX. HEALTH & SAFETY CODE ANN. § 81.085(h) (West 2013). This Texas law concerns imposition of area quarantines in outbreak scenarios. Under 22 M.R.S.A. § 802(2), Maine DHHS may declare a public health emergency and adopt emergency rules to quarantine individuals or groups of individuals, but the primary mechanism to protect public health when there is no active public health emergency is through the mechanisms of §§ 810-812.

Hickox's case, she had the potential to spread one of the most contagious, most dangerous, and least treatable known diseases of the 21st century. If Hickox had developed symptoms, which at the time was imminent, she could have potentially spread the disease in an isolated region poorly equipped to deal with the repercussions. This is not to say that a doomsday-like scenario would necessarily have ensued, but until she passed the 21-day incubation mark, though daily testing negative for the virus, Hickox ought to have been considered infectious. The clear and convincing evidence burden did not adequately account for the danger she posed to the public.

Especially in the context of dangerous infectious diseases, Maine law should provide easier relief for DHHS to protect the public health. Individual liberties are important, but the law should also consider the individual liberties of each and every other citizen to remain free from the harm that a single individual presents. "Response to emerging infections depends upon scientific evidence, but just as importantly, upon the values societies hold: how people live, how society is viewed, the balance of liberty, property, privacy rights, and individual autonomy with safety, security, and public health."[174] *Mayhew v. Hickox* represents a victory for individual rights, but a defeat for public safety, security, and health.

174. DeMaria, *supra* note 152, at 58.