

Health Law and Bigotry Distractions

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Abstract: Bigotry distractions are strategic invocations of racism, transphobia, or negative stigma toward other marginalized groups to shape political discourse. Although the vast majority of Americans agree on large policy issues ranging from reducing air pollution to prosecuting corporate crime, bigotry distractions divert attention from areas of agreement toward divisive identity issues. This article explores how the nefarious targeting of identity groups through bigotry distractions may be the tallest barrier to health reform, and social change more broadly. The discussion extends the literature on dog whistles, strategic racism, and scapegoating.

Few would deny the dire need for health reform in the United States. The unaffordability of insulin and other medicines, soaring health care costs, falling Medicare reimbursement, the loss of the primary care physician, and un- and underinsurance are just several problems plaguing our health care system. Yet, in some ways, we are on the brink of a revolution. Pharma suffered a major loss — for the first time in years — with the passage of the Inflation Reduction Act, which allows Medicare to negotiate the prices of some drugs. The No Surprises Act, too, protected patients from “balance billing” to the chagrin of health insurers and hospitals. The Tobacco 21 law increased the legal age to buy addicting tobacco products to 21 nationwide. We are finally living in a moment where real change may be at our fingertips — the kind of change envisioned by Charity Scott.

However, progress towards further reform is stalling. In this article, we explore a significant source of risk to health reform: political actors seeking to derail the political process by using an old trick with a new spin, which we call “bigotry distractions.” Bigotry distractions are a recurring theme in periods of progressive efforts to bring about change in the U.S., especially in the area of health. From red scares and racism to sexism and transphobia, bigotry has been used to distract from efforts at improving public health, health equity, and access to care.

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A broad typology is helpful to understanding bigotry distractions. We define specific bigotry distractions to mean deploying bigotry to change public support for particular policies and programs, whereas the more general form involves making broad racist, anti-LGBTQ+, sexist or similar appeals to swing elections or otherwise affect political processes. In this article honoring the contributions of Charity Scott to achieving health equity, we begin to explore how general and specific bigotry distractions have contributed to health policy failures in the U.S.

We start with a puzzle: Why has the United States not ensured access to basic necessities such as health,

accepted policy goals. People who support universal health care, for example, might be drawn to vote for candidates who are committed to repeal “Obamacare” because of the covert racist suggestion of the label. In addition, we use the plural because bigotry distractions can take multiple and overlapping forms: evocations of fear or resentment, disparagement of the other, dog-whistles or gaslighting, and likely more. Our goals in this paper are only first steps: to characterize bigotry distractions, to illustrate how they have diverted health reform at crucial points in U.S. history, and to suggest ways to confront distractions as they may occur.

However, progress towards further reform is stalling. In this article, we explore a significant source of risk to health reform: political actors seeking to derail the political process by using an old trick with a new spin, which we call “bigotry distraction.” Bigotry distractions are a recurring theme in periods of progressive efforts to bring about change in the U.S., especially in the area of health. From red scares and racism to sexism and transphobia, bigotry has been used to distract from efforts at improving public health, health equity, and access to care.

housing, medications, or a safe environment, despite popular support?¹ About 90% of Americans think Medicare should negotiate drug prices;² three-quarters want tighter limits on smog;³ three-quarters of Americans want the government to crack down on corporate crime;⁴ four-fifths believe the minimum wage is too low;⁵ four-fifths support mandated provision of paid family and medical leave;⁶ and there are many more areas in which popular support has not resulted in policy change.⁷ We hypothesize that a contributing factor to this conundrum is the use of bigotry distractions to divert attention from areas of public agreement to a focus on, and sometimes an obsession with, perceived threats from discrete and insular minorities.⁸ As LaFleur Stephens-Dougan has noted in the context of race, bigotry threatens democracy “when politicians are able to secure electoral victory simply by playing to pernicious stereotypes of racial, religious, and ethnic minorities.”⁹

Several points of clarification about our argument. We are not making claims about whether particular individuals or groups are themselves bigoted, including those who use bigotry as a distraction. Rather, we are pointing to how appeals to prejudice against particular identities can undermine otherwise widely

The next section describes the impacts of racism and transphobia as general bigotry distractions. We then illustrate specific bigotry distractions at work in opposition to efforts to expand access to health care and to rationalize drug policy. We conclude with some theoretical through-lines of bigotry distractions and suggestions for how to counter the distracting effects of bigotry.

