

Parallel Pandemics: The American Problem of Anti-Enforcement, Rational Distrust, and COVID-19

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There is nothing new under the sun, but there are new suns.

-Octavia E. Butler¹

In the United States of America, we have had moments when we seemed to know what our ailments were, and we named some of them accurately and honestly. Some of our laws once sought to remedy the rot at the branch and at the root, beginning with the Civil War Amendments² and Enforcement Acts,³ and again with the passing of the Civil Rights Act of 1964⁴ and Voting Rights Act of 1965.⁵ But the resolve to reconstruct and build anew, based on the ideals so many proclaimed they valued, proved to be fragile. Over and over again, the mantras of freedom and liberty became muddled in the mouths of those who either cowered or beckoned to treasonous redemption—clamoring for and ultimately achieving a re-imbaling at the sight of the slightest glimpse of equity and justice that would threaten white rule and supremacy—as the law of the land.

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¹ Octavia E. Butler, Parable of the Trickster (unpublished manuscript) (on file at the Huntington Library); see also Gerry Canavan, “*There’s Nothing New / Under the Sun, / But There are New Suns*”: Recovering Octavia E. Butler’s Lost Parables, *LOS ANGELES REVIEW OF BOOKS* (June 9, 2014), <https://lareviewofbooks.org/article/theres-nothing-new-sun-new-suns-recovering-octavia-e-butlers-lost-parables/> (discussing the discovery of Octavia Butler’s unpublished manuscript, Parable of the Trickster, found in the Huntington Library archive).

² *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Oct. 24, 2021).

³ *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited Oct. 24, 2021).

⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

⁵ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

The conjunctions of confederacies and retrenchments, both above and below the Mason-Dixon Line, ensured the intermingling of both private and state-shared interests. The very real rates of mortality and morbidity catalyzed by the laws, policies, and practices that made Redemption,⁶ Jim Crow, Red Summers,⁷ the War on Drugs⁸ and crime during the crack epidemic, the rise of the Prison Industrial Complex,⁹ and now the most current of pandemics, are the descendants of a parentage that began long ago. America's specific failure to correct its course of racial subordination is more evident now, at least to non-Black people, because of the COVID-19 pandemic. Marginalized people, specifically racially marginalized people, die a thousand procedural and administrative deaths in meetings, including those where they are in the room, logged on to Zoom, at the table, eating the catered lunch, all the while symbolizing the diversity and inclusion that often results in the

⁶ See, e.g., NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 28–29 (2006); Michael Gerson, *Modern White Supremacy's Roots Were in Redemption*, ASSOCIATED PRESS (May 8, 2019), <https://apnews.com/article/b8fa02572e0a41d7b95c9745325a6af7>; *Reconstruction vs. Redemption*, NAT'L ENDOWMENT FOR THE HUMANITIES (Feb. 11, 2014), <https://www.neh.gov/news/reconstruction-vs-redemption>.

⁷ See *Racial Violence and the Red Summer*, NAT'L ARCHIVES, <https://www.archives.gov/research/african-americans/wwi/red-summer> (last visited Oct. 24, 2021); see also CAMERON McWHIRTER, *RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA* 11 (2011). See generally IDA B. WELLS-BARNETT, *THE RED RECORD* (1895). In *The Red Record*, Wells-Barnett sets the record straight about why Black people were being lynched in this country. She gave voice to challenge the distorted claims about the rape of white women and revealed that Black people were targets of lynching, plunder, and brutality because of the progress they made post-slavery. Black progress (education, military service, business acumen, voting rights, etc.) triggered anti-Black violence and arguably continues to trigger anti-Black violence throughout this country—not only in the South.

⁸ Dan Baum, *Legalize It All: How to Win the War on Drugs*, Harper's Mag., Apr. 2016, <https://harpers.org/archive/2016/04/legalize-it-all/>. In his article, Baum quotes John Ehrlichman, one of Richard Nixon's domestic policy advisers, who admitted that the War on Drugs was a pretext to target Black people:

You want to know what this was really about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

See also Brian Mann, *After 50 Years of the War on Drugs, 'What Good is it Doing for Us?'*, NPR (June 17, 2021, 5:00 AM), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us>.

