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Racial Biases, Discrimination, and the Infringement of Civil Liberties in Times of Health Crisis

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The death toll associated with the novel coronavirus, otherwise known as COVID-19, has now surpassed a staggering 700,000 losses in the United States. To place this suffering in context, more Americans died during the first three months of the COVID-19 pandemic than all the American deaths suffered during the Vietnam War; the fatalities due to the 9/11 terrorist attacks; the wars in Iraq and Afghanistan; as well as the deaths resulting from H1N1, Ebola, and the Zika viruses combined. During that three-month period, COVID-19 killed more people across the United States than what Americans witnessed in the past fifty years of war and disease combined. And COVID-19 still hovers in the United States with hotspots in jails, prisons, and in meatpacking factories. As it lingers, some Americans refuse to vaccinate against the virus.

What this staggering death toll brings to light are two interrelated matters. First, it exposes questions related to capacity, compassion, and competency in American leadership from the federal government to local officials, particularly in 2020. The failure to heed international warnings and develop effective test kits in December 2019 and January 2020 highlights serious weaknesses in pandemic preparedness and, ultimately, American leadership. Hasty and imprudent political rhetoric in February and March 2020 comparing COVID-19 to the common, seasonal flu was not only inaccurate and misguided but also likely contributed to a sense of false security among Americans that sadly persists despite numerous deaths.

Second, fundamental questions of constitutional law have emerged. The coronavirus crisis brings to the forefront a national debate related to the interaction between constitutional rights, state police powers, and federalism: *what are the limits of government action in the midst of a pandemic?*

Do governors have the authority to issue executive orders to shelter-in-place or quarantine? Can legislatures prioritize some business activity as essential while not granting that status to others? Is it legal to impose shelter-in-place orders on Sundays—a day when many Americans (though not all) seek to worship? The short answer is that for nearly three centuries, quarantine has been justified and legally upheld in the U.S. provinces—even before the official founding of the United States, dating back to 1738.

In an 1824 case, *Gibbons v. Ogden*, the Supreme Court specifically referenced state authority to regulate health and enact quarantine laws. Eighty years later, the Supreme Court spoke directly to state police power to protect public health in its 1905 *Jacobson v. Massachusetts* ruling, upholding an ordinance requiring compulsory vaccination of all persons fit for inoculation. The Court found the statute to be a valid exercise of local police power to protect the public health and reduce the spread of smallpox—a deadly disease. Thus, despite the myriad rallies and protests to “re-open” as the virus rapidly spread in 2020 (some filled with vile and violent imagery, including effigies), governmental authority to impose the types of orders modeled in California by Governor Gavin Newsom is clear, consistent with constitutional law, and legal. During a pandemic, some constitutional rights may be burdened, but only if narrowly tailored to protect the public health and promote safety.

That said, government authority is not absolute—and that is important to keep in mind, even in times of a pandemic. In fact, during times of national disaster and health crises, governments may attempt to exercise unconstitutional authority or unfairly or excessively infringe on civil rights and civil liberties. Historically, governments, including our own, have deployed protection of the public health as a justification when seeking to harm and undermine the civil liberties of vulnerable groups. From eugenics to racial discrimination, politicians have claimed policies to be in the service of public health goals, when actually serving no other purpose than the perpetuation of social and racial stereotypes and discrimination.

During this pandemic, questions related to the limits of government authority are all the more pressing and relevant in the wake of legislatures in Alabama, Indiana, Mississippi, Oklahoma, and Texas, among others, coercively using the pandemic as a proxy for discriminating against women by dismantling abortion access. From a medical perspective, this is senseless and tragic, considering that abortions are as safe as penicillin shots and far safer than child delivery; a woman is fourteen times more likely to die by carrying a pregnancy to term than having an abortion. In these instances, hampering abortion rights had nothing to do with protecting health and safety but was simply another political attempt to undermine them.

Our thesis is that claims to protect the public’s health during crises 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. 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.

Government infringements on civil rights and civil liberties should be driven by science, confirmed by medical evidence, and tailored to address health harms and threats. It is not all or nothing—that is too simplistic a view. Rather, protecting the public’s health and safety during COVID-19 or any

national health crisis requires prioritizing the public's health while safeguarding civil liberties. The government must demonstrate that there is no other means by which to protect public health before it infringes on individuals' constitutional rights. The dynamics of COVID-19 present credible cases of government intervention such as mask mandates and sheltering in place, whereas government-imposed quarantine of a nurse in Maine who was uninfected by Ebola did not.