General Bigotry Distractions: From Racism to Transphobia

The strategy of using anti-transgender rhetoric for political gain has been adopted in force by conservative politicians following polling suggestive of its likely appeal. Today’s anti-trans panic has roots in other panics in U.S. history that have targeted marginalized groups.

Here, we use the examples of race and LGBTQ+ discrimination.

Race and LGBTQ+ Bigotry Distractions in U.S. History

Since Reconstruction in the 1860s, white politicians have “routinely engaged in race-baiting to generate political support.”¹⁰ After the end of slavery, the Freed-

men's Bureau was established to provide basic material goods to freed people (and white refugees) and to further equal justice before the law for Black Americans.¹¹ President Andrew Johnson and the Democratic Party criticized the Freedmen's Bureau as likely to make Black Americans lazy and dependent, to potentially corrupt Black women's sexuality, and to be "unfair to Whites."¹² Opponents voiced "preemptive, apocalyptic, slippery-slope arguments."¹³ Many Whites feared the consequences of racial equality, including that new social policies might infringe on white people's liberty.¹⁴ These narratives helped spell the unraveling of Reconstruction. Racial distraction ceded to full-blown racial oppression. Numerous state constitutional conventions were held in the late 1890s and early 1900s to eliminate Black participation in politics.¹⁵

Later in history, in the 1940s and 1960s, another battle was being waged: against sexual-minority Americans. Federal politicians, in part due to "political opportunism," launched investigations into suspected gay employees working for the federal civil service, which led to the Lavender Scare. Somewhere between 5,000 and tens of thousands of gay employees were fired or forced to resign from federal government positions.¹⁶ Until 1973, homosexuality was considered a mental disorder within the Diagnostic and Statistical Manual of Psychiatric Disorders, which suggested to many that psychiatry was acting as "an agent of social control,"¹⁷ and that psychiatric theory was contributing to anti-LGBTQ+ bigotry.¹⁸ Indeed, gay people were seen as "morally weak or psychologically disturbed," and lumped in with communists as part of the Red Scare.¹⁹ During the first investigation of the Lavender Scare in 1950, two senators questioned numerous agency officials about employment of gay people, and many agencies began to scrutinize their payrolls. The leader of the Civil Service Commission sent the senators a proposal for a "routine procedure to rid the offices of Government of moral perverts."²⁰ During a larger investigation later on, congressional staff contacted many federal agencies inquiring about "suspected homosexuals."²¹ Most agencies responded by condemning the suitability of gay employees. The Secretary of Commerce responded, "The privilege of working for the United States Government should not be extended to persons of dubious moral character, such as homosexuals or sex perverts." The report emerging from this investigation proved an authoritative symbol that "gay people did indeed threaten national security."²² And in 1953, President Dwight Eisenhower issued an executive order barring gays and lesbians from federal employment,²³ as part of "target[ing] a vulnerable minority ... as causing lots

of societal ills."²⁴ Eventually, the tide swung through massive protests over the next two decades, and by 1975 the Civil Service Commission issued protections for gay people in federal employment.²⁵ However, attacking gay people in government was, in part, "used as a battering ram by southern and rural members of the Republican Party to deride the New Deal as an upper-class affair foreign to ... 'ordinary' Americans."²⁶ In this way, gays were targeted as part of a backlash to legislative reform aimed at making Americans more economically equal.

A racial distraction surfaced deeply again in the 1960s, as the LGBTQ+ community was fighting for acceptance and Jim Crow was unraveling during a historic period of social change. In the late 1950s, white politicians opposed federal voting rights laws under the pretext that poll taxes and literacy requirements were intended only to ensure qualified citizens of any race could vote.²⁷ Many whites harbored resentment, believed the racial equality movement was moving too fast, and sought to promote their own grievances over those of Black Americans.²⁸ In brief, they embraced a "posture of victimization" that framed Black people as taking the reins over America and receiving "favoritism."²⁹ When it came to large-scale social policies, white workers generally proved unwilling to support them due to a perceived "short-term interest in maintaining racial control over labor and housing markets."³⁰