⁹ *What is the Prison Industrial Complex?*, TUFTS UNIV. PRISON DIVESTMENT, <https://sites.tufts.edu/prisondivestment/the-pic-and-mass-incarceration/> (last visited Oct. 24, 2021).

lived reality of ongoing exclusion and subordination. Presence in the room or at the table alone does not create power. The most important of these meetings are rarely racially benign. The agenda items range from where to put highways, how to determine credit worthiness, whether civil inquiry of white colleagues who end up shedding tears while at the proverbial table is read as aggression in University settings, which applicants are worthy of back door and previously invisible admissions, hiring, promotion, and tenure standards, to which unarmed people get shot¹⁰ disproportionately to which heavily armed people become recipients of fast food meals and police-sponsored daycare¹¹—if they are detained and remain in custody at all¹²—even if they participate in open insurrection at the seat of democracy, vigilante-mob violence, and murder. Meetings and agendas pile up over years, tracking how conceptualizations about Blackness render asinine, yet accepted and well-cited theories: super-predators, crack babies, welfare queens, aggressive Black colleagues and co-workers whose very presence create white discomfort and agitation. The United States of America is many things both great, admirable, and resilient, as well as disappointing, dangerous, and utterly terrifying. This Essay briefly explores a core and complex aspect of our Nation. The COVID-19 pandemic should force us

¹⁰ See Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns>; see also *Police Who Kill Unarmed Black People Continue to Avoid Accountability*, EQUAL JUST. INITIATIVE (Jan. 26, 2021), <https://eji.org/news/lack-of-accountability-for-police-who-kill-unarmed-black-people-persists/>; Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 AM. J. PREVENTIVE MED. 173, 173 (2016), [https://www.ajpmonline.org/article/S0749-3797\(16\)30384-1/fulltext](https://www.ajpmonline.org/article/S0749-3797(16)30384-1/fulltext); Elle Lett et al., *Racial Inequity in Fatal US Police Shootings, 2015–2020*, J. EPIDEMIOLOGY & CMTY. HEALTH (2020), <https://jech.bmj.com/content/early/2020/10/20/jech-2020-215097>.

¹¹ Staff Reports, *Charleston Shooting Suspect's Burger King Meal Gets National Attention*, CHARLOTTE OBSERVER (June 24, 2015, 8:51 AM), <https://www.charlotteobserver.com/news/local/article25394389.html>. But see Kim LaCapria, *Did Police Take Dylann Roof to Burger King?*, SNOPE (June 22, 2015), <https://www.snopes.com/news/2015/06/22/dylann-roof-burger-king/>.

¹² Laurel Wamsley, *Wisconsin Judge Denies New Arrest Warrant for Kyle Rittenhouse*, NPR (Feb. 11, 2021, 3:21 PM), <https://www.npr.org/2021/02/11/967033204/wisconsin-judge-denies-new-arrest-warrant-for-kyle-rittenhouse>; Brad Evans, *Prosecutors Don't Know Kyle Rittenhouse's Whereabouts, Seek Arrest Warrant*, WISN (Feb. 3, 2021, 11:00 AM), <https://www.wisn.com/article/prosecutors-kyle-rittenhouse-violated-conditions-of-release/35410096#>; Sam Cabral & Roderick Macleod, *Capitol Riots: Five Takeaways From the Arrests*, BBC NEWS (Feb. 8, 2021), <https://www.bbc.com/news/world-us-canada-55987603>; *Capitol Riots: Who Has the FBI Arrested So Far?*, BBC NEWS (Jan. 27, 2021), <https://www.bbc.com/news/world-us-canada-55626148>.

to consider how foundational parallel pandemics of anti-enforcement and white supremacy practices have harmed the country's ability to provide for its health and safety in these sobering moments. Unsurprisingly so, the confluence of parallel pandemics has created and sustained rational distrust¹³ in government (and privately sponsored) responses to COVID-19, including the vaccination process.

We should all be unflinchingly clear about what happens disproportionately to non-white bodies in general and specifically to Black bodies because it is part of our national tradition. When the law moves in the direction of progression towards what many have termed "towards a more perfect Union," the forces of regression (forces that history has proven exist on all sides¹⁴ of this social experiment) and retrenchment to traditional ways to deploy their plans—plans that range from incrementalism, the least effective paths to harm reduction, and pseudo-science to outright sabotage—act in opposition. Whether or not we all acknowledge our shared and known world, there are decisions that must be made that implicate our mutual survival in a time of parallel pandemics. The impact of the parallel pandemics means not only Black deaths but also maladies of commerce and capital; this is one of the major reasons why people who once said there were no problems in America that hard work and bootstrapping could not fix are now saying that America must at least do some things differently. America cannot Tuskegee-experiment¹⁵ its way out of the pandemic, although we have no proof, that if it could, given its history, patterns, and practices, it would not do so. Our Nation beckons, initially with Fauci-hat in hand, to the most vulnerable, who have always been the most vulnerable by

¹³ Lindsay Wells & Arjun Gowda, Clinical Commentary, *A Legacy of Mistrust: African Americans and the U.S. Healthcare System*, 24 PROCS. UCLA HEALTH (2020), <https://proceedings.med.ucla.edu/wp-content/uploads/2020/06/Wells-A200421LW-rko-Wells-Lindsay-M.D.-BLM-formatted.pdf>.