I. Proxy and Praxis for Discrimination

When analyzed 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, even scientists and doctors may conflate or exaggerate data, and consequentially, civil liberties may be compromised and constitutional rights trampled. 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.

Nearly a century ago, the United States found itself in the midst of a health crisis related to individuals it claimed to be socially, morally, and mentally 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 might 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. Proponents of eugenics laws intended such policies to limit the reproductive capacities of Americans 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. It was a dirty little secret in plain sight.

The U.S. Supreme Court took up the issue in an infamous 1927 test case, *Buck v. Bell*, involving the constitutionality of a Virginia law permitting compulsory sterilization of persons whom state health officials declared feeble-minded.¹ In that landmark case, Justice Oliver Wendell Holmes described Carrie Buck as a "feeble minded white woman who was committed to the State Colony [for Epileptics and Feeble Minded],"² and declared, "[s]he is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child."³ Dr. Albert Priddy, the superintendent of the Virginia Colony, provided testimony in the case, claiming "These people belong to the shiftless, ignorant, and worthless class of anti-social whites of the

¹ 274 U.S. 200 (1927).

² *Id.* at 205.

³ *Id.*

South.”⁴ Harry Laughlin, the chief drafter of U.S. eugenics legislation, concurred, using terms like “moral delinquency” to describe Carrie, although he had never met her.⁵

Over the years, scholars have copiously filled in the missing 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.⁶ Importantly, Carrie’s daughter’s academic records were uncovered, finding no evidence of cognitive delay or learning disabilities, which scientists at the time claimed were genetically heritable, like a disease. 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.”⁷

Buck v. Bell legalized compulsory sterilization of individuals deemed socially unfit, embedding eugenics into the American political, legal, and medical landscapes. *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 defectives.”⁸ 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.⁹ 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.”¹⁰

At the time, scientists claimed that heredity played a key role in the spread of cognitive impairment, social unfitness, and insanity.¹¹ The Court relied on its 1905 ruling upholding compulsory vaccination in *Jacobson v. Massachusetts*¹² to justify Carrie’s sterilization and the legalization of American eugenics.¹³ Sadly, it was believed that if states could vaccinate against

⁴ Paul Lombardo, *Eugenics Sterilization Laws*, IMAGE ARCHIVE ON THE AM. EUGENICS MOVEMENT, <http://www.eugenicsarchive.org/html/eugenics/essay8text.html>.

⁵ *Id.*

⁶ 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. STATE COLL. OF LAW, <http://readingroom.law.gsu.edu/buckvbell/29>. Some accounts reference them as her foster parents. See, e.g., Lombardo, *supra*, at 54, 61.

⁷ Lombardo, *supra* note 6, at 61.

⁸ *Buck v. Bell*, 274 U.S. 200, 205 (1927).

⁹ *Id.* at 205–06.

¹⁰ *Id.* at 206.

¹¹ 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).

¹² 197 U.S. 11 (1905).

¹³ See *Buck*, 274 U.S. at 207 (citing *Jacobson*, 197 U.S. 11).

viruses like smallpox, why not allow them to “immunize” social traits like intergenerational poverty?

Justice Holmes claimed that the principle sustaining compulsory vaccination in states like Massachusetts was “broad enough to cover cutting the Fallopian tubes,”¹⁴ because public welfare, including the public’s health, calls upon even “the best citizens for their lives.”¹⁵ 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.¹⁶ 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. 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.”¹⁷

Carrie Buck’s case was neither the first nor the last time that the rationale of protecting the public’s health would serve a discriminatory purpose or function against a vulnerable group. The intersection between minority rights and public health has a long and shameful history, dating back hundreds of years. 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, “Yellow Peril,”¹⁸ and early twentieth-century anti-immigration policy.¹⁹ These concerns surface in the wake of COVID-19, including anti-Asian racism and hate crimes. Troublingly, similar rhetoric marked some political responses to the pandemic, potentially stoking race-based fears. Senator John Cornyn of Texas told reporters “China is to blame because the culture where people eat bats and snakes and dogs and things like that . . . that’s why China has been a source of

¹⁴ *Id.* (citing *Jacobson*, 197 U.S. 11).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 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* (May 18, 2011, 12:00 AM), <http://beyondvictoriana.com/2011/05/18/quaint-20-roots-of-the-yellow-peril-part-2> (noting that anti-Chinese sentiments mushroomed as “Chinese were recast as drug-using sexual deviants”).

