
BOOK REVIEWS

NO IMMUNITY: RACE, CLASS, AND CIVIL LIBERTIES IN TIMES OF HEALTH CRISIS

ON IMMUNITY: AN INOCULATION. By Eula Biss. Minneapolis,
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We are all already polluted.

— Eula Biss (p. 76)

INTRODUCTION

Nearly a century ago, the United States found itself in the midst of a health crisis related to individuals it found to be socially unfit. At the time, social unfitness and “imbecility” were thought to be genetically inscribed and heritable — contagious within the gene pool. However, as with many diseases, states feared that these conditions could be masked; *how would they know who was unfit?* Was it possible that the unfit could contaminate the broader gene pool? If so, how could states prevent this so-called genetic pollution from entering and spreading in their states?

Eugenics policies provided a compelling answer for more than thirty states that adopted such legislation. Eugenics laws were designed to limit the reproductive capacities of Americans whom legislators perceived to be socially or mentally damaged, and therefore genetically unfit. Such laws literally stripped away the right to reproduce. Concerns about genetic and social contamination were so deeply rooted in the American consciousness that eugenics laws were adopted with relative ease throughout the nation.

The U.S. Supreme Court took up the issue in an infamous 1927 test case, *Buck v. Bell*.¹ That case involved the constitutionality of a Virginia law permitting compulsory sterilization of persons whom state health officials declared feebleminded.² The person in question was

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¹ 274 U.S. 200 (1927).

² *Id.* at 200.

Carrie Buck.³ Justice Oliver Wendell Holmes described Carrie as a “feeble minded white woman who was committed to the State Colony [for Epileptics and Feeble Minded].”⁴ Justice Holmes declared, “She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child.”⁵ Dr. Albert Priddy, the superintendent of the Virginia Colony, provided testimony in the case.⁶ He testified, “These people belong to the shiftless, ignorant, and worthless class of anti-social whites of the South.”⁷ Harry Laughlin, the chief drafter of U.S. eugenics legislation, concurred in Priddy’s testimony, emphasizing Carrie’s “moral delinquency” although he had never met her.⁸

Over the years, scholars such as Professor Paul Lombardo copiously filled in the narrative of Carrie’s life omitted from the Court’s opinion: her pregnancy at sixteen years old resulting from a rape committed by her employer’s nephew, as well as her destitution.⁹ Importantly, Lombardo uncovered Carrie’s daughter’s academic records, finding no evidence of cognitive delay or learning disabilities,¹⁰ which scientists at the time claimed were genetically heritable — like a disease.¹¹ Indeed, at the time of the case, health officials provided testimony that Carrie’s six-month-old daughter, Vivian, would become imbecilic because something about her did not seem right — she seemed “not quite normal.”¹²

Buck legalized compulsory sterilization of individuals deemed socially unfit, ushering and ensconcing eugenics into the American political, legal, and medical landscape. *Buck* pivoted on finding Virginia’s compulsory sterilization law constitutional, thereby validating all other similar laws in states across the nation. According to the Court, Virginia’s law “recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental

³ *Id.* at 201.

⁴ *Id.* at 205.

⁵ *Id.*

⁶ Paul Lombardo, *Eugenics Sterilization Laws*, IMAGE ARCHIVE ON AM. EUGENICS MOVEMENT, <http://www.eugenicsarchive.org/html/eugenics/essay8text.html> [<http://perma.cc/12F2V-8YYQ>].

⁷ *Id.*

⁸ *Id.*

⁹ See Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 53–55 (1985). Carrie lived with and worked for J.T. and Alice Dobbs. *Interrogatories and Papers of Commitment for Carrie E. Buck – Page 3*, *Buck v. Bell Documents*, GA. ST. C. L.: READING ROOM, <http://readingroom.law.gsu.edu/buckvbell/29> [<http://perma.cc/P9PK-DMKU>]. Some accounts reference them as her foster parents. See, e.g., Lombardo, *supra*, at 54, 61.

¹⁰ Lombardo, *supra* note 9, at 61.

¹¹ *Id.* at 30 n.2.

¹² *Id.* at 61.

defectives.”¹³ Legislators in Virginia feared that without sterilizing “unfit” girls and women and performing vasectomies on boys and men of a similar profile, “many defective persons . . . would become a menace” to society.¹⁴

However, if young men and women were rendered incapable of procreating, their heredity would not infect future offspring or others by “transmission of insanity [or] imbecility.”¹⁵ At the time, scientists claimed that heredity played a key role in the spread of cognitive impairment, social unfitness, and insanity.¹⁶ Indeed, the Court relied on its 1905 ruling in *Jacobson v. Massachusetts*,¹⁷ a compulsory vaccination case, to justify Carrie’s sterilization and the legalization of American eugenics.¹⁸ Sadly, it was believed that if states could vaccinate against viruses like smallpox, why not allow them to *immunize* against social traits like intergenerational poverty?

Justice Holmes claimed that the principle sustaining compulsory vaccination in states like Massachusetts “is broad enough to cover cutting the Fallopian tubes,”¹⁹ because public welfare, including the public’s health, calls upon even “the best citizens for their lives.”²⁰ Strange as it may seem now, vaccination was considered by many to be a sacrifice and a risk not only to one’s health but also to one’s life. Viewed in this light, the Supreme Court considered the sterilization of the girls and boys housed at Virginia’s State Colony to be a “lesser” sacrifice than potential death.²¹

Carrie Buck’s case, however, was neither the first nor the last time that the rationale of protecting the public’s health served a discriminatory purpose or functioned against a vulnerable group. Justice Holmes concluded, “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”²²

Buck flagged fears about the *other* and how proximity to the outsider class might pollute fitter, smarter, healthier, wealthier citizens or at least burden society with economic, health, and social problems em-

¹³ *Buck v. Bell*, 274 U.S. 200, 205 (1927).

¹⁴ *Id.* at 205–06.

¹⁵ *Id.* at 206.

¹⁶ See, e.g., WILLIAM W. IRELAND, ON IDIOCY AND IMBECILITY 15–18 (1877); see also Marilyn M. Singleton, *The “Science” of Eugenics: America’s Moral Detour*, 19 J. AM. PHYSICIANS & SURGEONS 122 (2014).

¹⁷ 197 U.S. 11 (1905).

¹⁸ See *Buck*, 274 U.S. at 207 (citing *Jacobson*, 197 U.S. 11).

¹⁹ *Id.* (citing *Jacobson*, 197 U.S. 11).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

anating from the poor. The Court's holding and the very law that it upheld reflected not only a moral panic, but also a public health panic: the fear of socially and morally polluted bodies infecting the broader society. *Buck* offers a chilling glimpse into the extremes of protecting the public's health in times of perceived crisis. As a result of the eugenics movement and the Court's decision in *Buck*, it is estimated that over 60,000 American women nationwide suffered involuntary surgical sterilizations.²³ Between 7000 and 8300 were sterilized in Virginia.²⁴

The relationship between public health, on the one hand, and race, poverty, and ethnicity discrimination, on the other, is neither new nor distinctly American. In 1933 Germany borrowed from the model U.S. eugenics law, which "provided the legal basis for sterilizing more than 350,000 people."²⁵ In fact, the intersection between minority rights and public health has a long and shameful history, dating back hundreds of years.²⁶ On close inspection, the metaphor of the polluted body and its menacing effect in American society persists, no doubt due to its local origins rooted so long ago in American slavery,²⁷ "Yellow Peril,"²⁸ and early-twentieth-century anti-immigration policy.²⁹ When analyzed

²³ See Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 123 (1993) (reporting that after *Buck*, twenty states embraced eugenic sterilization legislation, resulting in over 60,000 sterilizations prior to 1950).

²⁴ Gary Emerling, *Sterilized: What Virginia and Nazi Germany Had in Common*, U.S. NEWS & WORLD REP. (Jan. 27, 2014, 7:00 AM), <http://www.usnews.com/news/articles/2014/01/27/a-dark-past-should-virginia-pay-those-it-robbed-of-the-right-to-bear-children> [<http://perma.cc/V8M2-WLEL>].

²⁵ Lombardo, *supra* note 6. Lombardo reminds us that "[i]n 1936, Laughlin was awarded an honorary degree from the University of Heidelberg as a tribute for his work in 'the science of racial cleansing.'" *Id.*

²⁶ See Michele Goodwin & Allison M. Whelan, *Law, Bioethics, and Biotechnology*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 557 (James D. Wright ed., 2d ed. 2015).

²⁷ See Cheryl I. Harris, "Too Pure an Air:" Somerset's Legacy from Anti-Slavery to Colorblindness, 13 TEX. WESLEYAN L. REV. 439, 444 (2007) (discussing the metaphors of slaves as pollutants and slavery as pollution); Todd L. Savitt, *Black Health on the Plantation: Masters, Slaves, and Physicians*, in SICKNESS AND HEALTH IN AMERICA 351, 351-53 (Judith Walzer Leavitt & Ronald L. Numbers eds., 3d ed. 1997) (critiquing and debunking antebellum-rooted theories of race-based immunity on slave plantations); Todd L. Savitt, *Black Health on the Plantation: Owners, the Enslaved, and Physicians*, OAH MAG. HIST., Sept. 2005, at 14 (shedding light on pernicious "health" stereotypes as well as medical justifications for slavery, such as Blacks' possessing immunity to certain diseases that might disable whites).

²⁸ See Timothy A. Hickman, *Drugs and Race in American Culture: Orientalism in the Turn-of-the-Century Discourse of Narcotic Addiction*, 41 AM. STUD. 71, 72 (2000); Jess Nevins, *QUAINT #20: Roots of the Yellow Peril, Part 2*, BEYOND VICTORIANA (May 18, 2011, 12:00 AM), <http://beyondvictoriana.com/2011/05/18/quaint-20-roots-of-the-yellow-peril-part-2> [<http://perma.cc/2N4N-7NMD>] (noting that anti-Chinese sentiments mushroomed as "Chinese [men] were recast as drug-using sexual deviants").

²⁹ See, e.g., Gerald V. O'Brien, *Indigestible Food, Conquering Hordes, and Waste Materials: Metaphors of Immigrants and the Early Immigration Restriction Debate in the United States*, 18 METAPHOR & SYMBOL 33, 35-38 (2003); see also J. David Cisneros, *Contaminated Communi-*

from a distance, law's vulnerability to prejudice packaged as public health concern crystallizes. For example, judges may make poor judgment calls conditioned on spurious or misinterpreted science, politicians may manipulate the public's fear for political gain, and even scientists and doctors may conflate or exaggerate data. And consequentially, civil liberties may be compromised and constitutional rights trampled.

These concerns dramatically manifested in the wake of the 2014 Ebola outbreak in several western African nations and the arrival in the United States of one lone Liberian man, Thomas Eric Duncan, who contracted the virus prior to his arrival and subsequently died.³⁰ Not only did the nation's otherwise quiescent manner toward Liberia's outbreak peak at the time of Mr. Duncan's death, but so did fear, which gave way to hysteria. Mitt Romney, the former governor of Massachusetts (and two-time presidential candidate), urged the United States to close its borders to nations experiencing Ebola outbreaks, basically quarantining West Africa from travel to the United States.³¹ Even President Obama incurred blame for not stopping Ebola from entering the United States.³²

Robin Wright, a fellow at the Woodrow Wilson International Center and the United States Institute of Peace, warned that Ebola increased racial profiling and revived "imagery of the 'Dark Continent,'" pointing to children of African descent being mocked as "Ebola kids" in Texas.³³ Harsh labeling aside, a community college in Texas declared that it would not admit students from nations where Ebola was

ties: *The Metaphor of "Immigrant as Pollutant" in Media Representations of Immigration*, 11 RHETORIC & PUB. AFF. 569 (2008).

³⁰ Thomas Eric Duncan, *Ebola Victim in Texas, Has Died*, CBS NEWS (Oct. 8, 2014, 3:48 PM), <http://www.cbsnews.com/news/thomas-eric-duncan-ebola-victim-in-texas-has-died> [<http://perma.cc/DPM8-E67M>]; see also Harry R. Weber et al., *Ebola Scares Off Tutors as Dallas Virus Case Spurs Fear*, BLOOMBERG BUS. (Oct. 7, 2014, 7:12 PM), <http://www.bloomberg.com/news/articles/2014-10-07/ebola-scares-off-tutors-as-dallas-virus-spurs-immigrant-dread> [<http://perma.cc/4TFM-XDM4>].

³¹ Justin Sink, *Romney: Administration Not Serious About Treating Ebola*, THE HILL (Oct. 15, 2014, 11:11 PM), <http://thehill.com/policy/healthcare/220919-romney-administration-not-serious-about-treating-ebola> [<http://perma.cc/KZ2T-RKLM>] (quoting the former Massachusetts governor as saying, "I haven't been briefed on all the reasons not to close down the flights but my own reaction is we probably ought to close down the border with nations that have extensive Ebola spreading, and that means not bringing flights in from that part of Africa").

³² Earl Ofari Hutchinson, *Republican's Blame Ebola on Obama Ploy Backfires*, HUFFINGTON POST (Oct. 18, 2014, 10:45 AM), http://www.huffingtonpost.com/earl-ofari-hutchinson/republicans-blame-ebola-o_b_6006766.html [<http://perma.cc/C6KP-HD2N>].

³³ Robin Wright, *The Implicit Racism in Ebola Tragedy*, CNN (Oct. 9, 2014, 7:16 PM), <http://www.cnn.com/2014/10/09/opinion/wright-ebola-racism> [<http://perma.cc/9NNE-TVH8>] (noting "the implicit racism that the deadly virus has spawned" and that "as panic deepens, the danger is that racism — on planes and public transportation, in lines, on streets, in glances — deepens further, too").

present,³⁴ two students from Rwanda (over 2600 miles from the closest affected country) were virtually suspended from a New Jersey elementary school for three weeks,³⁵ an elementary school teacher in Maine was forced to take a three-week leave because she attended a conference in Dallas, Texas,³⁶ and a principal who traveled to Zambia, another country with no reported cases, was placed on administrative leave for a week.³⁷ What accounted for this type of hysteria, which prevented children from attending school and imposed unnecessary constraints on employees who wanted to work?