¹⁴ See, e.g., THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 75–191* (2016); Jeanne Theoharis, *Martin Luther King and the "Polite" Racism of White Liberals*, WASH. POST (Jan. 17, 2020, 6:49 AM), <https://www.washingtonpost.com/nation/2020/01/17/martin-luther-king-polite-racism-white-liberals/>; John Blake, *How "Good White People" Derail Racial Progress*, CNN (Aug. 2, 2020, 5:03 PM), <https://www.cnn.com/2020/08/01/us/white-liberals-hypocrisy-race-blake/index.html>.

¹⁵ See *The Tuskegee Timeline*, CDC, <https://www.cdc.gov/tuskegee/timeline.htm> (last visited Feb. 14, 2021); *About the USPHS Syphilis Study*, TUSKEGEE UNIV., <https://www.tuskegee.edu/about-us/centers-of-excellence/bioethics-center/about-the-usphs-syphilis-study> (last visited Feb. 14, 2021); Vann R. Newkirk II, *A Generation of Bad Blood*, ATLANTIC (June 17, 2016), <https://www.theatlantic.com/politics/archive/2016/06/tuskegee-study-medical-distrust-research/487439/>; Ada McVean, *40 Years of Human Experimentation in America: The Tuskegee Study*, MCGILL: OFF. FOR SCI. & SOC'Y (Jan. 25, 2019), <https://www.mcgill.ca/oss/article/history/40-years-human-experimentation-america-tuskegee-study>.

design, to save it from itself, seemingly begging that community to be vaccinated without the proper plans and governance in place.¹⁶ Sensing the communal side-eye, campaigns and press conferences continue to be deployed through images of Black doctors and patients developing, administering, and taking the vaccines on screens around the world to reassure that past is not present. And yet, the skepticism and distrust remain even with folks who have taken the vaccine. I think of my wonderful colleagues who texted photos of their teenage children receiving the vaccine. They texted the photos and then texted how they were tearing up because they were relieved that the vaccine would make “their children safe.” I received no such texts from Black, Latinx, or members of Indigenous communities who are colleagues, friends, and family members. We had different conversations. We compared notes (and are still comparing notes) on the studies and statistics we collected (and are still collecting), strategies for post-vaccination (and now booster shots) mishaps and anxieties over the many unknowns because both our historical and *current* experiences continue to be substantially different from those of our white colleagues. The vaccine could not make Black, Latinx,¹⁷ Indigenous¹⁸ and other racially marginalized children safe. More is required for that to become a reality in this country because Black, Latinx, Indigenous, and other marginalized communities were not safe *before* the pandemic.¹⁹ “Why? What does it

¹⁶ Cleve R. Wootson Jr. & Frances Stead Sellers, *Biden’s Vaccine Push Runs into Distrust in the Black Community*, WASH. POST (Feb. 13, 2021, 6:00 AM), https://www.washingtonpost.com/politics/biden-black-vaccine-hesitancy/2021/02/13/1abc1006-661f-11eb-886d-5264d4ceb46d_story.html; Michael Harriot, *Invasion of the Antibody Snatchers: How White People Colonized the COVID Vaccine*, ROOT (Feb. 8, 2021, 4:13 PM), <https://www.theroot.com/invasion-of-the-antibody-snatchers-how-white-people-co-1846203198>; Hannah Recht & Lauren Weber, *Black Americans Are Getting COVID Vaccines at Lower Rates Than White Americans*, SCI. AM. (Jan. 20, 2021), <https://www.scientificamerican.com/article/black-americans-are-getting-covid-vaccines-at-lower-rates-than-white-americans/>; Nicquel Terry Ellis, *Biden Administration Promises Equitable Vaccine Access to Black and Brown Communities*, CNN (Jan. 18, 2021, 6:00 PM), <https://www.cnn.com/2021/01/18/us/biden-vaccine-access-black-clergy/index.html>.

¹⁷ Meredith S. Shiels et al., *Racial and Ethnic Disparities in Excess Deaths During the COVID-19 Pandemic, March to December 2020*, ANNALS INTERNAL MED. (2021),

¹⁸ RANDALL AKEE & SARAH REBER, AMERICAN INDIANS AND ALASKA NATIVES ARE DYING OF COVID-19 AT SHOCKING RATES, BROOKINGS INST. (Feb. 18, 2021), <https://www.brookings.edu/research/american-indians-and-alaska-natives-are-dying-of-covid-19-at-shocking-rates/>.

¹⁹ *Black Children Are Six Times More Likely to be Shot to Death by Police*, EQUAL JUST. INITIATIVE (Dec. 2, 2020), <https://ejl.org/news/black-children-are-six-times-more-likely-to-be-shot-to-death-by-police/>; Kimberly Kindy, Julie Tate, Jennifer Jenkins & Ted Mellnik, *Police Shootings of Children Spark New Outcry, Calls for Training to Deal with Adolescents in Crisis*, WASH. POST (May 12, 2021), <https://www.washingtonpost.com/nation/2021/05/12/children-police-shootings/>; Marcia Hopkins & Susan Vivian

mean?” asked no Black, person ever in 2020, and now 2021. It means that for all of the images and well-meaning gestures, rational distrust in what is seen²⁰ and heard matters. America cannot fix its mouth to tell Black and other racially marginalized people to just “get over” this one, and it knows it.