¹⁹ 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 Communities: The Metaphor of “Immigrant as Pollutant” in Media Representations of Immigration*, 11 RHETORIC & PUB. AFF. 569 (2008).

a lot of these viruses.”²⁰ Even though in Senator Cornyn’s home state, rattle snake and racoon meat are regarded as gourmet delicacies. Equally, President Trump insisted on referring to COVID-19 as the “Chinese virus.”²¹

Troublingly, such rhetoric by political leaders has potentially stoked race-based fears. For example, Asian Americans report being spat at,²² threatened,²³ and physically attacked.²⁴ The rise in anti-Asian assaults at grocery stores and schools, and in subway stations and neighborhoods, have not spared children: A 16-year-old boy was attacked at his San Fernando Valley High School in California, as classmates accused him of spreading COVID-19. The boy was briefly hospitalized out of fear that he may have received a concussion from the assault.²⁵

Nor is this a problem isolated to physical spaces: online attacks and micro-aggressions against Americans of Asian descent in virtual spaces and social media escalated in 2020, flowing into 2021, in the wake of COVID-19—so much so that a website was launched at San Francisco State University’s Asian American Studies Department to track online harassment.²⁶

Sadly, anti-Asian sentiment is not new in the U.S.—and neither is using the public health as a proxy for expressing it. On August 1, 1883, *The New York Times* ran an [article](#), “Mott-Street Chinamen Angry; They Deny That They Eat Rats.”²⁷ The article and what it describes was typical of the anti-Asian racism propagated at the time in the United States. Troublingly, similar rhetoric marked some political responses to the coronavirus pandemic, potentially stoking race-based fears.

We find it a weak and unsatisfying argument that the duty to protect health and safety justifies the selective encroachments on civil liberties generally, and especially when racial status rather than medical condition motivates such actions. Equally uninspiring are the moral justifications on

²⁰ Lauren Aratani, ‘Coughing While Asian’: Living in Fear as Racism Feeds Off Coronavirus Panic, *GUARDIAN* (Mar. 24, 2020, 6:00 PM), <https://www.theguardian.com/world/2020/mar/24/coronavirus-us-asian-americans-racism>.

²¹ *Id.*

²² Bay City News, *Website Launches to Document Anti-Asian Hate Crimes in Wake of COVID-19*, *NBC BAY AREA* (Mar. 19, 2020, 10:40 PM), <https://www.nbcbayarea.com/news/coronavirus/website-launches-to-document-anti-asian-hate-crimes-in-wake-of-covid-19/2258297/>.

²³ Leonardo Castañeda, *Coronavirus: Attacks Against Asian Americans Reported in Bay Area and Beyond*, *MERCURY NEWS* (Mar. 21, 2020, 7:00 AM), <https://www.mercurynews.com/2020/03/21/coronavirus-attacks-against-asian-americans-reported-in-bay-area-and-beyond/>.

²⁴ Aratani, *supra* note 20.

²⁵ Christina Capatides, *Bullies Attack Asian American Teen at School, Accusing Him of Having Coronavirus*, *CBS NEWS* (Feb. 14, 2020, 1:53 PM) <https://www.cbsnews.com/news/coronavirus-bullies-attack-asian-teen-los-angeles-accusing-him-of-having-coronavirus/>.

²⁶ STOP AAPI HATE, <https://stopaapihate.org> (last visited Oct. 4, 2021).

²⁷ *Mott-Street Chinamen Angry; They Deny That They Eat Rats—Chung Kee, Threatens a Slander Suit.*, *N.Y. TIMES* (Aug. 1, 1883), <https://www.nytimes.com/1883/08/01/archives/mottstreet-chinamen-angry-they-deny-that-they-eat-ratschung-kee.html>.

which these civil liberty violations rest, such as protecting children from classmates, teachers, or principals who clearly do not pose medical threats.