That states (and their agencies) have a duty to protect the health and safety of their citizens provides a weak and unsatisfying defense of selective encroachments on civil liberties generally, especially when racial status, rather than medical condition, motivates such actions. Equally uninspiring are the moral justifications on which these civil liberty violations rest, such as protecting children from classmates, teachers, or principals who clearly do not pose medical threats. This Review takes up not only the metaphor of the polluted body and its menacing effect on society, but also what this metaphor means for law.

We turn to *On Immunity*, Eula Biss's 2014 book, interrogating omnipresent suspicions, fears, and myths surrounding the polluted body and vaccination in the United States. Ms. Biss's account of immunization policies and practices builds upon personal, sociological, historical, and medical anecdotes. She draws from experiences that mark her childhood, motherhood, and time as a journalist to paint a provocative narrative about not only vaccination policy in the United States, but also families' practices related to inoculating children and the chilling consequences that result when they do not.

Biss deftly unpacks parents' concerns about vaccinations and hotly debated but refuted studies linking inoculation to autism in children.³⁸

³⁴ Hanna Kozłowska, Opinion, *Has Ebola Exposed a Strain of Racism?*, N.Y. TIMES (Oct. 21, 2014, 6:29 AM), <http://op-talk.blogs.nytimes.com/2014/10/21/has-ebola-exposed-a-strain-of-racism> [<http://perma.cc/C6VY-R4VR>].

³⁵ Lindsay Abrams, *Parents Freak Out over Ebola, Keep Rwandan Children from Starting Elementary School*, SALON (Oct. 20, 2014, 1:26 PM), http://www.salon.com/2014/10/20/parents_freak_out_over_ebola_keep_rwandan_children_from_starting_elementary_school [<http://perma.cc/5C3D-DFLD>].

³⁶ Mia De Graaf, *Ebola Hysteria Sweeps US Schools: Teacher Who Visited Dallas Told Not to Come to Work as Hundreds of Mississippi Parents Pull Kids School Because Principal Visited Zambia . . . 3,000 Miles from Countries Hit by the Disease*, DAILY MAIL (Oct. 19, 2014, 10:22 AM), <http://www.dailymail.co.uk/news/article-2799014/ebola-hysteria-sweeps-schools-maine-teacher-visited-dallas-told-not-come-work-21-days-hundreds-mississippi-parents-pull-kids-school-principal-visited-zambia-3-000-miles-countries-hit-disease.html>.

³⁷ Anthony Zurcher, *Ebola, Race, and Fear*, BBC: ECHO CHAMBERS (Oct. 21, 2014), <http://www.bbc.com/news/blogs-echochambers-29714657> [<http://perma.cc/FDT3-YZU2>].

³⁸ See A.J. Wakefield et al., *Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 351 THE LANCET 637 (1998) (retracted).

She explains, “The women with whom I debated the merits of the flu vaccine possessed a technical vocabulary that was entirely unfamiliar to me at the time” (p. 10). These mothers could distinguish the vaccines that contained live viruses from those that were acellular and provide a detailed account of the “vaccine schedules of other countries” (p. 10).

Were the concerns about exposing their children to vaccines a form of paranoia or simply reflective of parenting? On the one hand, parents strive to keep children safe from all possible contaminants, including those in their mattresses and on their sheets and floors. And on the other hand, she points out an irony — those same parents believe that avoiding vaccines will achieve exactly that: healthy children. Biss exposes a paradox in social perceptions about who does and does not vaccinate.

In the antivaccine movement, the parents least likely to vaccinate their children resemble her; she describes them as white, wealthy elites,³⁹ who petition and protest government to avoid their children’s inoculation (p. 27). These parents apply for exemptions from laws that require their children’s vaccination as a condition of school enrollment. Sometimes, parents claim a religious objection to vaccines and, in some states, the refusal to vaccinate can be based on “personal belief.”⁴⁰ Some of the mothers wary about vaccination confided to Biss that they simply did not trust the government and believed “big pharmaceutical companies are corrupting medicine” (p. 9).

Yet poor Black mothers, she reminds readers, vaccinate their children, but often under-inoculate, particularly for those viruses that require boosters or second “shots” (p. 27).⁴¹ Their under-inoculation hinges not on choice, she explains, but rather a condition of their poverty. For example, homelessness and high rates of mobility (moving from one location to another) make it difficult to maintain connection with a consistent medical provider and preserve medical records. Lack of resources, such as a car, and even expenses for public transportation (where it is available), create additional burdens. Even the luxury to leave low-wage jobs to attend to medical concerns for them-

³⁹ “Unvaccinated children . . . are more likely to be white, to have an older married mother with a college education, and to live in a household with an income of \$75,000 or more — like my child” (p. 27).

⁴⁰ Recently, California eliminated its personal belief exemption to vaccination. Jon Brooks, *California Ends Personal Belief Exemption for Vaccines*, KQED NEWS (June 29, 2015), <http://www.kqed.org/stateofhealth/2015/06/29/bill-ending-vaccine-exemptions-passes-california-senate-moves-to-governors-desk> [http://perma.cc/VBV8-8WTZ]. In that state, along with Mississippi and West Virginia, children who have not adhered to the states’ mandatory inoculation schedules may not attend public schools. The law does provide for a medical exemption to vaccination (p. 9).

⁴¹ “Undervaccinated children, meaning children who have received some but not all of their recommended immunizations, are more likely to be black, to have a younger unmarried mother, to have moved across state lines, and to live in poverty” (p. 27).

selves or their children may be beyond reach for many families living in poverty.⁴² They are caught in a terrible double bind. The distinction between under-inoculation and no inoculation is significant, particularly in light of the risks posed to the public's health when a child has not received any vaccinations.

The most powerful theme in Biss's important account of inoculation is the story of fear and the dread of polluted *others*. It is a striking aspect of the book: misinformation based on race and class status that frequently influences health. She reminds readers that antebellum and Jim Crow racism blinded white Americans to the possibility that they could contract smallpox. Instead, the virus was repugnantly referred to as "Nigger itch" (p. 25), and perceived as a Black person's disease.⁴³ It was often underreported or unreported among whites because of "the shame they felt being caught with this 'loathsome negro disease.'"⁴⁴ Perhaps this attitude accounted for the preventable smallpox outbreak of the late 1800s, when many refused vaccination, thinking that being white could inoculate them from the disease.⁴⁵

Biss's book addresses fears about government and the medical establishment in times of health crises. In this Review, we examine law's role in instantiating and perpetuating these fears and the broader anxieties and suspicions to which Biss alludes. For example, she flags concerns about the roles of race, immigration, and class in negatively influencing social perceptions, medical decisionmaking, and even the delivery of care. However, her discussion of these issues is limited to personal accounts describing interactions with medical providers and potent, but few, historical observations. The book's omissions could be explained by the fact that Biss writes as a journalist, and in this book she blends personal and scientific narratives to weave a personal story about her medical journey as a new mother.

⁴² Recent cases involving poor Black mothers charged with child neglect help to underscore the difficult situations in which these parents find themselves. Shanisha Taylor, a homeless mother, was arrested, charged, and recently sentenced to eighteen years of probation for leaving her two children in a parked car, while at a job interview for a Scottsdale, Arizona, insurance agency. Michele Goodwin, *The Invisible Classes in High Stakes Reproduction*, 43 J.L. MED. & ETHICS 289, 289 (2015); Fernanda Santos, *18 Years' Probation for Arizona Woman Who Left Sons in Car*, N.Y. TIMES (May 15, 2015), <http://www.nytimes.com/2015/05/16/us/18-years-probation-for-arizona-woman-who-left-sons-in-car.html>. In 2014, Debra Harrell, a single mother in South Carolina, was arrested for "abandoning" her nine-year-old daughter whom she allowed to play at a nearby park while she worked at McDonald's. Goodwin, *supra*, at 289.

⁴³ See also MICHAEL WILLRICH, *POX: AN AMERICAN HISTORY* (2011) (describing how whites in southern communities perceived themselves immune from smallpox during Reconstruction and, in one city, explained away early cases of the virus as a reflection of young white men making "indiscreet visits" to areas where African Americans lived, *id.* at 97).

⁴⁴ *Id.* at 97.

⁴⁵ See *id.* at 54, 97.

However, missing from such a personal account are the broader impacts on law and society, such as the social and legal harms resulting from stereotyping, stigmatization, or blatantly disparate medical or legal treatment of some groups versus others. This Review takes up a more explicit discussion of the law in the time of health panic. Our questions do not relate to *whether to inoculate children* nor do we take up the antivaccine movement. We leave those important questions for a separate work.⁴⁶ Rather, Biss's provocative book inspires our focus on a narrow set of overlooked questions related to law's intervention at times of purported health crises.

We expand the focus of inoculation and the metaphor of the "polluted" other to include a taxonomy of biases and offer an important historical account, referencing early case law and situating vaccination in the framework of immigration quotas, race, and class. In *Buck v. Bell*, the Supreme Court sanctioned the notion that "unfit[ness]" and "imbecility" could be vaccinated away by sterilization.⁴⁷ The Court did not find Virginia's actions to be cruel and unusual.⁴⁸ Today, the case reads as a chilling account of misdirected law. Retelling vaccination and health crises as stories about social fitness, race, and class sheds light on what motivates public policy, and who benefits and who might be harmed by law and the government.

Our thesis is that claims to protect the public's health frequently have served as proxies for bias, discrimination, and nativism. Many people of color and vulnerable minority groups have been caused great harm in the name of advancing and protecting the public's health. Unfortunately, during such periods in American history, courts too have failed to protect basic civil liberties, and people have suffered as a result. Carrie Buck's nonconsensual sterilization provides a powerful example of government abuse of power in this regard, but sadly it is one among many forgotten or lesser-known cases even among lawyers. Indeed, children, men, and women have been interned, sterilized, banned from entering the United States, detained, subjected to horrific human research, and otherwise injured by government abuse of power under the cover of protecting or promoting health.

This Review proceeds in three parts. In Part I, we argue that, historically, fears of contagion and infection were as much rooted in racial and class fear and animus as genuine threats to health. We highlight instances where protecting the public's health served as the legal basis for explicit government abuses of power and the infliction of injuries

⁴⁶ Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. L. REV. (forthcoming 2016) (on file with authors).

⁴⁷ See *Buck v. Bell*, 274 U.S. 200, 207 (1927).

⁴⁸ See *Buck v. Bell*, 130 S.E. 516, 519 (Va. 1925), *aff'd*, 274 U.S. 200; Lombardo, *supra* note 9, at 51–52.

on minority populations through immigration policy. In Part II, we address implicit bias and public health. We argue that race and class bias continues to influence attitudes about the spread of disease, shape norms in the delivery of medicine, and influence legal policy. Finally, Part III turns to civil liberties in times of contemporary health crisis. Our conclusion is that the government must demonstrate that there is no other means by which to protect public health before it infringes on individuals' constitutional rights.

I. EXPLICIT BIAS: DISEASE, IMMIGRATION, AND THE LAW

Our fears are informed by history and economics, by social power and stigma, by myths and nightmares. And as with other strongly held beliefs, our fears are dear to us. When we encounter information that contradicts our beliefs . . . we tend to doubt the information, not ourselves.

— Eula Biss (p. 37)

We believe the government has a compelling interest in safeguarding the public and protecting the public's health. However, protecting the public's health has at times served as a proxy for bias, discrimination, and nativism. Protecting the public's health has justified harming people. It has served as the legal basis for the exclusion of immigrants and the usurpation of minorities' rights. In the health context, it has also served as the basis for justifying unethical experiments on the poor and people of color.

Sadly, some nativist views continue to incite such harms, including anti-immigration sentiment in the United States and abroad. And anti-immigration sentiment continues to fuel biases and stereotypes related to the spread of disease, fears about unhealthy behaviors — such as drug use and sexual violence — and anxieties about immigrants burdening the public dole and draining states' resources.⁴⁹ Such perceptions suggest that even if immigrants do not infect citizens, their perceived unhealthy behaviors can still provide a reason to exclude them.

Several candidates campaigning for the 2016 U.S. presidential election articulated such nativist concerns. Dr. Ben Carson wrote, "The American people should not be manipulated into believing that they are heartless simply because they want to preserve the rule of law in

⁴⁹ Several candidates for the U.S. presidency have articulated views connecting Mexican immigrants to crime or drains on the economy, despite data showing "inverse trajectories since the 1990s: immigration has increased, while crime has decreased." Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime> [<http://perma.cc/H4XU-LU2A>].

our nation and look after their own before they take in others.”⁵⁰ Donald Trump claimed in his 2015 presidential announcement speech that Mexican immigrants bring drugs, crime, and sexually violent behavior into the United States.⁵¹ Governor Scott Walker, who was also a candidate for the U.S. presidency, echoed that view, explaining to a news station:

I’ve been to the border with Governor Abbott in Texas and others, seeing the problems that they have there. There [are] international criminal organizations penetrating our southern based borders, and we need to do something about it. Secure the border, enforce the law, no amnesty, and go forward with the legal immigration system that gives priority to American working families and wages.⁵²

Yet fears articulated as public health concerns can and have too frequently couched anxieties about sex, the economy, miscegenation, racial hierarchies, and cultural dominance. Our concern is both historical and contemporary. As we show in this Part, protecting the public’s health has served as cover for nativist views and justified blatant racial animosity and bias.⁵³ For example, Angel Island on the West Coast and Ellis Island on the East Coast were actually quarantine detention sta-

⁵⁰ Ben Carson in *National Journal 2016 Series, On Immigration*, NAT’L J. (Feb. 23, 2015), http://www.ontheissues.org/Archive/2015_Nat_Jnl_Ben_Carson.htm [<http://perma.cc/WKW8-9L9X>].

⁵¹ *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid> [<http://perma.cc/Q6C9-5RYR>]. Weeks later, Trump defended his remarks about Mexican immigrants: “Everybody knows that’s true. And it’s happening all the time. So, why, when I mention all of a sudden I’m a racist. I’m not a racist. I don’t have a racist bone in my body.” *Donald Trump Punching Back*, FOX NEWS (July 5, 2015), <http://www.foxnews.com/transcript/2015/07/05/donald-trump-punching-back> [<http://perma.cc/5RDC-8JHV>] (quoting interview by Howard Kurtz, Host of Fox News’s “Media Buzz,” with Donald Trump (July 5, 2015)).