Richard Nixon's 1968 presidential run popularized the "southern strategy," which aimed to incite racialized anger through "code words and wedge issues" in order to increase white turnout for conservative candidates.³¹ The southern strategy is believed to be "the primary force" that turned the south into a conservative stronghold in presidential elections.³² Nixon railed against forced busing for school integration and ran commercials depicting riots and calling for law and order — coded cues of racial fear³³ — while catering to the "forgotten Americans," the "silent majority."³⁴

Racial resentment remained front-and-center during Ronald Reagan's 1980 presidential run, when the country steered heavily away from 1960s progressivism. Reagan launched his campaign in Philadelphia, Mississippi, where Ku Klux Klan members had, colluding with local government, murdered three civil rights employees. And he was famous for his dog whistles to "welfare queens" and "street crime," as well as for launching the war on drugs, while minimizing prosecution of corporate crime³⁵ and deregulating American society. By linking government benefits with racial handouts, Reagan proved "how dog whistle racism wrecks the middle class: by helping to convince

the middle class that government — and not concentrated wealth — is the greatest threat in their lives.”³⁶

A year after Reagan won the presidency, a political operative was forthright in what was then an anonymous interview:

By 1968 you can't say “n*****”—that hurts you. Backfires. So you say stuff like forced busing, states' rights and all that stuff. You're getting so abstract now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites. And subconsciously maybe that is part of it. I'm not saying that. But I'm saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me — because obviously sitting around saying, “We want to cut taxes and we want to cut this,” is much more abstract than even the busing thing, and a hell of a lot more abstract than “N*****, n*****.” So anyway you look at it, race is coming on the back burner.³⁷

Although the 1960s and 1970s generally expunged explicit racism from national discourse, politicians like George Wallace, Barry Goldwater, Richard Nixon, and Ronald Reagan “stoked, legitimized, and encouraged” subtler versions of bigotry — they “sought to take advantage of existing bigotry to get elected.”³⁸ Ian Haney-López has called this tactic strategic racism, defined as “purposeful efforts to use racial animus as leverage to gain material wealth, political power, or heightened social standing.” As we later suggest, the “War on Drugs” during this period can be viewed as an example of a specific bigotry distraction in an area of health policy.

To Same-Sex Marriage and Anti-Trans Laws

Overlapping with strategic racism, politicians also targeted gay men, especially in the 1980s. The AIDS epidemic provided a renewed rationale for fear of gay men and what became called the “gay disease.”³⁹ In addition to states criminalizing private same-sex consensual conduct, upheld by the Supreme Court in *Bowers v. Hardwick* (1986), the 1990s saw “no promo homo laws” that barred LGBTQ+ discussions in schools,⁴⁰ Don't Ask Don't Tell, and the rise of the religious right, which saw “gay people as a threat to the heterosexual family.”⁴¹ Politicians decried same-sex marriage as a threat to traditional marriage and American life. In 2004, George Bush beat John Kerry in part by using gay marriage as a wedge issue.⁴²

Eventually, same-sex marriage stopped being a successful wedge issue given increasing public support for LGBTQ+ people, and *Obergefell v. Hodges* (2015) spelled the end of this advocacy by constitutionally enshrining a right to marry someone of the same gender. “[S]ocial conservatives were set adrift” searching for a new issue that would “rally the base.”⁴³

As opposition to same-sex marriage waned as an effective social issue, conservative groups conducted polling to identify other issues regarding sexuality that could best excite the public.⁴⁴ That polling turned up opposition to transgender people participating in sports consistent with their gender identity and transgender minors' access to gender-affirming medical care. As “the result of careful planning by national conservative organizations to harness the emotion around gender politics,” anti-transgender sentiment gained steam, reaching the firestorm it is today.⁴⁵ This was no accident, but rather a “well-organized effort to put this on the map.”⁴⁶

According to Christopher Pepin-Neff and Aaron Cohen, the current anti-trans panic began in 2017, when then-President Trump tweeted that transgender people could no longer serve in the military “in any capacity.” His Administration also undid numerous LGBTQ+ nondiscrimination protections, scrubbed LGBTQ+ terms from the White House website, and used the Department of Justice to further legal interpretations that disfavored transgender people.⁴⁷ Trump is thought to have incited a “moral panic that made transgender Americans deviants outside of society.”⁴⁸ (Trump also leveraged fear of racial, ethnic, and religious minorities, suggesting the use of overlapping bigotry distractions.)