II. Explicit Bias: Disease, Immigration, and the Law

The government has a compelling interest in safeguarding the public and protecting the public's health. However, protecting the public's health has served both historically and contemporarily as cover for nativist views and justified blatant racial animosity and bias. 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.

Until the late 1800s, immigration control "was largely managed by individual states."²⁸ States with major ports controlled immigration into their regions, enacting laws and institutionalizing systems for "processing new arrivals."²⁹ Their efforts, however, were uneven and lacked uniformity. Yet, what they often had in common were measures to exclude the poor and ill.³⁰ Federal policy followed the same course, universalizing "selective immigration" and expanding the categories of persons barred entry into the United States.³¹

Ellis Island in New York and Angel Island in California inspire romantic associations with migration to the United States and therefore freedom. 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. Even though quietly kept, these 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. Ellis and Angel Islands were opened within one year of each other, both with the purpose of rationing who would merit entry into the United States

A. Ellis Island and Eugenics

Ellis Island opened in 1892.³² 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.³³ 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

²⁸ EITHNE LUIBHÉID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* 1 (2002).

²⁹ *Id.* at 1–2.

³⁰ *See id.* at 2.

³¹ *Id.*

³² *Ellis Island*, HISTORY.COM, <http://www.history.com/topics/ellis-island>.

³³ 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> ; 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>.

prohibiting sex workers from entering the country.³⁴ The Page Law³⁵ masked an explicit interest in banning Chinese women from entering the United States, casting them as women with “lewd and immoral purposes.”³⁶ 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. During the long voyages, some women were raped, and they, too, were denied entry, particularly if their perpetrators claimed that they were seduced by their female victims. Pregnant single women were denied entry because they were liable to become public charges.³⁷

The confluence of immigration law and public health policy exposed racial hostility in late-nineteenth-century U.S. society and continues 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.”³⁸ 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.”³⁹

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. 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 States.⁴⁰ However, not all immigrants were subjected to the same government probes and interventions. These screenings also served as the legal basis for government discrimination because the medical tests were almost exclusively

³⁴ 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.

³⁵ Page Act of 1875 ch. 141, 18 Stat. 477 (repealed 1974).

³⁶ *Id.*; see also LUIBHÉID, *supra* note 28, at 2.

³⁷ LUIBHÉID, *supra* note 28, 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., 2d Sess. 495 (1890) (statement of Dr. John Hamilton, Acting Surgeon Gen., U.S. Marine Hosp. Serv.))).

³⁸ Anne-Emanuelle Birn, *Six Seconds Per Eyelid: The Medical Inspection of Immigrants at Ellis Island, 1892-1914*, 17 DYNAMIS 281, 298 (1997) (“On Ellis Island, a homogeneous team of young, well-trained but inexperienced doctors rapidly judged who was fit to become an American.”).

³⁹ *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)).

⁴⁰ *Id.* at 287–88.

limited to immigrants in third class and stowage travel compartments.⁴¹ 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 were central to American health policy in the last century. Medical propaganda became ensconced in law. For example, Section 212 of the Immigration and Naturalization Act specifically clarifies the general classes of foreigners ineligible for admission and to receive visas.⁴² The law's very first prong addresses public health, denying 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."⁴³ The law also provides 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"; 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"; or who "is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict."⁴⁴

Eventually, laws were enacted to bar men, women, and children with mental and physical disabilities from entry into the United States.⁴⁵ 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 Condition — with stricter requirements than those found in federal law, calling for special scrutiny of those considered "insane, idiotic, imbecil[ic, or] epileptic immigrants."⁴⁶ 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.

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.⁴⁷ It was a common view among some government officers that "only immigrants with excellent physiques suitable to heavy physical labor should be allowed entry."⁴⁸ As a result,

⁴¹ KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH 91-108 (2004).

⁴² Pub. L. No. 82-414, 66 Stat. 163 (2012) (codified as amended in scattered sections of 8 U.S.C.).

⁴³ *Id.* § 1182(a)(1)(A)(i)-(ii).

⁴⁴ *Id.* § 1182(a)(1)(A)(i)-(iv).

⁴⁵ *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).