On October 7, 2020, during the vice-presidential debate, moderator Susan Page asked former California State Attorney General, United States Senator, and vice-presidential candidate Kamala Harris the following question: “If the Trump Administration approves a vaccine, before or after the election, should Americans take it, and would you take it?” Senator Harris responded, “If the public health professionals, if Dr. Fauci, if the doctors tell us that we should take it, I’ll be the first in line to take it, absolutely. But if Donald Trump tells us that we should take it, I’m not taking it.”²¹ Little has been said about why this point of

Mangold, *Cop Killing of Teen Shows How Child Welfare, Police Derail Young Black and Brown Lives*, USA TODAY (May 19, 2021, 5:34 PM), <https://www.usatoday.com/story/opinion/policing/2021/05/19/cop-killing-teen-shows-how-child-welfare-police-derail-black-lives/5143216001/>; Brakkton Booker, *Money May Not Shield Prosperous Blacks From Bigotry, Survey Says*, NPR (Oct. 24, 2017, 5:05 AM), <https://www.npr.org/2017/10/24/559690951/money-may-not-shield-prosperous-blacks-from-bigotry-survey-says>.

²⁰ The most recent debacle of the COVID-19 vaccine concerns a Philadelphia-based operation called “Philly Fighting COVID,” which is currently being investigated for misconduct and scrutiny for a host of equity issues raised by marginalized communities. See Nina Feldman, Max Marin & Alan Yu, *In Philadelphia, A Scandal Erupts Over Vaccination Startup Led By 22-Year-Old*, NPR (Jan. 29, 2021, 10:47 PM), <https://www.npr.org/sections/health-shots/2021/01/29/962143659/in-philadelphia-a-scandal-erupts-over-vaccination-start-up-led-by-22-year-old>; see also Frances Stead Sellers, *In Philadelphia, A Mass Vaccination Clinic Opened With Fanfare, Then Closed Amid Rifts of Trust*, WASH. POST (Feb. 14, 2021, 9:45 PM), https://www.washingtonpost.com/health/in-philadelphia-a-mass-vaccination-clinic-opened-with-fanfare-then-closes-amid-rifts-of-trust/2021/02/14/92045f9c-56a2-11eb-a08b-f1381ef3d207_story.html; Ali McPherson, *How the Philly Fighting COVID Scandal Has Hurt a Health Center Group’s Reputation*, WHYY (Feb. 8, 2021), <https://whyy.org/articles/how-the-philly-fighting-covid-scandal-has-hurt-a-health-center-groups-reputation/>; David Murrell, *Who, Exactly, Is Philly Fighting COVID?*, PHILA. MAG. (Jan. 26, 2021, 5:48 PM), <https://www.phillymag.com/news/2021/01/26/who-is-philly-fighting-covid/>; Rudy Chinchilla & Brian X. McCrone, *Philly Fighting COVID CEO Andrei Doroshin Admits to Giving Vaccines to Friends*, NBC PHILA. (Jan. 28, 2021, 6:13 PM), <https://www.nbcphiladelphia.com/news/coronavirus/philly-fighting-covid-ceo-andrei-doroshin-admits-to-giving-vaccines-to-friends/2682322/>; Alec Snyder & Travis Caldwell, *Deputy Health Commissioner Resigns in the Wake of “Philly Fighting COVID” Testing and Vaccine Rift*, CNN (Jan. 31, 2021, 2:42 AM), <https://www.cnn.com/2021/01/31/us/philly-commissioner-resigns-testing-vaccine/index.html>.

²¹ Harris on Taking a COVID Vaccine: *If Trump Tells Us to Take It, I Won’t*, CBS NEWS (Oct. 7, 2020), <https://www.cbsnews.com/video/2020-vp-debate-kamala-harris-on-coronavirus-vaccine/>; see also Kate Sullivan & Arlette Saenz, *Kamala Harris Receives First Dose of Moderna Covid-19 Vaccine on Camera*, CNN (Dec. 29, 2020, 12:16 PM), <https://www.cnn.com/2020/12/29/politics/kamala-harris-covid-vaccine/index.html>.

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view exists and its implications, the foundations of which are deeply connected to a legacy of racism, anti-enforcement and healthcare inequity, which results in what I argue is rational distrust.²² This Essay is neither salve nor balm for the most recent pandemic of COVID-19. It is meant to be a sobering historical glimpse at what the legacies of what I call anti-enforcement and the resulting rational distrust in America mean in the time of COVID-19. Exacerbation of health care and other social disparities, and the resulting damage, can no longer be contained in marginalized and racialized communities.