In the past several years, a raft of more than 550 anti-transgender bills has swept the country, 85 of which were enacted as of Dec. 18, 2023.⁴⁹ These laws limit transgender health care (such as hormone therapy, surgery, or puberty blockers), bar transgender people from participating in sports consistent with their gender identity, and confine educational speech, among other restrictions.

Not all proposed laws pass or survive court scrutiny; however, “many Republican officials use them to drum up media attention, fundraise and drive voters to polls.”⁵⁰ Major conservative politicians in 2023 have used transphobic rhetoric designed to evoke “moral panic.”⁵¹ Donald Trump has proposed a ten-point “Plan to Protect Children From Left-Wing Gender Insanity”⁵² and likened gender-affirming care for minors to “child abuse” and “child sexual mutilation.”⁵³ He has promised, if elected, to “revoke every Biden policy promoting the disfigurement of our youth.”⁵⁴ Eyeing

a presidential run, in 2023 Ron DeSantis signed into law restrictions targeting gender-affirming care, pronouns in schools, and gender-neutral bathrooms.⁵⁵ In the summer of 2023, DeSantis's campaign promoted a video mocking Trump's prior support for the LTBGQ+ community.⁵⁶ The video pairs a techno-thumping beat with a "barrage of images and headlines" highlighting DeSantis's anti-transgender efforts, including having signed the "most extreme slate of anti-trans laws in modern history."⁵⁷ Given the spate of anti-transgender laws, many politicians across the country evidently believe that whistling to anti-LGBTQ+ sentiment is a winning political strategy.

Today's anti-trans laws operate on a spectrum of justifications. On the one hand, many conservatives today believe that transgenderism is a social contagion. Citing a statistic about the rising rates of transgenderism in the UK, the conservative group Alliance Defending Freedom has tweeted, "The social contagion perpetuating gender confusion deeply harms vulnerable children. We must protect them ..."⁵⁸ Thus, according to activists, there is a need for consumer protection of children against an artificial construct. And some anti-trans activists point to protecting women, largely in the settings of preventing "biological men" from unfairly beating female athletes and from preying on women in restrooms.

Although bigotry may seem like a strong word for these social and cultural debates, at least three factors point against a generous understanding of the concerns raised by the anti-trans movement. First, while polls of Republicans showed that only 30% of Republicans in 2020 believed acceptance of transgender people had gone "too far," that figure climbed to 79% by April 2023.⁵⁹ These figures suggest animosity toward transgender people as a group. Second, the general legal response of states swept up in this fervor is extraordinarily sweeping. States *ban* gender-affirming medical care despite its lifesaving impact. They also have enacted bathroom use requirements invoking images of fear of transgender people. Third, today's anti-trans laws are arguably the outcome of a multi-year project to drum up energy among social conservatives about these issues, in the wake of falling political interest in opposing same-sex marriage and even abortion.⁶⁰ The popularity of Donald Trump's anti-transgender rhetoric suggests there are elements of bigotry at the core of anti-transgender laws.

Writers have called the current transgender moment a "wave of fear"⁶¹ and a moral panic,⁶² although this terminology does not fully capture the intentional nature of these developments. Rather, conservative politicians "realized that the issue could reliably excite

Republicans and potential swing voters, drawing them into broader cultural debates surrounding trans rights."⁶³ Conservative organizations "boost panics to elect friendly legislators."⁶⁴ Today, trans people are receiving attacks that have traditionally been devoted to other identity groups.

General bigotry distractions must be seen in a larger context of contemporary commentators maligning a polarized society, or "culture wars," rendering civil discussion impossible. This outcome is likely intentionally produced. The goal of stoking fear and bigotry is not fostering discussion, but shutting down empathy and stoking anger toward progressive change. The vitriol we see in today's politics is well suited to preserving the status quo, in health law and beyond. And not only are these intolerances stoked in a general way, but they are sometimes selectively deployed to implode specific health reforms.

Health Reforms Falter on Specific Bigotry Distractions

Bigotry distractions have taken specific form in derailing particular policy initiatives. This section describes several important moments in the history of health reform efforts in the U.S. It shows how at important junctures, the rhetoric of stigmatization directed at disfavored groups helped to shift public support away from the reform effort. It also shows how the predicted benefits of policy reform often went unnoticed as efforts to achieve change lost force and ultimately failed. Importantly, the disfavored groups differed, but the deflection tactics were largely the same.