⁵² *Transcript: Read the Full Text of the Primetime Republican Debate*, TIME (Aug. 11, 2015, 4:30 PM), <http://time.com/3988276/republi-can-debate-primetime-transcript-full-text> [<http://perma.cc/BU5V-V4VB>].

⁵³ Policies motivated by racial fears create and embed stigma against groups that can be very difficult to eradicate later. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1114 (1998). Professor Kevin Johnson posits that “the harsh treatment of noncitizens of color reveals terrifying lessons about how society views citizens of color.” *Id.* He points to several examples:

[T]he era of exclusion of Chinese immigrants in the 1800s occurred almost simultaneously with punitive, often violent, action against the Chinese on the West Coast. Efforts to exclude and deport Mexican citizens from the United States, which accelerated over the course of the twentieth century, tell much about how society generally views Mexican American citizens. Similarly, the extraordinarily harsh policies directed toward poor, Black, Haitian persons, seeking refuge from violent political and economic turmoil in Haiti, leave little room for doubt — if there were any — about how this society as a whole views its own poor Black citizens.

Id. (footnotes omitted).

tions, rationing rather than opening entry to the United States.⁵⁴ Chinese immigrants on the West Coast and persons of Mediterranean origin on the East Coast were flagged as disease prone and sexually deviant. This stigmatization shaped attitudes about vaccination and ultimately laws on immigration. It also influenced detention policy.

Ellis Island served as a crucial passageway into the United States and therefore to citizenship. However, health status was a chief factor in determining fitness for citizenship. As one medical officer surmised, the day would come when immigrants would be forced to present a “clean bill of health,” proving their mental and physical fitness as well as their character.⁵⁵ Such a “system ‘devised by the scientist and the statesman of the future’ [would] compel the newcomer ‘to prove his right to enjoy the benefits of American citizenship.’”⁵⁶ These concerns were not particular to the medical community.

Angel Island in California and Ellis Island in New York inspire romantic associations with migration to the United States and therefore freedom. On the East Coast, Ellis Island is tethered to imagery of the regal Statue of Liberty and her broad appeal to the poor, weary, and weak to settle in the United States. In reality, these facilities were quarantine stations and detention camps, where ships from foreign ports were fumigated and individuals perceived to be diseased could be and often were held in isolation against their will. Angel and Ellis Islands were opened within one year of each other, both with the purpose of rationing entry into the United States. These ports were specifically and blatantly intended to keep out the Chinese (and later all Asians), pregnant women, women of questionable sexual character, homosexuals, the mentally ill, and criminals.⁵⁷

In revisiting the history of immigration to the United States, we explain how rationales for protecting the public health masked racism and bigotry, which in turn shaped immigration policy and entrenched hostile social perceptions about certain classes of immigrants.⁵⁸ Until the late 1800s, immigration control “was largely managed by individu-

⁵⁴ Alfred C. Reed, *The Medical Side of Immigration*, 80 *POPULAR SCI. MONTHLY* 383, 383–92 (1912); *United States Immigration Station (USIS)*, ANGEL ISLAND CONSERVANCY, <http://angelisland.org/history/united-states-immigration-station-usis> [<http://perma.cc/7ZX2-H244>].

⁵⁵ Anne-Emanuelle Birn, *Six Seconds per Eyelid: The Medical Inspection of Immigrants at Ellis Island, 1892–1914*, 17 *DYNAMIS* 281, 299 (1997).

⁵⁶ *Id.* (quoting L.L. Williams, *The Medical Examination of Mentally Defective Aliens: Its Scope and Limitations*, 71 *AM. J. INSANITY* 257, 268 (1914)).

⁵⁷ See sources cited *supra* note 54.

⁵⁸ Of course, anti-immigrant sentiment existed at least from the middle of the nineteenth century. For a discussion of the aggressive xenophobia that the political movements of Native Americanism and the Know-Nothings advocated in the nineteenth century, see FRANK GEORGE FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES 184–300* (1906).

al states.”⁵⁹ States with major ports controlled immigration into their regions, enacting laws and institutionalizing systems for “processing new arrivals.”⁶⁰ Their efforts, however, were uneven and lacked uniformity. Yet what they often had in common were measures to exclude the poor and ill.⁶¹ Federal policy followed the same course, universalizing “selective immigration,” and expanding the categories of persons barred entry into the United States.⁶²

A. *Ellis Island and Eugenics*

Ellis Island opened in 1892.⁶³ What began as three acres ultimately multiplied to thirty seven — large enough both to implement federal policies to keep out the sick and to carry out a nascent yet burgeoning eugenics ideology.⁶⁴ The practice of keeping out “undesirables” was underway a few years before Ellis Island took up its new role. For example, in 1875, the United States began prohibiting prostitutes from entering the United States.⁶⁵ The Page Law⁶⁶ masked an explicit interest in banning Chinese women from entering the United States, casting them as women with “lewd and immoral purposes.”⁶⁷ The law even applied to persons (almost always women) who had been sex workers ten years before attempted entry and to single women, but not to men.⁶⁸ During the long voyages, some women were raped, and they too were denied entry, particularly if their perpetrators claimed that they were

⁵⁹ EITHNE LUIBHÉID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* 1 (2002).

⁶⁰ *Id.* at 1–2.

⁶¹ *See id.* at 2.

⁶² *Id.*

⁶³ *Ellis Island*, HISTORY.COM, <http://www.history.com/topics/ellis-island> [<http://perma.cc/A2SG-YV85>].

⁶⁴ Sewell Chan, *Ellis Island's Forgotten Hospital*, N.Y. TIMES: CITY ROOM (Oct. 26, 2007, 5:36 PM), <http://cityroom.blogs.nytimes.com/2007/10/26/ellis-islands-forgotten-hospital> [<http://perma.cc/9BCX-SEVF>]; Caitlin Johnson, *Remembering the Dark Side of Ellis Island*, CBS (July 1, 2007, 12:14 PM), <http://www.cbsnews.com/news/remembering-the-dark-side-of-ellis-island> [<http://perma.cc/S4DZ-MTSA>].

⁶⁵ Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974). Section 3 states that “the importation into the United States of women for the purposes of prostitution is hereby forbidden; and all contracts and agreements in relation thereto, made in advance or in pursuance of such illegal importation and purposes, are hereby declared void.” *Id.* § 3.

⁶⁶ Page Act of 1875 ch. 141, 18 Stat. 477 (repealed 1974).

⁶⁷ *Id.*; *see also* LUIBHÉID, *supra* note 59, at 2.

⁶⁸ *See* 8 U.S.C. § 1182(a)(2)(D)(i) (2012); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643, 697–99 (2005) (detailing the rigorous interrogations of Chinese women at several stages before possible entry to the United States, and noting that “[i]f a woman answered ‘single’ or if her aspired occupation seemed improbable, the consul could conclude that she was a likely prostitute,” *id.* at 699).

seduced by their female victims. Pregnant single women were also denied entry because they were liable to become public charges.⁶⁹

According to Professor Kevin Johnson, “[d]espite the rich analysis of race in critical scholarship, a body of law chock full of insights remains largely unexplored.”⁷⁰ That is, “the treatment of ‘aliens,’ particularly noncitizens of color, under the U.S. immigration laws reveals volumes about domestic race relations in the nation.”⁷¹ Johnson argues that legal scholars have largely ignored the government’s abuse of power or coercive use of force against noncitizen minorities, resulting in deportations, indefinite detentions, and differential treatment.⁷²

The confluence of immigration law and public health policy exposed racial hostility in late-nineteenth-century U.S. society⁷³ and continues to do so today. Professor Anne-Emanuelle Birn’s extensive research on Ellis Island medical policies reveals that “[f]ar from slowing [medical professionals’] work, prejudice seemed to speed diagnosis, allowing examiners to target a series of diseases for each ethnicity.”⁷⁴ For example, “[U.S. Public Health Service] officer Thomas Salmon, who later became the first Medical Director of the National Committee for Mental Hygiene . . . hailed the immigration station as the ideal setting in which to effectively apply the principles of eugenics.”⁷⁵

Salmon believed that future parents and therefore children could be weeded out of the American gene pool by simply restricting their entry into the United States or deporting them.⁷⁶ Mandatory public health screenings, conducted on immigrants coming through federal ports, were justified as a means of reducing the risk of disease in the United

⁶⁹ LUIBHÉID, *supra* note 59, at 5 (“The rule that was adopted within the last few days is that an unmarried woman, arriving in a state of pregnancy which could be discovered by ordinary examination, it was to be considered as presumptive evidence that she would be a public charge, and therefore be returned, be barred from landing because nobody would wish to employ a person in that condition . . . and therefore she was directed to be returned [sic].” (quoting *Immigration Investigations: Hearing Before the H. Select Comm. On Immigration & Naturalization*, 51st Cong. 495 (1890) (statement of Dr. John Hamilton, Acting Surgeon Gen., U.S. Marine Hosp. Serv.)).

⁷⁰ Johnson, *supra* note 53, at 1112.

⁷¹ *Id.* (“A deeply complicated, often volatile, relationship exists between racism directed toward citizens and that aimed at noncitizens.”).

⁷² *Id.* at 1112–13.

⁷³ See Birn, *supra* note 55, at 285–86 (“Urban hygiene campaigners increasingly assigned culpability for deteriorating cities to new arrivals, who were ‘of a decidedly lower scale of life’ than their counterparts several decades earlier.” *Id.* at 286 (quoting John Watrous Knight, *The Working-Man and Immigration*, 4 CHARITIES REV. 363, 365 (1895))).

⁷⁴ *Id.* at 298 (“On Ellis Island, a homogeneous team of young, well-trained but inexperienced doctors rapidly judged who was fit to become an American.”).

⁷⁵ *Id.* (citing Thomas W. Salmon, *Immigration and the Mixture of Races in Relation to the Mental Health of the Nation*, in 1 MODERN TREATMENT OF NERVOUS AND MENTAL DISEASES 277 (William Alanson White & Smith Ely Jelliffe eds., 1913)).

⁷⁶ See *id.*

States.⁷⁷ However, not all immigrants were subjected to the same government probes and interventions. These screenings also served as the legal basis for government-sponsored discrimination because the medical tests were almost exclusively limited to immigrants in third class and stowage travel compartments.⁷⁸ The government assumed that elites were immune to disease and treated immigrants unequally, generally depending upon their race and economic status.

These historical and legal issues reach beyond the scope of Biss's book, but they were central to American health policy in the last century. Medical propaganda became ensconced in law. For example, section 212 of the Immigration and Nationality Act⁷⁹ specifically clarifies the general classes of foreigners ineligible for admission and visas.⁸⁰ The law's very first prong addresses public health. The law denies entry to those who "have a communicable disease of public health significance," as well as those "who . . . failed to present documentation of having received vaccination against vaccine-preventable diseases."⁸¹

The law also provides in relevant part that entry will be barred to those who "have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others";⁸² who "have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior";⁸³ or who "[are] determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be . . . drug abuser[s] or addict[s]."⁸⁴

Eventually, laws were enacted to bar men, women, and children with mental and physical disabilities from entry into the United States.⁸⁵ In fact, the State of New York passed legislation — An Act to Amend the Insanity Law, Providing for the Examination of Immigrants at the Port of New York to Ascertain Their Mental Condition⁸⁶ — with stricter requirements than those found in federal law, calling for special scrutiny of those considered "insane, idiotic, imbecil[ic, or] epileptic

⁷⁷ *Id.* at 287–88.

⁷⁸ KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH 91–108 (2004).

⁷⁹ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

⁸⁰ *See* 8 U.S.C. § 1182 (2012).

⁸¹ *Id.* § 1182(a)(1)(A)(i)–(ii).

⁸² *Id.* § 1182(a)(1)(A)(iii)(I).

⁸³ *Id.* § 1182(a)(1)(A)(iii)(II).

⁸⁴ *Id.* § 1182(a)(1)(A)(iv).

⁸⁵ *See, e.g.*, Immigration Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952); *see also* Act of Apr. 23, 1906, ch. 296, 1906 N.Y. Laws 688 (establishing a board for testing for mental illness in immigrants in the Port of New York).

⁸⁶ Act of Apr. 13, 1904, ch. 326, 1904 N.Y. Laws 863.

immigrants.”⁸⁷ The law went into effect on April 23, 1906, mandating that hospitals and public institutions report any signs of mental weakness among immigrant patients, and thereby breach patient confidentiality.⁸⁸

Immigrants were not screened for purposes of providing them aid and specialized care. Rather, the practice veiled another purpose: to determine whether they were suitable cases for deportation and removal.⁸⁹ It was a common view among some government officers that “only immigrants with excellent physiques suitable to heavy physical labor should be allowed entry.”⁹⁰ As a result, medical exclusions against poor immigrants included “poor eyesight, varicose veins, and perhaps the most remarkable, ‘poor physique.’”⁹¹ As Birn recounts, the instruction manual issued to physicians warned that aliens with “poor physiques” were “very likely to transmit [their] undesirable qualities to . . . offspring should [they], unfortunately for the country in which [they are] domiciled, have any.”⁹² Ironically, this type of discrimination continued years after the detention centers at Ellis Island and Angel Island were closed. In 2013, Ellen Richardson, a Canadian woman, was denied entrance into the United States because she had been hospitalized a year before for depression.⁹³

B. Angel Island, Yellow Peril, and Drug Addiction

So the medical people gave me opium — a preparation of it, called morphine, and ether — and ever since I have been calling it my amreeta . . . my elixir

— Elizabeth Barrett Browning⁹⁴

Angel Island served as a West Coast counterpoint to Ellis Island, opening its doors in 1910 and, for thirty years, maintaining a quaran-

⁸⁷ *Id.*

⁸⁸ *Id.* at 864; see also LUIBHÉID, *supra* note 59, at 10 (recounting the case of twenty-year-old Maria Gambacurta from Italy, who “was served with a warrant ordering her deportation” after she gave birth at City Hospital on Blackwell’s Island in New York).

⁸⁹ See Act of Apr. 13, 1904 § 1.

⁹⁰ Birn, *supra* note 55, at 299.

⁹¹ *Id.* at 300.

⁹² *Id.* (quoting Letter from Prescott Hall to Walter Wyman, Surgeon Gen. (Dec. 22, 1906) (on file with the National Archives)).