⁴⁶ Act of Apr. 13, 1904, ch. 326, 1904 N.Y. Laws 863.

⁴⁷ *See id.* at § 1.

⁴⁸ Birn, *supra* note 38, at 299.

medical exclusions against economically vulnerable immigrants included “poor eyesight, varicose veins, and perhaps the most remarkable, ‘poor physique.’”⁴⁹ 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.”⁵⁰

B. Angel Island, Yellow Peril, and Drug Addiction

Angel Island served as a West Coast counterpoint to Ellis Island, opening its doors in 1910 and, for thirty years, maintaining a quarantine station and detention center.⁵¹ There, immigration officials detained Asian men and women in accordance with U.S. laws specifically to restrict their entry to the United States. Immigration laws reinforced anti-Asian bigotry reflected in exclusion practices. 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. 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, as already discussed, eugenics dominated American thinking and by 1909, California had enacted a compulsory sterilization law.⁵² There were no safeguards for patients, such as written notice, a hearing, or right to appeal. 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.⁵³ As one prominent doctor warned, “[b]y commingling with the Eastern Asiatics . . . we are creating degenerate hybrids.”⁵⁴ Fears about the afflicted and genetically inferior contaminating American whites directly fortified race and class distinctions and inspired government abuse of power.

⁴⁹ *Id.* at 300.

⁵⁰ *Id.* (quoting Letter from Prescott Hall to Walter Wyman, Surgeon Gen. (Dec. 22, 1906) (on file with the National Archives)). Ironically, this type of discrimination continued years after the detention centers at Ellis Island and Angel Island were closed. Sadly, the issue persists: in 2013, Ellen Richardson, a Canadian woman, was denied entrance into the United States because she had been hospitalized a year before for depression. See Andrew Solomon, *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, 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).

⁵¹ Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 559.

⁵² See Act of Apr. 26, 1909, ch. 720, 1909 Cal. Stat. 1093.

⁵³ 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).

⁵⁴ See YONG CHEN, *CHINESE SAN FRANCISCO, 1850–1943* 86 (2000).

Two key immigration cases mark the Supreme Court's sanctioning terrible injustices in this regard. In *United States v. Thind*,⁵⁵ the Court affirmed that an Indian National could not qualify for U.S. naturalization because he was not white within the meaning of a federal immigration statute. The Court found that the intent of the statute was to allow citizenship for applicants "whom the fathers knew as white, and to deny it to all who could not be so classified."⁵⁶ Thind argued that Indians were not *Asians*, but rather shared Aryan ancestry with whites. 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."⁵⁷ Nevertheless, the Court found that whatever Aryan blood Thind's ancestors might have once had, it was no longer "pur[e]." 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 would be willing to accept as citizens a class of persons whom it rejects as immigrants.⁵⁸

A second case, *Ozawa v. United States*,⁵⁹ 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. After deciding that skin color alone was not sufficient to determine whether Ozawa was a "white person," 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.⁶⁰

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

⁵⁵ 261 U.S. 204 (1923).

⁵⁶ *Id.* at 207 (quoting *Ozawa v. United States*, 260 U.S. 178, 195 (1922)).

⁵⁷ *Id.* at 210.

⁵⁸ *Id.* at 215.

⁵⁹ 260 U.S. 178 (1922).

⁶⁰ *Id.* at 198.

late 1800s.⁶¹ 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 drug addiction, which according to eugenics were thought to be inheritable, polluted the body, rendering it violated, decayed, and, ultimately, ruined. The drug addiction concern was exacerbated by the fact that Asians were blamed for white Americans' drug addictions, particularly to opium.⁶²

The late David Musto, an expert on U.S. drug policy and former government adviser to President Jimmy Carter, 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."⁶³ 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 rejected group within society."⁶⁴ 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.⁶⁵

⁶¹ See CHEN, *supra* note 54, 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.").