Truman, Health Care, and Red-Baiting

In the aftermath of the Second World War, Harry Truman as president initiated an effort at national health care. Such efforts were common in Europe, as the end of the War proved a fertile period for health reform. The British National Health Service dates from 1948; universal health care was introduced in the mid-1950s in Sweden, Iceland, and Norway. In France, the social security system was expanded to provide health insurance for all employees and retirees in 1945; other groups were gradually added in subsequent years. But in the United States the effort to expand access to coverage fell prey to crusades against supposed communist infiltration.

As President, Harry Truman first proposed the creation of a compulsory national insurance plan with employees and employers contributing to a fund.⁶⁵ This proposal would have built on the existing role of employers in providing health insurance for their employees, a role that had been encouraged by a ruling

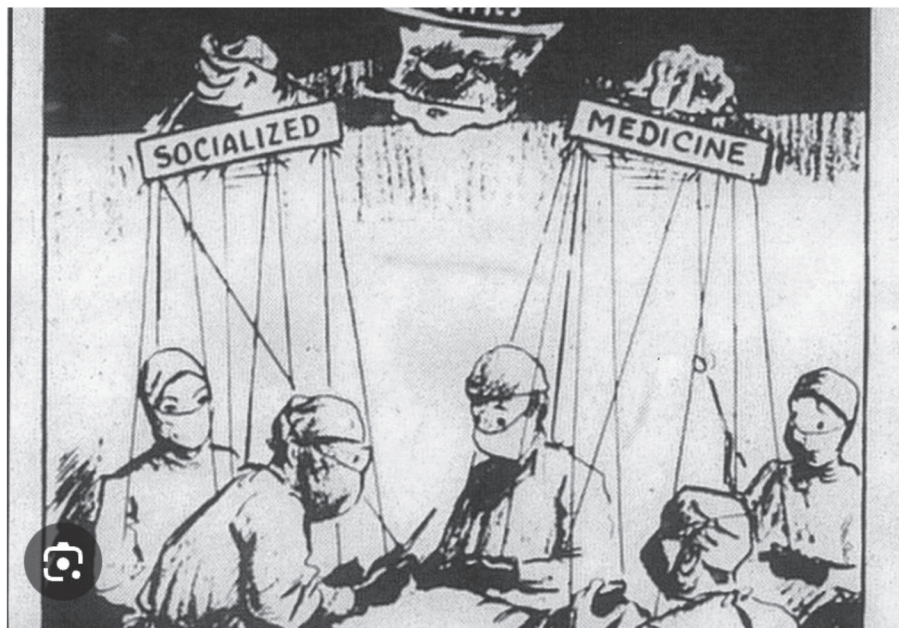


Figure 1

Cartoon depicting doctors under the influence of an evildoer named “socialized medicine.” The puppet strings symbolize government control (represented by a single villain) over doctors and our medical system. This cartoon appeared in a pamphlet from the National Physicians’ Committee for the Extension of Medical Services,⁷² a lobbying organization connected with the AMA.⁷³

of the IRS in 1943.⁶⁶ The bill did not pass right away because “President Truman was a Democrat for a primarily Republican Congress ... [and] he had become president upon Franklin D. Roosevelt’s death and thus had not yet independently earned public support.”⁶⁷

The AMA stepped in quickly to oppose the proposal, calling it “socialized medicine.”⁶⁸ Their efforts reveal the role of a private but highly influential political actor pursuing distraction bigotry. Historian Jill Lepore has observed that the AMA’s campaign turned healthcare reform into a bogeyman that scared millions of Americans by the threat of communism.⁶⁹ Importantly, sentiments associated with the “red Scare” have been associated with antisemitism and with opposition to immigration especially from southern and eastern Europe.⁷⁰ Upon a second effort to get the bill through Congress, the AMA (with help from a public relations firm) spent \$48 million in today’s dollars on ads that played on communist fears in opposition to the bill.⁷¹