⁹³ See Andrew Solomon, Opinion, *Shameful Profiling of the Mentally Ill*, N.Y. TIMES (Dec. 7, 2013), <http://www.nytimes.com/2013/12/08/opinion/sunday/shameful-profiling-of-the-mentally-ill.html>. The detaining agent cited the Immigration and Nationality Act, section 212, *id.*, which prohibits entry of those who are “certified to be helpless from sickness, mental or physical disability,” 8 U.S.C. § 1182(a)(10)(B)(i) (2012).

⁹⁴ Letter from Elizabeth Barrett Browning to Robert Browning (Feb. 5, 1846), in 1 ROBERT BROWNING & ELIZABETH BARRETT BROWNING, THE LETTERS OF ROBERT BROWNING AND ELIZABETH BARRETT BROWNING, 1845–1846, at 452 (1899).

tine station and detention center.⁹⁵ There, immigration officials detained Asian men and women in accordance with U.S. laws that were specifically intended to restrict their entry to the United States. Immigration laws reinforced anti-Asian bigotry reflected in exclusion practices.⁹⁶ For example, federal law excluded nonwhites from naturalization (carving out an exception for Blacks after the U.S. Civil War), which barred Asians from becoming U.S. citizens.⁹⁷ Health rationales served as the basis for excluding Asians, when lawmakers were really concerned about miscegenation, the escalation of drug use by whites, and Asian assimilation.

Two key movements overlapped to play significant roles in the promotion of anti-Chinese sentiment, which unfolded into broader anti-Asian bigotry. First, eugenics dominated American thinking. As early as 1907, U.S. states began enacting laws to institutionalize, incarcerate, and sterilize individuals considered unfit.⁹⁸ Such practices demarcated individuals across economic and race lines. By 1909, California had enacted a compulsory sterilization law⁹⁹ and within five years had replaced that law with another that expanded the categories of those subject to sterilization regulations, covering a more comprehensive range of persons, including those “afflicted with hereditary insanity or incurable chronic mania or dementia.”¹⁰⁰ California’s law did not provide safeguards for patients, such as written notice, a hearing, or right to appeal.¹⁰¹ As in Carrie Buck’s case, legislators and courts articulated deep concerns about preserving and promoting a pure white “race” unadulterated by miscegenation and the social ills that presumably would result.¹⁰²

According to Biss, “[a] passion for bodily purity drove the eugenics movement that led to the sterilization of women who were blind, black, or poor” (p. 75). States’ concern for racial purity extended beyond poor whites and Blacks. As one prominent doctor warned, “[b]y commingling with the Eastern Asiatics . . . we are creating degenerate hybrids.”¹⁰³ Biss reminds readers that “[c]oncerns for bodily purity were behind miscegenation laws that persisted more than a century after the abolition of slavery, and behind sodomy laws that were only re-

⁹⁵ Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 559.

⁹⁶ JOHNSON, *supra* note 78, at 18.

⁹⁷ *Id.*

⁹⁸ See Act of Mar. 9, 1907, ch. 215, 1907 Ind. Acts 377 (repealed 1963).

⁹⁹ See Act of Apr. 26, 1909, ch. 720, 1909 Cal. Stat. 1093.

¹⁰⁰ Act of June 13, 1913, ch. 363, 1913 Cal. Stat. 775–76.

¹⁰¹ See *id.*

¹⁰² See, e.g., An Act to Preserve Racial Integrity, ch. 371, § 5099a, 1924 Va. Acts 534 (repealed 1975); *Buck v. Bell*, 130 S.E. 516, 519 (Va. 1925), *aff’d*, 274 U.S. 200 (1927).

¹⁰³ See YONG CHEN, CHINESE SAN FRANCISCO, 1850–1943, at 86 (2000).

cently declared unconstitutional” (pp. 75–76) and of how much “human solidarity has been sacrificed in pursuit of preserving some kind of imagined purity” (p. 76).

Fears about the afflicted and genetically inferior contaminating American whites directly fortified race and class distinctions and inspired government abuse of power. Two key immigration cases mark the Supreme Court’s sanctioning terrible injustices in this regard. In *United States v. Thind*,¹⁰⁴ the Court affirmed that a “high caste Hindu” man, Bhagat Singh Thind, could not qualify for U.S. naturalization because he was not white within the meaning of a federal immigration statute.¹⁰⁵ The Court found that the statute’s “intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.”¹⁰⁶ The Court clarified, “It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. . . . [H]ad these particular races been suggested the language of the act would have been so varied as to include them within its privileges.”¹⁰⁷

The Justices refused to grant Thind’s argument that Indians were not *Asians*, but rather shared Aryan ancestry with whites.¹⁰⁸ The Court reasoned, “The Aryan theory as a racial basis seems to be discredited by most, if not all, modern writers on the subject of ethnology.”¹⁰⁹ The Court explained, “The term ‘Aryan’ has to do with linguistic and not at all with physical characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin.”¹¹⁰ Despite Thind’s claims, the Court found that whatever Aryan blood Thind’s ancestors once had, it was no longer “pur[e].”¹¹¹ The Court concluded:

It is not without significance in this connection that Congress, by the Act of February 5, 1917, c. 29, § 3, 39 Stat. 874, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress

¹⁰⁴ 261 U.S. 204 (1923).

¹⁰⁵ *Id.* at 210, 215.

¹⁰⁶ *Id.* at 207 (quoting *Ozawa v. United States*, 260 U.S. 178, 195 (1922)).

¹⁰⁷ *Id.* at 207–08 (quoting *Ozawa*, 260 U.S. at 195).

¹⁰⁸ *See id.* at 210–11.

¹⁰⁹ *Id.* at 210.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 213.

would be willing to accept as citizens a class of persons whom it rejects as immigrants.¹¹²

A second case, *Ozawa v. United States*,¹¹³ reached a similar, troubling result, holding firm an embedded eugenic conception of “fitness” for American citizenship. The question, according to the Court, was whether Ozawa, a Japanese man, was a “free white person” within the meaning of a federal naturalization statute.¹¹⁴ After deciding that skin color alone was not sufficient to determine whether Ozawa was a “white person,”¹¹⁵ the Court concluded:

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.¹¹⁶

The second key movement to play a significant role in anti-Chinese sentiment and exclusionary legislation coincided directly with medicine, infection, and disease. “Yellow peril” and the rise in opium addiction among white women incited anti-Asian, especially anti-Chinese, racism in the late 1800s.¹¹⁷ During that period, the disease concept fastened to medical science. Bodies could be diseased by miscegenation, and they could also be diseased by drugs and alcohol. Both race mixing and drugs (such as opium) polluted the body, rendering it violated, decayed, and ultimately ruined. Both concepts were rooted in early eugenic thought; each could be inherited, an altered “race” and a drug addiction. The drug addiction concern was exacerbated by the fact that Asians were blamed for white Americans’ drug addictions, particularly to opium.

The late David Musto, an expert on U.S. drug policy, elaborated on this important historical point: “Americans had quickly associated smoking opium with Chinese immigrants who arrived after the Civil War to work on railroad construction.”¹¹⁸ He explained that “[t]his association was one of the earliest examples of a powerful theme in the American perception of drugs: linkage between a drug and a feared or

¹¹² *Id.* at 215.

¹¹³ 260 U.S. 178 (1922).

¹¹⁴ *Id.* at 190, 195.

¹¹⁵ *Id.* at 197.

¹¹⁶ *Id.* at 198.

¹¹⁷ See CHEN, *supra* note 103, at 88 (“Opponents of Chinese immigration were quick to claim that the Chinese opium users’ habit was physically and mentally self-destructive, contributing to their racial degeneration.”).

¹¹⁸ David F. Musto, *Opium, Cocaine and Marijuana in American History*, 265 SCI. AM. 40, 42 (1991).

rejected group within society.”¹¹⁹ And because “[t]he outstanding feature of nineteenth-century opium and morphine addiction [was] that the majority of addicts were women,” legislators understood the fight against drug addiction not only as a fight against the Chinese but also as a struggle to preserve the future of their nation.¹²⁰

According to Professor Diana Ahmad, physicians led the way in attempts to exclude Chinese people from entrance to the United States.¹²¹ Concerns about “respectable classes,” especially white women, becoming addicted to opium spurred aggressive, collaborative efforts by physicians and legislators to ban Chinese immigration.¹²² Doctors feared “genetic contamination through miscegenation” caused by either white women sleeping with Chinese men to gain access to opium or white men visiting opium dens and purchasing sex from Chinese prostitutes.¹²³ Doctors claimed miscegenation between whites and the Chinese caused racial deterioration — essentially the contamination of whites — and overall promoted social decay in the United States.¹²⁴ Professor Yong Chen’s research further substantiates that point. In a compelling ethnography on the Chinese in San Francisco before World War II, Chen explains that legislators recoiled at “[t]he momentary mingling of Chinese men and white women,” noting that such relationships “represented another serious problem.”¹²⁵

Metaphors of compromised health, pollution, decay, disease, and death caused by Chinese immigrants found common expression in political and medical commentary in the late 1800s and early 1900s. For example, Dr. Arthur B. Stout proclaimed that Chinese miscegenation would bring about the “decay” of a nation.¹²⁶ Interestingly, concerns about race mixing primarily related to how whites would become compromised — their bodies rendered less healthy through intimacy with the Chinese, whether in the context of drug use or prostitution. Dr. Hugh H. Toland, a highly influential doctor who gifted a medical school to the University of California,¹²⁷ “declared that Chinese prosti-

¹¹⁹ *Id.*; see also DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 4 (3d ed. 1999).

¹²⁰ DAVID T. COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940*, at 36 (1982) (noting surveys indicating that in Iowa, Michigan, and Chicago over sixty percent of those addicted to opium and morphine were women).

¹²¹ See Diana L. Ahmad, *Opium Smoking, Anti-Chinese Attitudes, and the American Medical Community, 1850-1890*, 1 *AM. NINETEENTH CENTURY HIST.* 53, 53-54 (2000).

¹²² See *id.* at 54, 59, 65.

¹²³ *Id.* at 61.

¹²⁴ See *id.*

¹²⁵ CHEN, *supra* note 103, at 86.

¹²⁶ ARTHUR B. STOUT, *CHINESE IMMIGRATION AND THE PHYSIOLOGICAL CAUSES OF THE DECAY OF A NATION* 5 (1862).

¹²⁷ *A History of UCSF*, U.C.S.F., <http://history.library.ucsf.edu/toland.html> [http://perma.cc/E26Y-2QPA].

tutes were responsible for nine-tenths of the syphilis cases in San Francisco.”¹²⁸

Dr. Harry Hubbell Kane, a chief architect in associating opium use with Chinese immigrants, wrote that opium addiction is “[m]orally . . . *always* for the worse”¹²⁹ and burdens the government because it is “a fertile cause of crime, lying, insanity, debt and suicide.”¹³⁰ According to Kane, opium addiction promoted the breeding of sensuality and destroyed bodily and mental functions.¹³¹

The legislative debates marking passage of both the Harrison Narcotic Act of 1914 (the first antinarcotic regulations in the United States) and the Marijuana Tax Act of 1937 stoked racial anxieties and fears about Chinese immigrants, African Americans, and Mexicans.¹³² Well-worn but effective stereotypes fastening race and sex to drug trafficking amplified these concerns.

In a fascinating chronicle of these issues, *Drugs and Race in American Culture*, Timothy Hickman proffers that American drug dependence became politically associated with Chinese “opium” men,¹³³ in spite of the fact that many early-twentieth-century drug addictions resulted from the care of white physicians who treated a wide range of maladies with narcotic injections.¹³⁴ For decades, doctors successfully plied their female patients with laudanum, a tincture primarily derived from opium, to relieve pain and aches.¹³⁵ To alleviate colic and ease

¹²⁸ CHEN, *supra* note 103, at 86 (writing that Toland’s white patients “think diseases contracted from Chinawomen are harder to cure than those contracted elsewhere” (quoting *Chinese Immigration: The Social, Moral, and Political Effect of Chinese Immigration: Hearing Before the S. Special Comm. on Chinese Immigration*, 21st Sess. 104 (Cal. 1876))).

¹²⁹ H.H. Kane, *Opium Smoking: A New Form of the Opium Habit Amongst Americans*, 33 GAILLARD’S MED. J. 101, 114 (1882).

¹³⁰ Ahmad, *supra* note 121, at 54 (quoting H.H. KANE, OPIUM-SMOKING IN AMERICA AND CHINA 153 (1882)).

¹³¹ Kane, *supra* note 129, at 110–14.

¹³² See Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 39; see also Mathea Falco, *Toward a More Effective Drug Policy*, 1994 U. CHI. LEGAL F. 9, 10; LEAGUE OF WOMEN VOTERS OF THE CHARLESTON AREA, MAPPING THE ELEPHANT: ILLEGAL DRUGS IN SOUTH CAROLINA 13 (2010), http://lwvcharleston.org/files/complete_drug_study_revised.pdf [<http://perma.cc/U6G6-N8KD>].