⁶² In a fascinating chronicle of these issues, *Drugs and Race in American Culture*, Timothy Hickman suggests that American drug dependence became politically associated with Chinese "opium" men, 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. See Hickman, *supra* note 18, at 71–72. 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.* at 71. 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." Indeed, anti-Asian bigotry "was embedded in the medical literature of narcotic addiction." *Id.*

⁶³ David F. Musto, *Opium, Cocaine and Marijuana in American History*, 265 *SCI. AM.* 40, 42 (1991); see also H.H. Kane, *Opium Smoking: A New Form of the Opium Habit Amongst Americans*, 33 *GAILLARD'S MED. J.* 101, 114 (1882); Diana L. Ahmad, *Opium Smoking, Anti-Chinese Attitudes, and the American Medical Community, 1850-1890*, 1 *AM. NINETEENTH CENTURY HIST.* 53, 54 (2000) (quoting H.H. KANE, *OPIUM-SMOKING IN AMERICA AND CHINA* 153 (1882)). Dr. Harry Hubbell Kane, a prominent commentator at the time, wrote that opium addiction is "[m]orally . . . always for the worse" and burdens the government because it is "a fertile cause of crime, lying, insanity, debt and suicide." According to Kane, opium addiction promoted the breeding of sensuality and destroyed bodily and mental functions. He was notorious for conflating opium use and addiction to Chinese immigration. Kane, *supra*.

⁶⁴ Musto, *supra* note 63, at 42; see also DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 4 (3d ed. 1999).

⁶⁵ DAVID T. COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940*, 36 (1982) (noting surveys indicating that in Iowa, Michigan, and Chicago over sixty percent of those addicted to opium and morphine were women).

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.⁶⁶ Well-worn but effective stereotypes fastening race and sex to drug trafficking amplified these concerns.

People of Asian descent 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 like the Chinese"⁶⁷ — an unwelcomed status. Dr. Samuel Collins, a noted voice in the antiaddiction movement, suggested that opium addiction could virtually turn white women Chinese.⁶⁸

From a political point of view, framing opium trafficking in Sinophobic terms, such as Chinese men's efforts to seduce defenseless white women,⁶⁹ helped to justify race-based immigration

⁶⁶ 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.

⁶⁷ Hickman, *supra* note 18, at 72.

⁶⁸ SAMUEL B. COLLINS, *THERIAKI: A TREATISE ON THE HABITUAL USE OF NARCOTIC POISON* 19 (1887). 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." *Id.* at 8.

⁶⁹ Concerns about "respectable classes," especially white women, becoming addicted to opium spurred aggressive, collaborative efforts by physicians and legislators to ban Chinese immigration. See Ahmad, *supra* note 63, at 53–54. 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 sex workers. *Id.* at 61. Doctors claimed miscegenation between white people and the Chinese immigrants caused racial deterioration — essentially the contamination of white people — and promoted social decay in the United States. *Id.* Metaphors to 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. ARTHUR B. STOUT, *CHINESE IMMIGRATION AND THE PHYSIOLOGICAL CAUSES OF THE DECAY OF A NATION* 5 (1862). Interestingly, concerns about race mixing primarily related to how white Americans would become compromised — their bodies rendered less healthy through intimacy with Chinese immigrants, whether in the context of drug use or prostitution. For example, Dr. Hugh H. Toland, a highly influential doctor who gifted a medical school to the University of California, "declared that Chinese prostitutes were responsible for nine-tenths of the syphilis cases in San Francisco." CHEN, *supra* note 54, at 86.

exclusion strategies, including the Chinese Exclusion Act of 1882⁷⁰ and the Scott Act of 1888⁷¹ (enacted with near unanimous support). These laws dramatically constrained 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,⁷² political punditry and twentieth-century pulp fiction linking the Chinese to a drug crisis provided a provocative counter-narrative.⁷³ As one commentator explained, Chinese people came to be viewed as "physical, racial, and social pollutants,"⁷⁴ 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 1924,⁷⁵ 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.⁷⁶

⁷⁰ 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.*

⁷¹ Scott Act, ch. 1064, 25 Stat. 504 (1888) (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.*

⁷² S.J. Res. 23, Ch. 134 2013–2014 Sess. (Cal. 2014), http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SJR23 (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).

⁷³ Jess Nevins, *Yellow Peril Thrillers*, LOOKING GLASS, <http://www.lookingglassmagazine.com/observatory/?p=162>; Phillip Smith, *Four of the Major Fear Campaigns that Helped Create America's Insane War on Drugs*, ALTERNET (Feb. 9, 2015), <http://www.alternet.org/drugs/four-moral-panics-drug-policy>; 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>.