The advertisement used terms like “A Threat to Health — A Threat to Freedom!”⁷⁴ AMA lobbying efforts called the bill “unAmerican” and charged members of the Truman administration backing the bill with being “followers of the Moscow party line.”⁷⁵ Senator Robert A. Taft (R-Ohio) took up the theme in Congress: “It is to my mind the most socialistic

measure that this Congress has ever had before it, seriously.”⁷⁶ Congress largely ignored testimony that access to insurance would improve health by encouraging preventive care. It also failed to distinguish between medicine for the “social” good and “socialized medicine,” as urged by one commentator.⁷⁷ In these efforts, the AMA was motivated not by identity issues, but by the goal of preserving professional freedom and physician incomes.⁷⁸

Separating Medicaid from Medicare: The Distraction of Racism

Medicare and Medicaid were born twins during the Johnson administration in 1965. But as health reforms they could not have been more different — with Medicaid associated with racial and ethnic minorities. Their separation is another example of bigotry as distracting from a specific policy initiative.

Medicare has been constructed as “earned” by a lifetime of work and concomitant payment of the Federal Insurance Contribution Act (FICA) taxes. People are eligible for Medicare when they reach age 65, the age supposed to be the “normal” retirement age for Social Security as initially established. They may also become eligible if they are permanently disabled and have paid FICA taxes for a proportionately appropriate set of

quarters by the onset of their disability. People permanently disabled from childhood can also receive eligibility based on their parents' FICA status. Medicare is an entirely federal program, not at all dependent on the willingness of individual states to participate. (The one element of localism in Medicare is that the program is administered by regional carriers; national coverage decisions, however, can override a decision by a carrier not to cover novel forms of care.) Important to the decision of the AMA to finally stop blocking efforts to expand health insurance was that Medicare was modeled on private health insurance in use at the time. Individuals were to have free choice of providers, providers were free to decide whether or not to participate in the program, and federal government employees were explicitly not authorized to exercise control over the practice of medicine.⁷⁹

On the other hand, despite their similar-sounding names, Medicaid was perceived from the beginning as "welfare" only for the "deserving" poor: the aged, blind, and disabled, and pregnant women as a later addition. States could decide whether or not to implement the program and to accept federal funding for it. States could also decide on coverage of many "optional" benefits. Still today, ten states comprising about a third of the U.S. population have not expanded Medicaid to cover all people in poverty.

Critical to the passage of Medicare was the differentiation of that program from Medicaid.⁸⁰ A compromise worked out in the House Ways and Means Committee by Wilbur Mills, a long-serving representative from Arkansas, brought one bill with the separate programs to a floor debate and vote in the House without possibilities for amendment.⁸¹ In discussing the procedure to be followed by the House, representatives emphasized themes such as freedom, the excellence of medical care in the U.S., and the impoverishment of the elderly.

The single bill, with the separate programs, was also introduced in the Senate.⁸² Three days of debate featured many efforts to expand access, for example coverage for pharmaceuticals or for retirees under 65. Opponents once again raised the specter of "socialism" in opposition to governmental support for health care.⁸³ In addition, news sources of the time indicate a subtle role of racism in opposition to Medicaid as a "welfare" program. Senator Barry Goldwater (also a user of general bigotry distractions as we described above) linked "welfare state" social theories to rising crime rates. Further, he suggested that "most of the people who lack jobs or education owe their position to low intelligence or ambition. He declared that a trend toward 'handouts and circuses' is threatening

the nation with a fate comparable to that of Rome or ancient Egypt."⁸⁴ Senator Eastland, a Medicaid opponent, was quoted as an avowed segregationist, who often said black people were "an inferior race."⁸⁵ While overtly racist statements had largely vanished in the halls of Congress by 1965, Dixiecrat senators for the most part voted against Medicaid or abstained, despite their support for other Johnson era programs.⁸⁶

After adoption of Medicaid, states' uptake and administration were uneven from the start, with the South lagging.⁸⁷ In fact, thirty-two states had adopted Medicaid before even the first former Confederate state had adopted it.⁸⁸ Eligibility for Medicaid was initially tied to the receipt of public cash assistance under the Aid to Families with Dependent Children program.⁸⁹ This meant that medical assistance was burdened with the social stigma and political disadvantages associated with a welfare program.⁹⁰ To this day, the split continues to disadvantage the nearly one-third of the population living in states that have refused to expand Medicaid.