¹³³ Hickman, *supra* note 28, at 71. Indeed, “[r]eports of the British Opium Wars of the 1840s and a steady stream of sensationalized, journalistic descriptions of American and Chinese ‘opium dens’ had long confirmed the relationship of the Chinese with opium use for many Americans.” *Id.*

¹³⁴ *Id.*

¹³⁵ See *Developing Treatments: Pain*, MUSEUM ROYAL PHARM. SOC’Y (2006), <https://www.rpharms.com/museum-pdfs/e-pain.pdf> [<http://perma.cc/XRE3-ZBP9>]; see also CHEN, *supra* note 103, at 89–90 (explaining that despite popular misconception, “Chinese immigrants . . . were not responsible for introducing the drug to the United States — it had arrived long before them. . . . Americans . . . , along with the British, were responsible for creating a large-scale drug problem in China during the Daoguang years (1821–50). Before the Opium War American players in the China trade, such as Perkins & Company and Russel & Company, became important suppliers for

other infant ailments, nurses spoon-fed laudanum to babies or rubbed it “on [their] gums to relieve the pain of teething.”¹³⁶ Opium use or “opiophagism” (opium eating) was habitual and, according to the *Journal of the American Medical Association*, “found in all parts of the country and in nearly every walk [of] life.”¹³⁷ The Royal Pharmaceutical Society notes: “In the 1800s [laudanum] was the most readily available pain-killer. Many people became dependent on it and some died from overdoses. It was not only the adult population who ran these risks. Infants were given sweetened preparations of laudanum, sold under names such as ‘Mother’s Quietness.’”¹³⁸

Opium and its derivatives vitalized the medical and pharmaceutical industries. In fact, around 1900, Bayer Pharmaceuticals (today best known for aspirin) made available a new product: “heroin hydrochloride,” which could be taken as tablets.¹³⁹ Bayer’s heroin tablets were recommended for treating a range of illnesses from whooping cough to shortness of breath; “[t]he dose for adults was 1–2 tablets 2–3 times a day. For children over 2 years old half a tablet was to be taken 2–3 times a day.”¹⁴⁰

Despite white doctors plying their white patients with opiates and the widespread accessibility of narcotic pain medications, “the association of Asian otherness with drug use and its effects persisted in the turn-of-the-century debate surrounding narcotic addiction.”¹⁴¹ Indeed, anti-Asian bigotry “was embedded in the medical literature of narcotic addiction.”¹⁴²

Asians served as a metaphor for and cause of drug addiction; “to . . . be Chinese was to be like an addict,” according to Hickman.¹⁴³ They became a convenient political scapegoat for whites’ drug addictions, and protecting the nation’s public health served as a proxy for legalized discrimination. In other words, “to be an addict was to be

China’s increasing inhaling population. In negotiating the 1858 Sino-American treaty with China, American officials managed to lift the ban on opium importation to China.” (footnotes omitted).

¹³⁶ *Developing Treatments: Drugs for Pleasure, Drugs for Pain? Part Two: Opium, Morphine, & Heroin*, MUSEUM ROYAL PHARM. SOC’Y (2011), <http://www.rpharms.com/museum-pdfs/controlled-drugs---opium--morphine-and-heroin.pdf> [<http://perma.cc/P27Q-FKNM>] (further explaining that “[d]uring the 1800s morphine was also included in many children’s medicines, including soothing syrups,” and that “[m]orphine was not completely removed from [Mrs. Winslow’s] syrup[] formula until . . . 1915 in the US”).

¹³⁷ “*Opiokapnism*” or *Opium Smoking*, 1892 J. AM. MED. ASS’N 719.

¹³⁸ *Developing Treatments: Pain*, *supra* note 135.

¹³⁹ *Id.*

¹⁴⁰ *Developing Treatments: Drugs for Pleasure, Drugs for Pain?*, *supra* note 136 (highlighting that “papine” was another “liquid preparation of opium, used for relieving pain” and promoted for use with children).

¹⁴¹ Hickman, *supra* note 28, at 71.

¹⁴² *Id.* at 72.

¹⁴³ *Id.* (emphasis added).

like the Chinese”¹⁴⁴ — an unwelcomed status. Dr. Samuel Collins, a noted voice in the antiaddiction movement, suggested that opium addiction could virtually turn white women Chinese. He wrote that when “Mrs. Jones,” a common white woman, became an “opium eater” her skin became yellow and her eyes assumed an “unearthly” aspect.¹⁴⁵ He conjectured that even her home became yellow, perhaps insinuating that she had lost what was American and white about her; she became a friendless foreigner.¹⁴⁶ Collins wrote that “[t]he physical improvement or regeneration of the race can come only through the mothers. . . . We urge upon you ladies, who are about to become mothers, to shun opium in all its forms as you would a loathsome contagion.”¹⁴⁷

From a political point of view, framing opium trafficking in Sinophobic terms, such as Chinese men’s efforts to seduce defenseless white women, helped to justify race-based immigration exclusion strategies, including the Chinese Exclusion Act of 1882¹⁴⁸ and the Scott Act of 1888¹⁴⁹ (enacted with near unanimous support¹⁵⁰). These laws dramatically strained Chinese emigration, particularly as the latter permanently prohibited Chinese laborers’ immigration and return to the United States. To the extent that such laws evoked criticism due to their explicit racial design and objectives,¹⁵¹ political punditry as well as twentieth-century pulp fiction, linking the Chinese to a drug crisis, provided a provocative counternarrative.¹⁵² As one commenta-

¹⁴⁴ *Id.*

¹⁴⁵ SAMUEL B. COLLINS, *THERIAKI: A TREATISE ON THE HABITUAL USE OF NARCOTIC POISON* 19 (1887).

¹⁴⁶ *Id.* (“[T]he opium was yellow, she lived in a yellow house, and she had a yellow skin. She was auriferous all the way through. A poor miserable woman, nobody befriended her . . .”).

¹⁴⁷ *Id.* at 8.

¹⁴⁸ Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943). Section 14 of the Act reads: “[H]ereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.” *Id.*

¹⁴⁹ Scott Act, ch. 1064, 25 Stat. 504 (repealed 1943). The Scott Act made it illegal for Chinese who departed to return to the United States. It read in part: “[I]t shall be unlawful for any [C]hinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.” *Id.*

¹⁵⁰ MARTIN B. GOLD, *FORBIDDEN CITIZENS* 288 (2012) (noting that only three senators voted in opposition); *Blair, the White Elephant of the Administration*, *HARPWEEK*, <http://www.harpweek.com/09Cartoon/BrowseByDateCartoon.asp?Month=October&Date=10> [<http://perma.cc/6TJQ-ML4R>].

¹⁵¹ S. J. Res. 23, 2013–2014 Sess. (Cal. 2014) http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=20132014oSJR23 [<http://perma.cc/CNX4-L2DF>] (discussing that Senator George Frisbie Hoar argued against the Chinese Exclusion Act as in conflict with “American institutions” because of its legal distinction based on race).

¹⁵² Jess Nevins, *Yellow Peril Thrillers*, *LOOKING GLASS*, <http://lookingglassmagazine.com/observatory?p=162> [<http://perma.cc/LJ7A-LJMC>]; Phillip Smith, *Four of the Major Fear Cam-*

tor explained, the Chinese came to be viewed as “physical, racial, and social pollutants,”¹⁵³ addicting themselves and others to narcotics.

Medical rationales motivated by racial stereotyping played key roles in legislation to exclude Chinese entry into the United States. The Chinese Exclusion Act and subsequent legislation, including the National Origins Act of 1924,¹⁵⁴ prohibited all Asian entry into the United States. Not until the passage of the Magnuson Act in 1943 were Chinese allowed entry and even then only around 105 per year.¹⁵⁵ It took eighty years before discriminatory legislation against the Chinese was finally lifted by the 1965 Immigration Act,¹⁵⁶ demonstrating, as Professors Nico Voigtländer and Hans-Joachim Voth contend, that the legacy of stereotyping, bias, and discrimination can persist long after an actual or perceived health crisis dies away.¹⁵⁷

II. IMPLICIT BIAS, INFECTION, AND IMMUNITY

Relieved to be told that this vaccine was not for people like me, I failed to consider what exactly that meant.

— Eula Biss (p. 24)

Race has been a central concern in the United States since the Founding. Race influences attitudes about the spread of disease, shapes norms in the delivery of medicine, and influences legal policy in the medical field. As demonstrated in Part I, protecting and safeguarding the public’s health has, at times, served as the legal basis for explicitly restricting the rights of minorities and justified government abuse of power against people of color, the poor, and stigmatized communities. Throughout the twentieth century, public health rationales were deployed in the exercise of denying basic civil rights and sometimes even criminalization of otherwise legal conduct. We name a few here: criminal prohibitions against interracial marriage, homosex-

paigns that Helped Create America’s Insane War on Drugs, ALTERNET (Feb. 9, 2015), <http://www.alternet.org/drugs/four-moral-panics-drug-policy> [<http://perma.cc/Q278-4UCC>]; Tim Yang, *The Malleable Yet Undying Nature of the Yellow Peril*, <http://www.dartmouth.edu/~hist32/History/S22%20-The%20Malleable%20Yet%20Undying%20Nature%20of%20the%20Yellow%20Peril.htm> [<http://perma.cc/9JEH-52M5>].

¹⁵³ Nevins, *supra* note 28 (noting that anti-Chinese sentiments grew as “Chinese were recast as drug-using sexual deviants”).

¹⁵⁴ Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

¹⁵⁵ Chinese Exclusion Repeal Act, ch. 344, 57 Stat. 600 (1943); *Milestones: 1937-1945*, OFF. HISTORIAN, U.S. DEP’T STATE, <https://history.state.gov/milestones/1937-1945/chinese-exclusion-act-repeal> [<http://perma.cc/9M9K-T3KU>].

¹⁵⁶ Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 913 (codified as amended in scattered sections of 8 U.S.C.).

¹⁵⁷ Nico Voigtländer & Hans-Joachim Voth, *Persecution Perpetuated: The Medieval Origins of Anti-Semitic Violence in Nazi Germany*, 127 Q.J. ECON. 1339 (2012).

ual intimacy, alcohol selling and consumption, adultery, pornography, and gambling.¹⁵⁸

However, implicit racial biases actually undermine the public's health. That is, individuals may perceive themselves to be immune from certain diseases based on their race or socioeconomic status. Doctors may share these implicit biases and fail to recommend certain medical treatments to some patients, believing that those vaccines or medicines will not provide a benefit or are unnecessary. Implicit biases can result in injury and even death. For example, when the pediatrician treating Eula Biss's son suggested that Hepatitis B vaccination was "for the inner city," and not for people like her, he problematically framed the vaccine as one "designed to protect the babies of drug addicts and prostitutes" and not children like hers (pp. 23–24). As she recounts, the doctor assured her the vaccine was not something that educated, white women like her needed to worry about (p. 24).

A brief, but frightful, bout of Ebola on U.S. shores that infected fewer than a handful of people during 2014 exposed outsized racialized biases in the public's perception of disease. For example, while lawmakers called for flight bans to western African nations,¹⁵⁹ very little attention was paid to enterovirus, a highly contagious virus associated with severe respiratory illness that swept through forty-nine states and severely infected over 1000 people, almost exclusively children.¹⁶⁰ Compared to the one death associated with Ebola in the United States by November 2014, there were fourteen patients whose deaths were associated with enterovirus during the exact same period.¹⁶¹ In fact, the CDC estimated that "there were likely millions of mild EV-D68 [enterovirus] infections for which people did not seek medical treatment and/or get tested."¹⁶²

What accounts for how some communities view their vulnerability to disease? Biss suggests that race sometimes plays a factor. We agree.

¹⁵⁸ See, e.g., *Perez v. Lippold*, 198 P.2d 17, 23–24 (Cal. 1948) (rejecting California's argument that state antimiscegenation law was necessary for public health and holding the law unconstitutional). Antisodomy statutes, now rendered unconstitutional by *Lawrence v. Texas*, 539 U.S. 558 (2003), provide yet another example.

¹⁵⁹ Sarah Ferris, *Dems Call for Ebola Flight Ban*, THE HILL (Oct. 9, 2014, 4:03 PM), <http://thehill.com/policy/healthcare/220317-dems-call-for-obama-to-ban-flights-from-ebola-countries> [<http://perma.cc/Q2H6-JX5C>] ("A group of 27 lawmakers, including three Democrats, signed a letter . . . urging Obama to ignore health officials and immediately halt flights from the West African countries worst-affected by Ebola.")

¹⁶⁰ *Non-Polio Enterovirus: Enterovirus D68*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 23, 2015), <http://www.cdc.gov/non-polio-enterovirus/about/ev-d68.html> [<http://perma.cc/7AYN-NMHU>].

¹⁶¹ *Id.*

¹⁶² *Id.*

A. *Smallpox: The Idea of a Tainted Community*

The problem with status-based conceptions of disease and implicit biases is that they underestimate the reach of viruses that do not discriminate by skin color, ethnicity, religion, sex, or socioeconomic status. Medical policies, including vaccination regimens driven by such attitudes, pose as significant a set of public health concerns now as they have in the past. Much can be learned from the experience with smallpox, the disease that “killed more people in the twentieth century than all the century’s wars” (p. 83).

Smallpox was a virtual plague; it decimated communities, robbed children of their mothers, buried fathers, and killed thousands of children. In Europe, millions died in the late nineteenth century from smallpox outbreaks.¹⁶³ Those who survived smallpox were usually marked for life with horrible lesions and scarring on their faces, trunks, hands, and arms.¹⁶⁴ Nevertheless, as Biss recounts, “[w]hen the last nationwide smallpox epidemic began in 1898, some people believed that whites were not susceptible to the disease” (p. 25). Their presumption of immunity was rooted in deeply engrained racial ideology.

According to Professor Peter Ubel, whites were not alarmed by smallpox outbreaks among communities of Black farmers in southern states because they believed the disease was brought on by the vices of Black people.¹⁶⁵ Therefore, smallpox was considered a Black person’s disease in the United States, referred to infamously in medical literature as “Nigger itch” (p. 25). As such, “Nigger itch” infected only Blacks, but white Americans were immune, or so they thought. As a result even southern whites failed to heed any cause for alarm; they avoided vaccination. Indeed, “a vocal minority argued vehemently that the vaccine was of no benefit.”¹⁶⁶

Because smallpox was racialized, doctors and government officials failed to engage preventative protocols that could have spared communities.¹⁶⁷ Importantly, as Ubel recounts, the smallpox virus “was colorblind.”¹⁶⁸ It is important to note here that such bias implicates the

¹⁶³ See Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 BAYLOR U. MED. CTR. PROC. 21, 21 (2005) (“In the 18th century in Europe, 400,000 people died annually of smallpox, and one third of the survivors went blind.”).

¹⁶⁴ *Id.*; *Fact Sheet on Smallpox*, WORLD HEALTH ORG. (Oct. 2001), <http://www2.cdc.gov/nip/isd/spoxclinician/contents/references/factsheet.pdf> [http://perma.cc/XEF8-U29G].

¹⁶⁵ Peter Ubel, *When Americans Rejected Small Pox Vaccines*, FORBES (Sept. 5, 2012, 2:38 PM), <http://www.forbes.com/sites/peterubel/2012/09/05/when-americans-rejected-small-pox-vaccines>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

integrity of the medical field; after all, it was Biss's doctor who declared that Hepatitis B shots were not for her son (pp. 23–24).