The lack of enforcement around the laws we already have, laws that were supposed to hold violators accountable under the high core values of equal protection, justice, and equality, reveal widespread failure and only halting and inconsistent success. The law and its pattern of inequitable enforcement have the power to turn democracy into an oligarchy.²³ These failures connote social betrayal and create rational distrust that extends beyond the lifetimes of those who live through it. The Tuskegee Experiment²⁴ started in 1932 and ended in 1972, a time period that covers Henrietta Lacks'²⁵ diagnoses of cervical cancer. These are just two of the most well-known examples that, for Black communities across America, are part of the foundation of rational distrust of the medical and research community. Distrust and apprehension are rational if we care enough to understand both the historical and current records. What happened to Henrietta Lacks still happens to women categorized as socially undesirable, including those seeking asylum and then held in detention centers in this country. Reports of forced sterilization,²⁶ motivated by eugenicist beliefs and

²² See Giselle Corbie-Smith, Stephen B. Thomas & Diane Marie M. St. George, *Distrust, Race, and Research*, 162 ARCH INTERN MED. 2458, 2458–63 (2002), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/214437>. I define rational distrust as a feeling that something or someone cannot be relied upon in certain situations given their historical and current behavioral and decisional patterns and practices. This working definition is rooted in data not feelings or claimed intentions.

²³ See generally CHRIS HAYES, *A COLONY IN A NATION* (2017); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880* (1998). In both Hayes' and Du Bois' books, the authors describe the tradition that entails how Black progress has been cut down by law, policy, violence and terror-all working hand in hand to create Black subordination.

²⁴ See *supra* note 15.

²⁵ *Henrietta Lacks: Science Must Right a Historical Wrong*, NATURE (Sept. 1, 2020), <https://www.nature.com/articles/d41586-020-02494-z>; *The Legacy of Henrietta Lacks*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/henrietalacks/> (last visited Feb. 14, 2021); see Maninder Ahluwalia, *Genetic Privacy: We Must Learn from the Story of Henrietta Lacks*, NEWSIDENTIST (Aug. 1, 2020), <https://www.newscientist.com/article/2250449-genetic-privacy-we-must-learn-from-the-story-of-henrietta-lacks/>.

²⁶ *ICE, a Whistleblower and Forced Sterilization*, NPR (Sept. 22, 2020, 3:04 PM), [https://www.npr.org/2020/09/18/914465793/ice-a-whistleblower-and-forced-](https://www.npr.org/2020/09/18/914465793/ice-a-whistleblower-and-forced-sterilization)

codified in policies that ensure marginality and vulnerability along racial lines, are some of the most recent examples contributing to this distrust.

Moreover, the ever-present social tautology revealed in study after study tells us that there are deep racial disparities in the provision of healthcare which result in mean morbidity being highest in racially marginalized communities. The disparities exist in the quality of care that Black, Indigenous, and Latinx patients receive. The reasons for this can be found in studies that have already been written and in things that have already been said. The reasons range from W.E.B. DuBois' response²⁷ to Frederick Hoffman's²⁸ misinformation-filled "study" that has been used in actuarial accounts describing Black life expectancy and other traits, to the most current research on race and healthcare, where the results and patterns follow one trajectory—which means it is the default scenario of a healthcare system that allows professional incompetence and a denigrated standard of care to Black mothers in child birth—not to mention the leaky pipeline in public health and academic medical centers.²⁹ Default scenarios must be intentionally managed to remedy and fully account for fault lines—even when the act in question is vaccination and not the withholding of treatment, as has previously been the case.

Before the COVID-19 pandemic, Black women in the United States were two to six times more likely than white women to die in childbirth.³⁰ In New York City, that number quadrupled to twelve times

sterilization; Steven Moore, *ICE Is Accused of Sterilizing Detainees. That Echoes the U.S.'s Long History of Forced Sterilization*, WASH. POST (Sept. 25, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/09/25/ice-is-accused-sterilizing-detainees-that-echoes-uss-long-history-forced-sterilization/>; Maya Manian, *Immigration Detention and Coerced Sterilization: History Tragically Repeats Itself*, ACLU (Sept. 29, 2020), <https://www.aclu.org/news/immigrants-rights/immigration-detention-and-coerced-sterilization-history-tragically-repeats-itself/>.

²⁷ W.E.B. DuBois, *Review of "Race Traits and Tendencies of the American Negro,"* 11 ANNALS AM. ACAD. POL. & SOC. SCI. 127–33 (1897); see also Megan J. Wolff, *The Myth of the Actuary: Life Insurance and Frederick L. Hoffman's Race Traits and Tendencies of the American Negro*, 121 PUB. HEALTH REPS. 84, 85 (2006).

²⁸ See Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro*, 11 AM. ECON. ASS'N 1 (1896).