⁷⁴ Jess Nevins, *QUAINT #20: Roots of the Yellow Peril, Part 2*, BEYOND VICTORIANA (May 18, 2011, 12:00 AM), <https://beyondvictoriana.com/2011/05/18/quaint-20-roots-of-the-yellow-peril-part-2/> (noting that anti-Chinese sentiments grew as "Chinese were recast as drug-using sexual deviants").

⁷⁵ Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

⁷⁶ Chinese Exclusion Repeal Act, ch. 344, 57 Stat. 600 (1943); *Milestones: 1937-1945*, OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1937-1945/chinese-exclusion-act-repeal>.

It took eighty years before discriminatory legislation against the Chinese was finally lifted by the 1965 Immigration Act,⁷⁷ 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.⁷⁸

Indeed, some nativist views continue to incite 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.⁷⁹ 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. presidency articulated such nativist concerns. Donald Trump claimed throughout his run for the presidency and through his term in office that Mexican immigrants bring drugs, crime, and sexually violent behavior into the United States.⁸⁰ Governor Scott Walker 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.⁸¹

⁷⁷ 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.).

⁷⁸ Nico Voigtländer & Hans-Joachim Voth, *Persecution Perpetuated: The Medieval Origins of Anti-Semitic Violence in Nazi Germany*, 127 Q.J. ECON. 1339 (2012).

⁷⁹ 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>.

⁸⁰ *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>. 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> (quoting Trump’s interview on Fox News’ “Media Buzz” on July 5, 2015).

⁸¹ *Transcript: Read the Full Text of the Primetime Republican Debate*, TIME (Aug. 11, 2015, 4:30 PM), <http://time.com/3988276/republican-debate-primetime-transcript-full-text>.

III. Implicit Bias, Infection & Lessons from the Past

Race has been a central concern in the United States since the founding. It continues to influence attitudes about the spread of disease, shape norms in the delivery of medicine, and influence legal policy in the medical field. As discussed earlier, 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 denial of basic civil rights and sometimes even criminalization of otherwise legal conduct. We name a few here: criminal prohibitions against interracial marriage, homosexual intimacy, alcohol selling and consumption, adultery, pornography, and gambling.

However, implicit racial biases may 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.

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 significant public health concerns now as they have in the past. Much can be learned from the experience with smallpox, the disease that caused the deaths of more people in the 20th century than World Wars I and II.

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. Those who survived smallpox were usually marked for life with horrible lesions and scarring on their faces, trunks, hands, and arms. Nevertheless, as the writer Eula Biss recounts, "[w]hen the last nationwide smallpox epidemic began in 1898, some people believed that whites were not susceptible to the disease"⁸² Their presumption of immunity was rooted in deeply engrained racial ideology.

According to Professor Peter Ubel, white people 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 and would as a result hover only among that population, sparing white Americans.⁸³ Smallpox was considered a Black person's disease in the United States, referred to infamously in medical literature as "N---er itch".⁸⁴ As such, "N---- itch" *infected only* Black people, but white Americans were immune, or so they thought. As a result, even southern white

⁸² EULA BISS, ON IMMUNITY: AN INOCULATION 25 (2014).

⁸³ 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>.

⁸⁴ *Id.*

people failed to heed any cause for alarm; they avoided vaccination. Indeed, “a vocal minority argued vehemently that the vaccine was of no benefit.”⁸⁵

Because smallpox was racialized, doctors and government officials failed to engage preventative protocols, which could have spared communities. Importantly, as Ubel recounts, the smallpox virus “was colorblind.”⁸⁶

IV. A Modern Dilemma: Law in Times of Health Crisis

So how should governments react when there is an actual health threat? It is during times of emergency, conflict, or disaster that American history shows injuries inflicted on minorities and significant trampling on basic constitutional rights. Many individuals have suffered great harms as a result. People have been detained, interned, imprisoned, and even executed when lawmakers have perceived that the nation’s wellbeing was under threat. Importantly, governments cannot be above the law.

As discussed earlier, 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 Chinese immigration based on race, and denied Black people numerous accommodations based on spurious health and safety claims associated with their race. In each instance, courts backed the government’s action.