B. Racism, Class Bias, and the Vaccination Blindspot

In this Review, we describe times in history when government has abused power and harmed minorities in the name of protecting the public's health. Equally problematic, the government has also tolerated or been slow to intervene against practices that harm the public health when the perpetrators are the most privileged in society: wealthy, white Americans. For example, implicit bias and "institutionalized racism" create dramatic disproportionalities in how the state responds to claims of parental neglect in Black and white families.¹⁶⁹ Vaccination is a particularly important and timely example.

For example, in 2015, claims that undocumented immigrants spread measles emerged during a recent outbreak in the United States.¹⁷⁰ Yet Tara Haelle, a health columnist for *Forbes*, argues the outbreak was a "home-grown" problem caused by privileged but paranoid white Americans who fear a link between vaccines and autism.¹⁷¹ Ultimately, economically and politically elite parents who refuse to vaccinate their children not only risk their children's becoming

¹⁶⁹ Robert B. Hill, *Institutional Racism in Child Welfare*, 7 RACE & SOC'Y 17, 18 (2004) (finding that despite "popular belief . . . all three [National Incidence Studies of Child Abuse and Neglect] studies revealed that black families do not maltreat their children more often than white families. . . . And, when class and other risk factors are controlled for, blacks have lower rates of abuse and neglect than whites.").

¹⁷⁰ Glenn Kessler, *Is There a Link Between the Measles Outbreak and Illegal Immigration?*, WASH. POST (Feb. 6, 2015), <https://www.washingtonpost.com/blogs/fact-checker/wp/2015/02/06/is-there-a-link-between-the-measles-outbreak-and-illegal-immigration> [http://perma.cc/J9N5-N3TQ] (quoting conservative opinion leaders as arguing that the measles outbreak was linked to undocumented immigration, and noting that the CDC did not trace either the 2015 outbreak or previous ones to undocumented immigration).

¹⁷¹ Tara Haelle, *Five Things to Know About the Disneyland Measles Outbreak*, FORBES (Jan. 20, 2015, 8:01 AM), <http://www.forbes.com/sites/tarahaelle/2015/01/20/five-things-to-know-about-the-disneyland-measles-outbreak>. Antivaccination campaigns intensified after the publication of a 1998 study in *The Lancet*. The article, written by Dr. Andrew Wakefield, inferred a possible link between autism and measles, mumps, and rubella vaccines. Wakefield et al., *supra* note 38, at 637. Despite Wakefield's express caution that the study did not "prove an association" between the vaccines and autism, *id.* at 641, his media interviews, press conferences, undisclosed financial conflicts, and the overall weakness of his study resulted in scientists discrediting the article, see Sarah Boseley, *Andrew Wakefield Found "Irresponsible" by GMC over MMR Vaccine Scare*, THE GUARDIAN (Jan. 28, 2010, 3:34 PM), <http://www.theguardian.com/society/2010/jan/28/andrew-wakefield-mmr-vaccine> [http://perma.cc/E5MM-4VM8], his study's subsequent retraction from *The Lancet*, The Editors of *The Lancet*, *Retraction — Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 375 THE LANCET 445, 445 (2010), and the loss of his medical license, see John F. Burns, *British Medical Council Bars Doctor who Linked Vaccine with Autism*, N.Y. TIMES (May 24, 2010), <http://www.nytimes.com/2010/05/25/health/policy/25autism.html>.

sick and possibly dying, but also risk infecting others.¹⁷² Such public health threats are real, and government has a compelling interest to intervene. So why do government officials, doctors, social workers, and public schools accommodate these parents' preferences and behavior when such harms can result?¹⁷³

In *On Immunity*, Biss grapples with some of these issues, devoting a chapter to concerns about the racialization of smallpox and Hepatitis B (pp. 23–28). She informs readers about an awkward interaction with her son's pediatrician who reminded her that she is not *one of them* (pp. 23–32). She ponders: *what did this mean?* As Biss recounts, after the doctor assured her that Hepatitis B shots are not for people like her son, she felt “ashamed by how little of [the doctor's] racial code [she] registered” (p. 24). Biss acknowledges that “[t]he belief that public health measures are not intended for people like us is widely held by many people like me” (p. 24). She confides to readers that “[p]ublic health, we assume, is for people with less — less education, less healthy habits, less access to quality health care, less time and money” (p. 24).

However, in 2015, the United States experienced a reported 189 cases of measles from “24 states and the District of Columbia,” but “most of these cases [113 cases (60%)] were part of a large multi-state outbreak linked to an amusement park in California.”¹⁷⁴ In the previous year, the United States “experienced a record number of measles cases . . . with 667 [infections] from 27 states [accounting for] . . . the greatest number of cases since measles elimination was documented in the U.S. in 2000.”¹⁷⁵ According to the CDC, “[t]he majority of people who got measles were unvaccinated,”¹⁷⁶ and in 2015 the cases were attributed primarily to wealthy white parents in southern California.¹⁷⁷ Pundits question the reason behind the rise in measles cases, particularly as the disease was “considered eliminated” fifteen years ago.¹⁷⁸

¹⁷² According to the World Health Organization, “[m]easles is one of the most infectious human diseases and can cause serious illness, lifelong complications and death.” WORLD HEALTH ORG., GLOBAL MEASLES AND RUBELLA: STRATEGIC PLAN 2012-2020, 10 (2012). At least two million deaths per year and tens of thousands of incidences of blindness were attributed to the disease worldwide before the broad availability of a vaccine. *See id.*

¹⁷³ Biss explains that “[u]nvaccinated children . . . are more likely to be white, to have an older married mother with a college education” (p. 27).

¹⁷⁴ *Measles (Rubeola): Measles Cases and Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/measles/cases-outbreaks.html> (last updated Oct. 19, 2015) [<http://perma.cc/3URA-AXQ3>].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Haille, *supra* note 171.

¹⁷⁸ *See, e.g.*, Mark Berman, *How the U.S. Went from Eliminating Measles to a Measles Outbreak at Disneyland*, WASH. POST (Jan. 23, 2015), <https://www.washingtonpost.com/news/post>

Haelle explains, “It’s . . . upper-middle class, well-educated, mostly white southern California parents who have chosen not to vaccinate their children we should be giving the side-eye to.”¹⁷⁹ She is right. In some pockets of the United States, the vaccination rates among wealthy white parents dip below that of developing countries.¹⁸⁰ One reporter’s investigation into these concerns in California revealed:

Whether it’s measles or pertussis, the local children statistically at the greatest risk for infection aren’t, as one might imagine, the least privileged — far from it. An examination by *The Hollywood Reporter* of immunization records submitted to the state by educational facilities suggests that wealthy Westside kids — particularly those attending exclusive, entertainment-industry-favored child care centers, preschools and kindergartens — are far more likely to get sick (and potentially infect their siblings and playmates) than other kids in L.A.¹⁸¹

And while vaccination is required for school admission, some parents “express their noncompliance by submitting a form known as a personal belief exemption (PBE) instead of paperwork documenting a completed shot schedule.”¹⁸² The exemption rate for some wealthy southern California communities is over four times that of the general Los Angeles population.¹⁸³ The result is that health threats extend beyond measles to whooping cough and chicken pox.

In 2014, nearly eleven thousand cases of onset pertussis (whooping cough) were reported to the California Department of Public Health.¹⁸⁴ Moreover, of the nearly 380 cases that required hospitalization, almost one-quarter required intensive care.¹⁸⁵ Disease outbreaks like whooping cough and measles broaden risks to the under-vaccinated as well as the unvaccinated because herd immunity is compromised.¹⁸⁶ For measles, herd immunity requires that over ninety

-nation/wp/2015/01/23/how-the-u-s-went-from-eliminating-measles-to-a-measles-outbreak-at-disneyland [http://perma.cc/NA7Z-ACMJ].

¹⁷⁹ Haelle, *supra* note 171.

¹⁸⁰ See Gary Baum, *Hollywood’s Vaccine Wars: L.A.’s “Entitled” Westsiders Behind City’s Epidemic*, HOLLYWOOD REPORTER (Sept. 10, 2014, 9:00 AM), <http://www.hollywoodreporter.com/features/los-angeles-vaccination-rates> [http://perma.cc/9XZS-9WYV].

¹⁸¹ *Id.*

¹⁸² *Id.* (“The number of PBEs being filed is scary.”).

¹⁸³ See *id.*; see also Lydia O’Connor, *Do Not Bring Your Kids to “Measles Parties,” Doctors Warn*, HUFFINGTON POST (Feb. 11, 2015, 6:59 PM), http://www.huffingtonpost.com/2015/02/11/measles-parties-warning_n_6658232.html [http://perma.cc/G76L-7W4Z] (discussing parents who host “measles parties,” where an infected child exposes other children to the virus).

¹⁸⁴ CAL. DEP’T OF PUB. HEALTH, PERTUSSIS REPORT 1 (Jan. 7, 2015), http://www.cdph.ca.gov/programs/immunize/Documents/Pertussis_Report_1-7-2015.pdf [http://perma.cc/FA9X-3D6Y] (finding that as of January 2015 “California is currently experiencing a pertussis epidemic,” and “the overall incidence of [the disease] has increased since the 1990s”).

¹⁸⁵ *Id.*

¹⁸⁶ Community immunity (or “herd immunity”) necessitates that a “critical portion . . . of a population is vaccinated against a contagious disease,” at which point the majority of members

percent of the population be vaccinated in order for the vaccine to be effective.¹⁸⁷ In other words, to stop the infection rate of measles, public health officials must ensure that an individual will cause, on average, fewer than one infection.¹⁸⁸ For this reason, wealthy parents who refuse to vaccinate their children undermine herd immunity more than poor parents who *undervaccinate* because at least one inoculation in a series provides some immunity,¹⁸⁹ whereas the total absence of vaccination threatens the full herd.

The nonvaccination problem is not restricted to California. In a wealthy, predominantly white community in Ashland, Oregon, twenty-five percent of kindergartners were exempted from at least one vaccine in the 2007–2008 school year.¹⁹⁰ According to one parent in Ashland: “I don’t think I know anyone in Ashland who has vaccinated on the CDC schedule, and most of them haven’t vaccinated at all.”¹⁹¹ Nevertheless, there are no reported cases of negligence filed in that town against parents who fail to vaccinate.

Research into disparities in child welfare outcomes sheds some light on this phenomenon. In a recent publication, *Keeping the White Family Together*, Professor Angela Kaufman writes, “[D]ifferences in outcomes between black and white children in [child protective services] may be largely due to the perception that blacks constitute a more dangerous group, even when their behaviors are similar to that of

in the community are protected against the disease, because members of the “herd,” including pregnant women and infants, are safeguarded or shielded from the potential penetration of the virus. Chemerinsky & Goodwin, *supra* note 46 (manuscript at 13–14).

¹⁸⁷ See WORLD HEALTH ORG., *supra* note 172, at 13 (estimating that ninety percent of coverage of the first routine dose and ninety-five percent with supplementary immunization will “[r]educ[e] annual measles incidence to less than five cases per million and maintain that level”).

¹⁸⁸ See Marcel Salathé, *Why a Few Unvaccinated Children Are an Even Bigger Threat than You Think*, WASH. POST (Feb. 3, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/02/03/why-a-few-unvaccinated-children-are-an-even-bigger-threat-than-you-think/> [http://perma.cc/TY4Y-UWRT].

¹⁸⁹ See, e.g., *Measles (Rubeola): Measles Vaccination*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/measles/vaccination.html> (last updated July 1, 2015) [http://perma.cc/5ZHA-43WY] (“One dose of [the measles] vaccine is about 93% effective at preventing measles if exposed to the virus, and two doses are about 97% effective.”).

¹⁹⁰ Kelly Yan, *Oregon’s Low Vaccination Rate Causes Health Concerns*, OR. LIVE (Aug. 27, 2008, 5:06 AM), http://www.oregonlive.com/kiddo/index.ssf/2008/08/post_2.html [http://perma.cc/2GWE-48W9]. Over forty percent of Ashland residents have a family income of over \$75,000 per year. *Selected Economic Characteristics*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/bkmk/table/1.o/en/ACS/13_5YR/DP03/1600000US4103050%7C0400000US41 (last visited Nov. 22, 2015).

¹⁹¹ Yan, *supra* note 190; see also Jennifer Steinhauer, *Public Health Risk Seen as Parents Reject Vaccines*, N.Y. TIMES (Mar. 21, 2008), <http://www.nytimes.com/2008/03/21/us/21vaccine.html> (describing one antivaccination parent who “saw medical studies, not given to use by the mainstream media, connecting [vaccines] with neurological disorders, asthma and immunology”).

whites.”¹⁹² Zena Oglesby, the executive director of the Institute for Black Parenting, argues that racism continues to shape the very different ways in which government agencies and courts address protecting children’s health, including whether they are likely to remove a child from the home. He informed a reporter that Black children are at greater risk of being separated from their parents, even in situations “where flagrant abuse is not an issue.”¹⁹³ Oglesby explained, “Black children still tend to be taken into custody at a much higher rate, and kept in the [foster care] system much longer.”¹⁹⁴

According to Dean Alan J. Dettlaff, empirical studies “have found that even after controlling for both poverty and risk, race remains a significant predictor of disparities at various decisionmaking points.”¹⁹⁵ For example, even when controlling for income and risk, a study published in the journal of child welfare “found that African American children were 77% more likely to be removed and placed into foster care in lieu of receiving services in their home compared to White children.”¹⁹⁶ Numerous studies in the last decade show that racial disparities persist at every level of decisionmaking in child protective service involvement, from allegations of abuse and initiation of case files,¹⁹⁷ and prosecution of allegations of neglect and abuse,¹⁹⁸ to out-of-home placements and even exits from the system.¹⁹⁹ Kaufman explains that racial disparities and bias are “especially evident in less serious reports, where case workers and judges have greater

¹⁹² Angela M. Kaufman, *Keeping the White Family Together: Racial Disparities in the Out-of-Home Placements of Maltreated Children*, 3 *ADVANCES APPLIED SOC.* 320, 321 (2013) (“[E]vidence from case review studies often support racial bias in child maltreatment reporting.”).

¹⁹³ Katti Gray, *What’s Really Behind Black Child-Abuse Stats*, *THE ROOT* (Mar. 24, 2011, 12:52 AM), http://www.theroot.com/articles/culture/2011/03/black_childabuse_statistics_report_debunks_bias_assumptions.html.