²⁹ Jesus Ramirez-Valles, *Public Health Has an Equity Problem: A Latinx's Voice*, FRONTIERS IN PUBLIC HEALTH (Sept. 11, 2020), <https://www.frontiersin.org/articles/10.3389/fpubh.2020.559352/full>.

³⁰ Mary Beth Flanders-Stepans, *Alarming Racial Differences in Maternal Mortality*, 9 J. PERINATAL EDUC. 50–51 (2000); see also Nina Martin & Renee Montagne, *Black Mothers Keep Dying After Giving Birth. Shalon Irving's Story Explains Why*, NPR (Dec. 7, 2017, 7:51 PM), <https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why>; Amy Roeder, *America Is Falling its Black Mothers*, HARV. PUB. HEALTH (2019), <https://www.hsph.harvard.edu/>

more likely. In the United States, Black people with COVID-19 have experienced some of the highest death rates and are nearly four times more likely to be hospitalized with COVID-19.³¹ Additionally, we cannot accept the ill-informed rationalization that only Black people who are poor, uneducated, and without insurance are the victims of the pandemic when these health disparities exist across all socioeconomic statuses in Black communities. Instead, we should be challenging our legal, sociopolitical, and economic systems to account for and redress how people of African descent along with other racially marginalized people in developed nations are made to be uniquely vulnerable to the systems that rely on their subordination.³² There are abiding consequences to this social reality.

Moreover, the communities most severely impacted by the pandemic have high levels of rational distrust in the healthcare system and continue to have alienating experiences when they approach the system. Hesitancy and rational distrust aside, access to the vaccine continues to be difficult because of “location sites, online-only sign-ups, appointment scheduling, transportation, and other planning and access issues”³³ In addition to the ongoing logistical barriers connected to

magazine/magazine_article/america-is-failing-its-black-mothers/; Linda Villarosa, *Why America's Black Mothers and Babies Are in a Life-or-Death Crisis*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

³¹ See Editorial, *Too Many Black Americans Are Dying from COVID-19*, SCI. AM. (Aug. 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19/>; see also Maria Godoy, *Black Medicare Patients with COVID-19 Nearly Four Times as Likely to End up in Hospital*, NPR (June 22, 2020), <https://www.npr.org/sections/health-shots/2020/06/22/881886733/black-medicare-patients-with-covid-19-nearly-4-times-as-likely-to-end-up-in-hosp>; Akilah Johnson & Nina Martin, *How COVID-19 Hollowed Out a Generation of Young Black Men*, PROPUBLICA (Dec. 22, 2020, 5:30 AM), <https://www.propublica.org/article/how-covid-19-hollowed-out-a-generation-of-young-black-men>; Tracie White, *More Than Half of In-Hospital Deaths from COVID-19 Among Black, Hispanic Patients, Study Finds*, STAN. MED.: NEWS CTR. (Nov. 17, 2020), <https://med.stanford.edu/news/all-news/2020/11/deaths-from-covid-19-of-inpatients-by-race-and-ethnicity.html>.

³² To fully understand and have due regard for all of this would require acquisition and maintenance of competencies that are grossly lacking in public health and medical research. This is a matter of will and won't, not can and can't. It is not clear to this Author that those tasked with making the decisions about deploying the vaccine have the requisite competencies of racial literacy or the benefit of knowing how to quiet their biases and interpersonal essentialist beliefs. These kinds of deficiencies are at the core of why so many medical students believed that Black people did not feel pain the way non-Black people feel pain. See, e.g., Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT'L ACAD. SCI. U.S. 4296, 4296 (2016).

³³ Nina Feldman, *Why Black and Latino People Still Lag On COVID Vaccines—And How To Fix It*, NPR (Apr. 26, 2021, 2:01 PM), <https://www.npr.org/sections/health-shots/>

marginality and vaccine access, we should also ask: What does our Nation do with rational distrust—especially in a pandemic amongst other pandemics, where mechanisms like vaccinations and contact tracing—found to actually work, at least as they were used before the age of big data—seemed trustworthy? It is unclear, and this Essay does not have any definitive answers except to suggest that nothing will get better unless the pattern and practice of anti-enforcement changes to actual enforcement of the laws and policies we already have. Going from one pseudo-solution to the next, without accounting for what we already have and have not used properly, will not solve the problems of rational distrust. Yet, this kind of behavior is what Americans playing at democracy do, which means that Americans have to stop playing and start doing democracy for real.