The potential for government to abuse power in times of perceived or actual crises cannot be overstated or overlooked

Race-based fears associated with a deadly virus manifested in the wake of the 2014 Ebola outbreak in several western African nations and the U.S. entrance of one lone Liberian man, Thomas Eric Duncan, who contracted the virus prior to his arrival and subsequently died.⁸⁷ 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. Senator Mitt Romney urged the United States to close its borders to nations experiencing Ebola outbreaks, basically quarantining West Africa from

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *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>; *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>.

travel to the United States⁸⁸ President Obama was blamed for not “stopping” Ebola from entering the United States

Robin Wright, a fellow at the Woodrow Wilson International Center and the United States Institute of Peace, warned that fear of Ebola increased racial profiling and revived “imagery of the ‘Dark Continent,’” pointing to children of African descent being mocked as “Ebola kids” in Texas.⁸⁹ A community college in Texas declared that it would not admit students from nations where Ebola was present;⁹⁰ two students from Rwanda (over 2600 miles from the closest affected country) were virtually suspended from a New Jersey elementary school for three weeks;⁹¹ an elementary school teacher in Maine was forced to take a three-week leave because she attended a conference in Dallas, Texas;⁹² and a principal who traveled to Zambia, another country with no reported cases, was placed on administrative leave for a week.⁹³

Despite broad media coverage about Ebola, a few key facts about the sole legal case 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 the Ebola scare, Mr. Duncan’s death, and politicians’ escalating fear, her arrival home made national news.

⁸⁸ Justin Sink, *Romney: Administration not serious about treating Ebola*, HILL (Oct. 15, 2014, 11:11 PM), <http://thehill.com/policy/healthcare/220919-romney-administration-not-serious-about-treating-ebola> (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”).

⁸⁹ 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> (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”).

⁹⁰ 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>.

⁹¹ 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.

⁹² 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>.

⁹³ Anthony Zurcher, *Ebola, Race, and Fear*, BBC: ECHO CHAMBERS (Oct. 21, 2014), <http://www.bbc.com/news/blogs-echochambers-29714657>.

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.⁹⁴ 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 who visits our great state."⁹⁵ He then issued an order that prohibited her from making close contact with others: Hickox could not be within three feet of a person. In addition, the governor prohibited her from returning to work, banned her from public gatherings, and forced her to stay at home. State health officials threatened to obtain a court order for her arrest if she defied the quarantine by stepping out of her home.

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"⁹⁶ in the state of Maine. But why should fear, rather than an actual health threat, dictate public policy?

In hindsight, the responses of these officials were overblown. But were they also a legal overreach? 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 policy.

Maine District Court Chief Judge LaVerdiere ruled in favor of Ms. Hickox, writing, "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."⁹⁷ 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."⁹⁸ 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.⁹⁹ Rather, "[a]ccording to the information presented to the court," Ms. Hickox did not show any symptoms of Ebola and the court declared

⁹⁴ 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>; Ray Sanchez, Catherine E. Shoichet & Faith Karimi, *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>; 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>.

⁹⁵ Zernike & Fitzsimmons, *supra* note 94.

⁹⁶ *Id.*

⁹⁷ *Mayhew v. Hickox*, No. CV-2014-36, slip op. at 1 (Me. Dist. Ct. Oct. 31, 2014) (order pending hearing).

⁹⁸ *Id.* at 3.

⁹⁹ *Id.*

that she therefore was “*not* infectious.”¹⁰⁰ As the court made clear, in cases of Ebola, a person poses no threat of spreading the disease until after symptoms develop.¹⁰¹ Ms. Hickox did not exhibit symptoms.¹⁰²

Ms. Hickox never did contract Ebola, and therefore could not spread the disease and infect others. By quarantining Ms. Hickox, prohibiting her 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? As mentioned earlier, the government has a compelling interest in protecting the public’s health. However, the 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.

In Ms. Hickox’s case, if not for a court ruling in her favor, she 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.

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.

V. Conclusion

Ebola and COVID-19 raise 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?

Negative ethnic and racial attitudes developed, nurtured, and promoted within medical and legal systems are not easily overcome or eviscerated. Racialized assumptions too often result in preferential treatment in some instances and in loss of empathy for and devaluation of groups based on race in others. It thus remains crucial to understand the impacts of status and fear in government responses to health crises as well as the delivery of medicine.

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

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