¹⁹⁴ *Id.* (alteration in original).

¹⁹⁵ Alan J. Dettlaff, *Racial Disproportionality and Disparities in the Child Welfare System*, *CW360*, Winter 2015, at 5; see also Kaufman, *supra* note 192, at 321 (“The belief that biases and discrimination are behind racial disparities in CPS agency involvement is supported by several national studies suggesting there are no racial-ethnic differences in the occurrence of child maltreatment.”).

¹⁹⁶ Dettlaff, *supra* note 195, at 5 (citing S. L. Rivaux et al., *The Intersection of Race, Poverty and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 *CHILD WELFARE* 151 (2008)).

¹⁹⁷ In their study, Fluke et al. found that “African American children were overrepresented and White children consistently underrepresented at the stage of investigation” in each of the five states they studied. John D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 *CHILD. & YOUTH SERVS. REV.* 359, 359 (2003).

¹⁹⁸ Katherine Elliott & Anthony Urquiza, *Ethnicity, Culture, and Child Maltreatment*, 62 *J. SOC. ISSUES* 787, 787–88 (2006).

¹⁹⁹ Dettlaff, *supra* note 195, at 5.

discretion, and are thus more susceptible to the practice of differential response.”²⁰⁰

Racial biases also privilege white parents. We could not find any reported instances of child-neglect claims filed in wealthy, predominantly white communities that refuse vaccination. By contrast, poor and minority parents are more likely to be reported to law enforcement and child protection services for neglect and to have their children removed from the home.

C. *Implicit Bias and Medical Decisionmaking*

What accounts for racially biased treatment in law and medicine? Research suggests that implicit biases, which derive from automatic, heuristic-driven neural processes that produce assumptions about individuals or groups, may hold answers. Implicit biases shape unconscious attitudes, beliefs, and actions according to status markers such as ethnicity, religion, sex, class, and race.²⁰¹

We argue that implicit biases held by members of the public, government decisionmakers, and medical professionals may also produce negative public health impacts, including demographic health disparities and differences in access to and quality of medical care that are not fully explained by differences in patient education, income, insurance status, expressed preference for treatments, and severity of disease. Even for African Americans with uncompromised access to health care services, gross disparities persist in diagnostic screening, general medical care, mental health diagnosis and treatment, pain management, HIV-related care, and treatments for cancer, heart disease, diabetes, and kidney disease.²⁰²

Implicit bias may be a significant factor in dissimilar care and health disparities²⁰³ because health disparities develop along at least two paths: (1) microlevel discriminatory behavior occurring in the ex-

²⁰⁰ Kaufman, *supra* note 192, at 321.

²⁰¹ Professor Charles Lawrence argues that unconscious discrimination and bias are rooted in a shared “historical and cultural heritage” that transmits beliefs and preferences about groups of people. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); *see also* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973–75 (2006).

²⁰² *See* Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care*, 263 J. AM. MED. ASS’N 2344, 2344–45 (1990); Michelle van Ryn & Steven S. Fu, *Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Racial/Ethnic Disparities in Health?*, 93 AM. J. PUB. HEALTH 248, 248–49 (2003); Executive Summary, BRIAN D. SMEDLEY ET AL., UNEQUAL TREATMENT 5–6 (2003), <http://www.allhealth.org/briefingmaterials/UnequalTreatment-56.pdf> [<http://perma.cc/9RW4-BSCD>].

²⁰³ For example, the Institute of Medicine has defined disparities in care “as racial or ethnic differences in the quality of healthcare that are not due to access-related factors or clinical needs, [patient] preferences, and appropriateness of intervention.” SMEDLEY ET AL., *supra* note 202, at 3–4 (citation omitted).

change between the individual patient and provider, and (2) macrolevel operation and regulation of health care systems.²⁰⁴ In the context of medicine, “differences in care that result from biases, prejudices, stereotyping, and uncertainty in clinical communication and decision-making”²⁰⁵ can impact not only the discriminated individual, but also the broader community’s public health.

For example, a study involving a sample of 618 post-angiogram physician-patient encounters traced the relationship between race and socioeconomic status to physician perceptions and medical decision-making.²⁰⁶ After adjusting for “patient age, sex, frailty/sickness, depression, mastery, social assertiveness,”²⁰⁷ and physician age, sex, race, and specialty,²⁰⁸ researchers found that “[p]atient race was associated with physicians’ assessment of patient intelligence, feelings of affiliation toward the patient, and beliefs about patient’s likelihood of risk behavior and adherence with medical advice.”²⁰⁹ Compared to white patients, Black patients with coronary artery disease were “more likely to be seen as at risk for noncompliance with cardiac rehabilitation, substance abuse, and having inadequate social support.”²¹⁰

Biss sheds light on such biases when describing her personal interactions with medical professionals who distinguished her son — and the care he should or should not receive — from babies born of poor mothers (pp. 23–24). Because these biases operate at the subconscious level, medical professionals who perceive themselves as open minded and attuned to racism may also act on cognitively based prejudices. Recall the advice of Biss’s “left of center” pediatrician that we recounted in the previous section: “Hep B was a vaccine for the inner city” (p. 23). But “[a]ll that this doctor knew of [Biss] then was what he could see” (p. 24). And although she lived in “the outer city of Chicago, [her] neighborhood [was] very much like what some people mean when they use the term *inner city*” (p. 24). The broader impact of such advice is potentially devastating from a public health perspective. Because herd immunity is absolutely necessary in order for vaccines to work effectively, any break in the line of resistance could mean serious health risks for all.

As implicit biases aggregate to change the landscape of a particular case, they also begin to alter the direction of the entire medical field.

²⁰⁴ *Id.* at 4.

²⁰⁵ *Id.*

²⁰⁶ Michelle van Ryn & Jane Burke, *The Effect of Patient Race and Socio-Economic Status on Physicians’ Perceptions of Patients*, 50 SOC. SCI. & MED. 813, 813 (2000).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 816.

²⁰⁹ *Id.* at 813.

²¹⁰ *Id.* at 821.

Implicit biases may help explain the widening health disparity gap, patient accounts of poor quality of care, and physician decisionmaking. Indeed, implicit bias may have played a significant role in the death of Thomas Eric Duncan, the first patient to die of Ebola in the United States.²¹¹

III. A MODERN DILEMMA: LAW IN TIMES OF HEALTH CRISIS — REFLECTIONS ON EBOLA

So how should governments react when there is an actual health threat? We believe that a preeminent purpose of the Constitution (as well as courts) is to be vigilant against the potential for discrimination and abuse of state power in times of crisis. It is during times of emergency, conflict, or disaster that American history shows a higher level of injuries inflicted on minorities and greater trampling on basic constitutional rights. It is during these times when many individuals have suffered great harms as a result. Women and men have been detained, interned, imprisoned, and even executed when lawmakers have perceived the nation's wellbeing to be under threat. It is precisely at these moments that the government cannot be above the law.

A. *Implicit Racial Bias and Ebola*

The potential for government abuse of power came into sharp focus in 2014 when fear and hysteria about Ebola emerged in the wake of Thomas Eric Duncan's death from the disease in Texas.²¹² The case highlighted both implicit bias as well as the ways in which civil liberties can be trampled in times of crisis.

Unlike the enterovirus — a highly contagious virus that went virtually ignored in the media despite its having infected hundreds of Americans, particularly children, in forty-three states, and having caused over a dozen deaths — Ebola caused hysteria in the United States.²¹³ President Obama canceled a campaign stop to hold a press conference in which he promised that federal authorities were “taking this very seriously at the highest levels of government.”²¹⁴ President

²¹¹ Wright, *supra* note 33.

²¹² See Jane C. Timm, *Lawmakers Call for Ebola Quarantines as Experts Urge Calm*, MSNBC (Oct. 27, 2014, 8:45 AM), <http://www.msnbc.com/morning-joe/lawmakers-call-ebola-quarantines-experts-urge-calm> [<http://perma.cc/364L-RHTJ>] (discussing ACLU's “serious constitutional concerns about the state [of New Jersey] abusing its powers”).

²¹³ See Paul Farhi, *Media Goes Overtime on Ebola Coverage, But Not Necessarily Overboard*, WASH. POST (Oct. 6, 2014), https://www.washingtonpost.com/lifestyle/style/media-goes-overtime-on-ebola-coverage-but-not-necessarily-overboard/2014/10/06/d65e92fc-4d8a-11e4-8c24-487e92bc997b_story.html [<http://perma.cc/9FKT-SAUM>].

²¹⁴ President Barack Obama, Remarks by the President After Meeting on the Government's Response to Ebola (Oct. 15, 2014, 5:26 PM), <https://www.whitehouse.gov/the-press-office/2014/10/15/remarks-president-after-meeting-governments-response-ebola> [<http://perma.cc/2E2Q-FC3L>].

Obama even appointed an Ebola czar to investigate how the U.S. government could best address the “crisis.”²¹⁵ Mitt Romney, the former governor of Massachusetts, urged that the United States close the borders to countries with Ebola outbreaks, basically quarantining West Africa from travel to the United States.²¹⁶ Other politicians urged similar courses of action.²¹⁷ The threat of Ebola reaching the United States caused a panic and distinct reaction unlike health epidemics in Europe and their potential to infect Americans.²¹⁸

The face of Ebola was decidedly Black and immigrant or “outsider.”²¹⁹ As one reporter wrote at the time, “Ebola now functions in popular discourse as a not-so-subtle, almost completely rhetorical stand-in for any combination of ‘African-ness,’ ‘blackness,’ ‘foreign-ness’ and ‘infestation’ — a nebulous but powerful threat, poised to ruin the perceived purity of western borders and bodies.”²²⁰ Despite the fact that Liberia is the direct offshoot of America’s slavery legacy and is populated by freed slaves from the United States, it is a country long forgotten to most Americans. It is more of a stranger than a cousin. Moreover, it is a country where the population is Black. Sadly, these factors may have contributed to America’s rather slow humanitarian interventions in Western Africa, Mr. Duncan’s initial treatment at a Texas hospital, and the inaccurate media accounts shortly following his diagnosis,²²¹ which would suggest explicit racial bias.

²¹⁵ Zeke J. Miller, *Obama Appoints Ron Klain as Ebola Czar*, TIME (Oct. 17, 2014), <http://time.com/3516888/obama-ron-klain-ebola-czar> [<http://perma.cc/BAM2-EAXF>].

²¹⁶ At a political rally in New Hampshire, Romney urged, “[M]y own reaction is we probably ought to close down the border with nations that have extensive Ebola spreading and that means not bringing flights in from that part of Africa.” Rick Ungar, *How the Ebola Experience Shines a Light on Mitt Romney’s Inability to Win the Presidency*, FORBES (Oct. 16, 2014, 2:09 PM), <http://www.forbes.com/sites/rickungar/2014/10/16/how-the-ebola-experience-shines-a-light-on-mitt-romneys-inability-to-win-the-presidency>.

²¹⁷ See Taylor Wofford & Lucy Westcott, *Dear Politicians: A Travel Ban Won’t Stop Ebola — and May Make It Worse*, NEWSWEEK (Oct. 18, 2014, 8:18 AM), <http://www.newsweek.com/dear-politicians-travel-ban-wont-stop-ebola-and-may-make-it-worse-278225>.

²¹⁸ Lynn Stuart Parramore, *How Overblown Ebola Panic Could End Up Costing Billions*, ALTERNET (Oct. 20, 2014), <http://www.alternet.org/economy/how-overblown-ebola-panic-could-end-costing-billions> [<http://perma.cc/5VBD-XVKV>].

²¹⁹ See Anthony Zurcher, *Ebola, Race, and Fear*, BBC: ECHO CHAMBERS (Oct. 21, 2014), <http://www.bbc.com/news/blogs-echochambers-29714657> [<http://perma.cc/L2XF-JXCS>].

²²⁰ Hannah Giorgis, *The Problem with the West’s Ebola Response Is Still Fear of a Black Patient*, THE GUARDIAN (Oct. 16, 2014, 4:30 AM), <http://www.theguardian.com/commentisfree/2014/oct/16/west-ebola-response-black-patient> [<http://perma.cc/GP6S-DCFV>].

²²¹ See, e.g., Tara Culp-Ressler, *The Ugly Racial Undertones in Our Panicked Response to Ebola*, THINKPROGRESS (Oct. 16, 2014, 4:18 PM), <http://www.thinkprogress.org/health/2014/10/16/3580815/racial-undertones-ebola> [<http://perma.cc/XB8Y-YW57>] (discussing several ways in which race has affected the Ebola response); Abby Haglage, *Ebola Racism Reaches a New Low in Texas*, DAILY BEAST (Oct. 15, 2014, 5:45 PM), <http://www.thedailybeast.com/articles/2014/10/15/texas-college-s-ebola-racism-reaches-a-new-low.html> [<http://perma.cc/BUF2-ES7B>] (describing a college policy of not accepting students from countries with confirmed Ebola cases); Jon

Medical records showed that Mr. Duncan, who died from the Ebola virus, was diagnosed with a high fever of 103 degrees during “his four-hour visit to the emergency room of Texas Health Presbyterian Hospital on September 25, according to 1,400 pages of medical records that Mr. Duncan’s family provided to The Associated Press.”²²² Mr. Duncan had reported severe pain, recording his level of discomfort at eight on a scale of ten.²²³ In fact, his fever “was marked with an exclamation point in the hospital’s record-keeping system, The A.P. reported.”²²⁴ Despite the very clear evidence that Mr. Duncan was suffering, unstabilized, and had reported being in Liberia weeks before, hospital officials released him, telling him to take antibiotics and Tylenol. Mr. Duncan’s family believes that had he been white, he would have received better medical care.²²⁵

Another explanation for the lack of medical attention Mr. Duncan received, which may have contributed to or hastened his death, is implicit bias. And while the outcomes of explicit versus implicit racial bias may be the same, including Mr. Duncan’s prolonged suffering and eventual death, law is problematically structured to respond to the former and not the latter. Mr. Duncan’s case raises flags similar to those discussed in Part II, where African American patients have been either denied certain treatments or refused the proper standard of care. When hospital officials failed to provide the basic quality of care expected under the circumstances in Mr. Duncan’s case, it fit a pattern that research has shown consistently negatively impacts Blacks.