Before the Civil Rights Act of 1968³⁴ (supposedly eliminating housing discrimination), there was a Civil Rights Act of 1964³⁵ (supposedly ending Jim Crow laws, such as separate but equal under *Plessy v. Ferguson*, and discrimination on the basis of race, color, religion, sex, or national origin). Before that, the Civil Rights Act of 1957³⁶ established the U.S. Commission on Civil Rights. Even before that, our Nation passed the Civil Rights Act of 1875,³⁷ which provided that “all persons within the jurisdiction of the United States [are] entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement” regardless of race and color, and that any person denied access to these facilities on account of race is entitled to monetary restitution in a federal court of law. The Supreme Court declared that law unconstitutional in 1883³⁸ in the consolidated case known as *The Civil Rights Cases*, wherein the Court held that the Fourteenth Amendment to the Constitution granted Congress the right to regulate the behavior of states, not of individuals. This, of course, foreshadowed the 1896 *Plessy v. Ferguson*³⁹ case where the Court held that the separate but equal doctrine was constitutional. And let us not

2021/04/26/989962041/why-black-and-latino-people-still-lag-on-covid-vaccines-and-how-to-fix-it.

³⁴ Civil Rights Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 73 (1968).

³⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241 (1964).

³⁶ Civil Rights Act of 1957, Pub. L. No. 85-315, § 101, § 111, 71 Stat. 634 (1957).

³⁷ Civil Rights Act of 1875, ch. 114, §§ 1–3, 18 Stat. 335 (1875). See generally Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966) (discussing the framers’ understanding of “places of public accommodation”).

³⁸ *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883).

³⁹ *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896).

forget the Civil Rights Act of 1866,⁴⁰ which was the first piece of legislation that granted all citizens the full and equal benefit of all laws and proceedings for the security of person and property. All the way down, there has been a consistent pattern of progression, retrenchment, and re-imbaling in our laws and policies resulting in multiple incremental steps forward, accompanied by regression and inequity.

That there is now a pattern reflecting who is more likely to become infected and die from COVID-19, then, is not new or surprising. That the pattern aligns with race and strongly with non-whiteness⁴¹ is also not new or surprising. That, for all of the billions of dollars and billionaires in the technology sector, this sector has failed to acknowledge or even begin to address this fundamental disparity is, again, not new or surprising, but instead a failure of our Nation's democracy. Marginalized communities, specifically Black, Indigenous, and Latinx communities, are the most vulnerable at every level in our socioeconomic system. The technological solutions in the COVID-19 pandemic are now described as being focused on equity. Yet, as past is present, the most vulnerable of us must ask whether these solutions, in their largely socially agnostic wisdom, are focused on *efficiencies* most of all. Prioritizing efficiency means that the concerns that the most vulnerable suffer from fail to be answered fully in the interest of bringing the virus to heel one way or another.⁴² In this way, we find that the belief systems behind the need for everyone to queue up to get the vaccine occupy a Janus-like space⁴³ with believers in herd immunity. In the end, collateral damages in both scenarios are calculated and projected but never really accounted for in terms of actual human loss when it is the loss of the most vulnerable, unless the loss threatens to upend commerce and capital. And because we do not know how to contain that potential threat without a vaccine, we are forced to deal

⁴⁰ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

⁴¹ See Editorial, *supra* note 31.

⁴² There are several notions about herd immunity shared during the pandemic—the more prominent of which began taking shape during the early stages of the pandemic. Comments and politically-motivated positions based on Darwinian perceptions of herd immunity catalyzed refusals to wear masks, refusals to socially distance, and refusal and/or denial of the harmful impact of COVID-19 beyond the misinformation and disinformation characterizing it as nothing more than a cold or the flu. Ongoing denialism and refusal to take necessary precautions substantiated by medical science continue to be part of the *irrational distrust* by some.

⁴³ Janus, the god of beginnings, doorways, and archways in Roman religion, is traditionally depicted with a two-faced head. See *Janus*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Janus-Roman-god>. “Janus” has come to be shorthand for having two contrasting characteristics. See *Janus-faced*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Janus-faced> (last visited Aug. 27, 2021).

with rational distrust since America, hedging its bets, needs at least some of the most vulnerable to take the vaccine. There is a deficit of trust, however, between marginalized communities and those who come bearing technological “solutions” (even if a representative of that community is part of the giving committee). These technological “solutions” are viewed by some as Trojan Horses⁴⁴ in the time of COVID-19. What the political, technological, and healthcare solutionists fail to realize is that trust is more important than efficiency, and the pathway to building trust is rarely efficient. This is not because the distrustful are being unreasonable or superstitious, but because history lays bare the fact that they have never saddled a non-Trojan horse.

Let us consider a few things. First, at the time of this Essay’s publishing, the healthcare system in the United States is tainted by overwhelming disparities, which result in disproportionate deaths from preventable and manageable ailments at every level of socioeconomic status among Black, Indigenous, and Latinx people. Second, Black, Indigenous, and Latinx people’s rational distrust of the healthcare and medical research sectors is rooted in historical and ongoing experiences of betrayal, devastation, and unnecessary suffering and death; in addition, there is a deficit of healthcare professionals at the forefront of leadership who are clearly outlining how the past is no longer the present or the future in this regard. This deficit naturally leaves a gaping question about what is more likely, given the pattern and practice substantiated by historical fact and current experiences.