Herskovitz, *In Dallas, African Immigrants Worry About Backlash from Ebola Case*, REUTERS (Oct. 5, 2014, 2:19 PM), <http://www.reuters.com/article/2014/10/05/us-health-ebola-usa-immigrants-idUSKCN0HU00120141005> [<http://perma.cc/LZ85-PJX2>] (documenting racism faced by African immigrants in the aftermath of the Ebola outbreak); Marc Kilstein, *This American Doctor Says Racism Is to Blame for the Slow Response to the Ebola Outbreak*, PRI (Sept. 15, 2014, 10:15 PM), <http://www.pri.org/stories/2014-09-15/american-doctor-says-racism-blame-slow-response-ebola-outbreak> [<http://perma.cc/3LRH-NKSP>] (reporting the belief of Chief Medical Officer at Partners in Health that race helps explain the slow response to the Ebola crisis); Laura Seay & Kim Yi Dionne, *The Long and Ugly Tradition of Treating Africa as a Dirty, Diseased Place*, WASH. POST (Aug. 25, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/08/25/othering-ebola-and-the-history-and-politics-of-pointing-at-immigrants-as-potential-disease-vectors> [<http://perma.cc/J7A7-CRBE>] (critiquing a *Newsweek* cover and describing “a long and ugly tradition of treating Africans as savage animals and the African continent as a dirty, diseased place to be feared”).

²²² Manny Fernandez & Kevin Sack, *Ebola Patient Sent Home Despite Fever, Records Show*, N.Y. TIMES (Oct. 10, 2014), <http://www.nytimes.com/2014/10/11/us/thomas-duncan-had-a-fever-of-103-er-records-show.html>.

²²³ *Id.*

²²⁴ *Id.* (noting also that the records compiled by the *Associated Press* confirmed Duncan’s family’s claims and called into question the veracity of the earlier reports made by hospital officials who claimed that Mr. Duncan had a temperature of 100.1 degrees).

²²⁵ *See id.*

Mr. Duncan was not the only Black person who had traveled from Africa to suffer backlash in the United States because of Ebola. A college established a policy to deny admission to students from countries with confirmed Ebola cases.²²⁶ African immigrants in Texas reported experiencing racism in the wake of the Ebola outbreak.²²⁷ Even two little girls were denied entry to school because their family came from Rwanda, over 2600 miles from the nearest country with an Ebola case.²²⁸

Glenn Beck, a popular political pundit, claimed on his television show that “a tipster warned him about an increasing number of Mexican and Nigerian prison guards in Texas.”²²⁹ Beck warned that it “doesn’t really seem like a good policy [to have Nigerians and Mexicans work in those positions] for a number of reasons,” because “what pops out is Ebola! Call me crazy, but letting Nigerians roam freely in and out of our country as they work as correctional officers in prisons, also in transportation and food service, might seem like something we should look into. You know?”²³⁰

The Ebola episode is the most recent example of how claims to protect the public’s health frequently have served as proxies for bias, discrimination, and nativism. The government has caused significant injury to people of color, women, individuals with disabilities, and other groups during times of health panic. The United States has interned groups based on their ethnicity, sterilized people based on their poverty, banned the immigration of the Chinese because of their race, and denied African Americans numerous accommodations, including access to integrated swimming pools and water fountains, based on spurious health and safety claims associated with their race. In each instance courts backed the government’s action.

B. Civil Liberties and Ebola

With the Ebola outbreak ongoing, civil liberties came under threat. Some governors went so far as to impose quarantines on individuals who had been or may have been in contact with Ebola patients.²³¹ In some tough elections, politicians pandered to constituents’ worst anxieties and fears to advance their political agendas — in the process ig-

²²⁶ Haglage, *supra* note 221.

²²⁷ Herskovitz, *supra* note 221.

²²⁸ Abrams, *supra* note 35.

²²⁹ Erica Ritz, “What’s Our Plan?”: Beck Warns Americans Not to Underestimate Ebola Threat, THE BLAZE (Sept. 15, 2014, 10:00 PM), <http://www.theblaze.com/stories/2014/09/15/whats-our-plan-beck-warns-americans-not-to-underestimate-ebola-threat> [<http://perma.cc/LL92-225G>].

²³⁰ *Id.*

²³¹ Katie Zernike & Emma G. Fitzsimmons, *Threat of Lawsuit Could Test Maine’s Quarantine Policy*, N.Y. TIMES (Oct. 29, 2014), <http://www.nytimes.com/2014/10/30/us/kaci-hickox-nurse-under-ebola-quarantine-threatens-lawsuit.html>.

noring science and making unfounded assertions about the disease and its potential spread in the United States. Vigilante groups threatened to intervene in order to “protect” the public, politicians advanced their political agendas with vehement calls for quarantines, and the public responded to the hysteria. Indeed, although there were only a few cases of Ebola in the United States, an irrational national panic took over.²³²

The public’s panic and responses from lawmakers continue to raise serious questions for law, medicine, and society. For example, how do we safeguard civil liberties in times of crisis? How will we protect individuals from the potential cruelty of citizens, let alone the government? What can be learned from the United States’ brief encounter with Ebola?

In this section, we look beyond discrimination against particular groups to consider how fear-induced responses can lead to the erosion of civil liberties more generally in times of health crises.²³³ The potential for government to abuse power in times of perceived or actual crises cannot be overstated or overlooked.

Despite broad media coverage about Ebola, a few key facts about the sole legal case arising from the outbreak bear description here. In October 2014, Kaci Hickox, a nurse who volunteered for Doctors Without Borders, returned home to Maine after providing urgently needed medical services to Ebola patients in Sierra Leone. Her return home might typically have gone unnoticed, but in the wake of a scare about Ebola, Mr. Duncan’s death, and politicians’ escalating fear, her arrival home made national news.

Maine’s governor, Paul R. LePage, debated how to address Ms. Hickox’s return home and ultimately decided that she should be quarantined from society for three weeks.²³⁴ Governor LePage issued a statement: “While we certainly respect the rights of one individual, we must be vigilant in protecting 1.3 million Mainers, as well as anyone

²³² See *Cases of Ebola Diagnosed in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html> (last updated Dec. 16, 2014) [<http://perma.cc/G788-GS8W>] (identifying four confirmed cases of Ebola in the United States); Abrams, *supra* note 35; Haglage, *supra* note 221.

²³³ One author has presented some aspects of the argument contained in this section in a previously published article. See Erwin Chemerinsky, Opinion, *Don’t Let Ebola Kill Civil Liberties*, ORANGE COUNTY REG. (Nov. 6, 2014, 12:00 AM), <http://www.oregister.com/articles/hickox-641084-ebola-public.html> [<http://perma.cc/FT4W-FHPK>].

²³⁴ See Robert F. Bukaty, *Judge Rejects Maine’s Ebola Quarantine for Nurse Kaci Hickox*, DALL. MORNING NEWS (Oct. 31, 2014, 2:33 PM), <http://www.dallasnews.com/ebola/headlines/20141031-maine-asks-court-to-isolate-quarantined-nurse-kaci-hickox.ece> [<http://perma.cc/WFR5-GPUK>]; Ray Sanchez et al., *Ebola Update: Maine Judge Rejects Quarantine for Nurse Kaci Hickox*, CNN (Nov. 1, 2014, 2:59 PM), <http://www.cnn.com/2014/10/31/health/us-ebola> [<http://perma.cc/7AMY-G37B>]; Zernike & Fitzsimmons, *supra* note 231.

who visits our great state.”²³⁵ He then issued an order that prohibited her from making close contact with others: Hickox could not be within three feet of another person.²³⁶ In addition, the Governor prohibited her from returning to work, banned her from public gatherings, and forced her to stay at home.²³⁷ State health officials threatened to obtain a court order for her arrest if she defied the quarantine by stepping out of her home.²³⁸

When asked about the State’s response, Maine’s Health and Human Services Commissioner, Mary Mayhew, did not claim to have interviewed Ms. Hickox or made any determination about her health. Rather, she told a reporter, “there is a great deal of fear” in the State of Maine.²³⁹ But why should fear, rather than actual health threat, dictate public policy?

In hindsight, the responses of these officials were overblown. But were they also a legal overreach? We strongly believe so. Ms. Hickox never contracted Ebola and therefore could not spread the disease and infect others. By quarantining Ms. Hickox, denying her right to return to work, severely restricting her contact with others, threatening her arrest, and otherwise stigmatizing her, state officials in Maine seriously infringed on her civil liberties. Of course, she was simply one case. What if there were many others? We don’t disagree with the importance of protecting public health. As we mentioned earlier, the government has a compelling interest in protecting the public’s health. We also believe, however, that government is most in need of restraint in times of crisis. History shows that in times of crisis, politicians too frequently acquiesce to pressures that result in the compromise of constitutional values. Restraining lawmakers — and indeed the majorities that they represent — at such times is essential.²⁴⁰

Ms. Hickox and her lawyer challenged the quarantine, claiming that the State’s actions were not evidence based. She argued that the State did not fairly balance the risks and benefits of its quarantine pol-

²³⁵ Zernike & Fitzsimmons, *supra* note 231.

²³⁶ See Press Release, Office of Governor Paul R. LePage, Governor to Exercise the Full Extent of His Authority to Protect Public Health and Safety (Oct. 30, 2014), <http://www.maine.gov/tools/whatsnew/index.php?topic=Gov+News&id=630562&v=article2011> [<http://perma.cc/URR6-38JZ>].

²³⁷ See *id.*

²³⁸ Susan K. Livio, *Maine Preparing to Seek Court Order to Arrest Nurse if She Defies Ebola Quarantine*, NJ.COM (Oct. 30, 2014, 9:34 AM), http://www.nj.com/healthfit/index.ssf/2014/10/ebola_maine_preparing_to_seek_court_order_to_arrest_nurse_if_she_defies_quarantine.html [<http://perma.cc/J3DG-77Z9>].

²³⁹ *Id.*

²⁴⁰ For example, 2014 was an election year, and governors in Maine, Georgia, Florida, and Connecticut were up for reelection. Their states were among those that imposed quarantines. See Zernike & Fitzsimmons, *supra* note 231.

icy. Challenging the State's action in court became Ms. Hickox's most reasonable option.

Maine District Court Chief Judge LaVerdiere ruled in favor of Ms. Hickox,²⁴¹ and we agree with the court's ruling. He wrote: "This decision has critical implications for Respondent's freedom, as guaranteed by the U.S. and Maine Constitutions, as well as the public's right to be protected from the potential severe harm posed by transmission of this devastating disease."²⁴² Chief Judge LaVerdiere also noted that the "court is fully aware of the misconceptions, misinformation, bad science and bad information being spread from shore to shore in our country with respect to Ebola."²⁴³

Chief Judge LaVerdiere reasoned that "[t]he State has not met its burden . . . to prove by clear and convincing evidence that limiting [Hickox's] movements to the degree requested is 'necessary to protect other individuals from the dangers of infection,'" as required by Maine law.²⁴⁴ Rather, "[a]ccording to the information presented to the court," Ms. Hickox did not show any symptoms of Ebola, and the court declared that she therefore was "*not* infectious."²⁴⁵

If not for the court's ruling in her favor, Ms. Hickox likely would have been arrested and jailed for simply leaving her home. In order to balance and protect civil liberties in times of health crisis, quarantine laws and detention policies cannot be absolute because of the significant risk that such rules will be subject to the whims of politicians appealing to fear or fanning the flames of xenophobia. Quarantining a person restricts that person's basic civil liberties. Quarantining may restrict a person's freedom of movement to the point of effectively imprisoning that person. Even restrictions that are less severe than a quarantine can implicate a citizen's civil liberties.

Simply stated, the government must demonstrate that there is no other means by which to protect public health except by quarantining the individual. There should be a balancing of interests. That is, a state may impose on an individual's liberty by quarantine, but only under circumstances where such actions are required to prevent the spread of a communicable disease and when there are no other means to accomplish this public health goal. That was not the case when the State of Maine forced Ms. Hickox under house arrest.

Kaci Hickox's case highlights an underlying theme of Biss's book and this Review: fear. Chief Judge LaVerdiere took special pains to

²⁴¹ Sanchez et al., *supra* note 234.

²⁴² Mayhew v. Hickox, No. CV-2014-36, slip op. at 1 (Me. Dist. Ct. Oct. 31, 2014) (order pending hearing).

²⁴³ *Id.* at 3.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

point out that “[t]he Court is fully aware that people are acting out of fear and that this fear is not entirely rational.”²⁴⁶ The Chief Judge further acknowledged: “[W]hether that fear is rational or not, it is present and it is real.”²⁴⁷ To emphasize this point, the court took the unusual step to urge Hickox that her actions “need to demonstrate her full understanding of human nature and the real fear that exists.”²⁴⁸

CONCLUSION

On Immunity raises important questions about the ways in which fear shapes health policy on the ground. We expanded that focus to include a discussion about American history and law. What can be learned from past health crises? How are policies most likely to be shaped in times of health panic, and will race matter in a society in which *post-racialism* is vogue?

This Review shows that negative ethnic and racial attitudes developed, nurtured, and promoted within medical and legal systems are not easily overcome. Racialized assumptions may result in preferential treatment in some instances and in loss of empathy for and devaluation of groups along racial lines in others. It thus remains crucial to understand the impacts of status and fear in states’ responses to health crises as well as the delivery of medicine.

History — and recent cases, too — show that in times of health crises, elected officials may succumb to political pressures that result in government abuse of power and the compromising of constitutional values. At those times, the most vulnerable are more likely to suffer harms. Because government wields significant power and can inflict great injury on people, courts should play an essential role in preserving and protecting the rights of the vulnerable. Courts, less susceptible to political pressures than elected officials, may be the last defense for basic constitutional protections. It is their role to enforce the limits of the Constitution and prevent harm inflicted on those most likely to suffer deprivation of constitutional rights. When courts have neglected or failed in this regard, great harm to basic constitutional rights has been caused, and people have suffered as a result.

The rights of citizens, particularly minority groups, will be meaningless if they cannot be vindicated. Thus, not only must there be access to courts, but judges must also act with courage and refuse to condone government abuse of power, particularly in times of perceived health crisis.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*