So, what is more likely? That the technological solutions for COVID-19 will, in fact, exacerbate racial inequity, not only because the historical inequity is being ignored or downplayed or completely dismissed altogether,⁴⁵ but also because it is still viewed as efficient to do so? Or that the warp-speed-produced vaccine(s) will truly benefit Black, Indigenous, and Latinx peoples? The pathway to well-intentioned and real equity seems precarious, not only because of who gets to decide what technology gets greenlighted, who gets to try and tinker, who gets funded, and what gets deployed, but also because of the patterns of mind and imagination that get stuck in old and comfortable feedback loops—

⁴⁴ See generally *Trojan Horse*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Trojan%20horse> (last visited Feb. 28, 2021); Matt Pickles, *Did the Trojan Horse Exist? Classicist Tests Greek “Myths,”* OXFORD ARTS BLOG (July 25, 2014), <https://www.ox.ac.uk/news/arts-blog/did-trojan-horse-exist-classicist-tests-greek-myths>.

⁴⁵ April Dembosky, *No, the Tuskegee Study is Not the Top Reason Some Black Americans Question the COVID-19 Vaccine*, KQED (Feb. 25, 2021), <https://www.kqed.org/news/11861810/no-the-tuskegee-study-is-not-the-top-reason-some-black-americans-question-the-covid-19-vaccine>.

loops that do not prioritize promising practices about how to communicate, understand, and respect marginalized communities' concerns. That is the nature of marginalization at the intersection of technology and social subordination during a pandemic—this too is not new or surprising.

More time and effort should be allowed to conceptualize; create contingencies; test, and retest; and, most importantly, effectively communicate the recognition of the bases for rational distrust, and why the current solutions not only will not replicate but will also work to eliminate harmful patterns, practices, and positions. Genuine effort to provide good governance around the conceptualization, development, deployment, and monitoring of adverse impact, corrective action, and process improvement must become a clear and communicated part of the COVID-19 vaccine communication and strategic and logistical planning processes.⁴⁶ The overarching objective must be anti-subordination. Input from stakeholders within marginalized communities needs to be highly prioritized and taken seriously. Voices never invited to the proverbial tables because of feelings about white people being made to be uncomfortable and/or challenged must not only be heard, but those voices must also continue to create their own tables and processes to ensure the health and wellness outside of the current dominant structures.⁴⁷ That is the only way new behavior, new patterns, and new practices for marginalized communities will actually and sustainably develop—in spaces where they are no longer marginalized in the first place. The promise of anti-subordination and anti-marginality will not happen so long as these communities sit at or wait for a seat at someone else's table where they have historically been a transactional afterthought—at best—patiently waiting for interests to converge in ways that offer little more than crumbs from said table in

⁴⁶ See Pien Huang, 'You Can't Treat If You Can't Empathize': Black Doctors Tackle Vaccine Hesitancy, NPR (Jan. 19, 2021, 5:00 AM), <https://www.npr.org/sections/health-shots/2021/01/19/956015308/you-cant-treat-if-you-cant-empathize-black-doctors-tackle-vaccine-hesitancy>; see also Julia Craven, *Black Doctors Explain How to Overcome Reluctance Toward the COVID Vaccine*, SLATE (Jan. 16, 2021, 5:45 AM), <https://slate.com/technology/2021/01/covid-vaccine-trust-black-doctors.html>; Eugenia South, *I'm a Black Doctor Who Didn't Trust the Covid Vaccine. Here's What Changed My Mind*, NBC NEWS (Jan. 22, 2021, 2:30 AM), <https://www.nbcnews.com/think/opinion/i-m-black-doctor-who-didn-t-trust-covid-vaccine-ncna1255085>.

⁴⁷ See generally CYRIL DEGRASSE TYSON, *THE "UNCONDITIONAL WAR ON POVERTY": AND THE USE OF COMPUTER TECHNOLOGY BY COMMUNITY ACTION AGENCIES 1965-1972* (1997). Cyril Degrasse Tyson emphasizes that marginalized communities must be able to "plan objectives over time, measure achievements, and define options and their consequences for future action. For planning to be productive, communities had to be able to introduce—through their own recognized institutions—appropriate technology that would make these activities effective." *Id.* at 13.

paltry recognition of deep and abiding compromises that seem to go only in one direction.

The health and well-being of America has always been bound up in its people. How and which people mattered in its racially stratified hierarchy were established by its laws, first and foremost, and from its laws came myths, illusions, and pathological projections that remain to this day. If, as we say, we intend to eliminate COVID-19, we cannot do so by getting back to normal, because normalcy is what created the pandemic parallels of race-based health disparities and social subordination. The pandemic—particularly, deployment of the vaccine—presents opportunities to become a real version of what this Nation claimed to be all along.