Drug Reform: Twin Distractions of Racism and Xenophobia

The "war on drugs," declared by Nixon and pursued by the Reagan, first Bush, and Clinton administrations, is a clear illustration of distractions of race and xenophobia driving health policy (and disability policy). If use of a drug is illegal under federal law, people can claim no civil rights protection for the use, even if the use is legal under the law of their state. People who relapse just once while in treatment — and estimates are that over 50% will do so⁹¹ — are not covered by the Americans with Disabilities Act⁹² or the Fair Housing Act.⁹³ These statutes were adopted at the zenith of the federal "War on Drugs," and shaped by the bigotry distraction of racism.

Marijuana policy has also been distracted by bigotry appeals, especially at the federal level. Here, the continuing influence of the war on drugs can be seen, along with the xenophobia associated with the identification of drug cartels as Hispanic. Marijuana use and production were little regulated in the United States until 1937, when registration and a steep federal tax were imposed on the product.⁹⁴ Many states adopted laws criminalizing marijuana possession or sale during this time. Calls for federal action about the dangers of "drugs" and allegedly associated criminal activity grew during the 1950s and 1960s, culminating in President Nixon's declaration of the "War on Drugs" in 1971. According to John Ehrlichman, one of President Nixon's close advisors, the Nixon campaign against

drugs had an explicit agenda to disrupt the antiwar left and the Black community.⁹⁵

Marijuana is explicitly specified as a Schedule I drug in the CSA.⁹⁶ In federal statutes, the spelling is deliberately Spanish—*marihuana*—carrying the implication that it is Mexicans and other Spanish-speaking groups against whom criminal penalties are directed. To this day, *marihuana* possession is a federal crime carrying penalties of up to a year in prison and a minimum fine of \$1,000 for a first offense.⁹⁷ Marijuana possession is also criminalized under the laws of many states; arrest rates remain high in some areas of the country although they are declining since their high point in 2008. Data collected by the National Organization for the Reform of Marijuana Laws (NORML) indicate over 350,000 arrests for marijuana violations in 2020, about 91% of which were for possession only.⁹⁸ Marijuana arrests are heavily skewed by race, even in jurisdictions where recreational use is legal under local law; across the U.S., Blacks are nearly four times as likely as whites to be arrested for marijuana possession. In Manhattan in 2014–2016, 86% of marijuana arrests were of Blacks and Latinos.⁹⁹ Finally, the U.S. Veterans Health Administration will not provide counseling about medical marijuana use or referrals for medical marijuana, rejecting the possibility¹⁰⁰ even as data have surfaced to suggest that it may be medically useful for PTSD.¹⁰¹ Federal insurance plans such as Medicare will not pay for medical marijuana, either, putting its use well beyond affordability for many. Here, too, we can see the complex interplay of bigotry distractions functioning to shape specific health policies.

Towards Further Research and Potential Solutions

To truly obtain health reform, the U.S. must reckon with its legacy and present of demonizing minoritized groups to stoke anger that pulls attention from areas of public agreement, as has occurred with broadly-favored health reforms. History suggests we are trapped in a vicious cycle. How do we combat these “bigotry distractions,” and how might we launch a period of sustained health care and public health change? These are giant questions we think the health law literature must address in support of evidence-based health policies in the U.S.

We view our research on bigotry distractions as furthering an interdisciplinary analysis of an important way that health reforms and potentially other progressive reforms are derailed. We should also express caution that bigotry distractions can operate across the political spectrum, as terms like “poor white trash” or

“deplorables” may reveal. While we have drawn significantly from the political science and sociology literature, we believe numerous other literatures should inform this discussion and identify mechanisms that may underly bigotry distractions as a phenomenon that has repeatedly appeared throughout history, albeit with different names.¹⁰² Bigotry distractions provide a new opportunity for the literature on race-baiting, strategic racism, dog-whistles, scapegoating, and similar terms to conceptualize the relationship between identity characteristics and seemingly tangential areas of social change, such as health and the environment.

A primary aim of further research should be the development of potential solutions for identifying, calling out, and countering bigotry distractions. The authors of this article are legal experts, not communication or sociology scholars. Yet legal solutions are challenging because distraction bigotry often takes place through political speech, where First Amendment protection is at its height. This is especially true for content-based restrictions. Legal barriers highlight the importance of counter-speech, education, or other non-speech-restricting measures to combat distraction bigotry. In addition, ideas for laws targeting distraction bigotry that could survive strict scrutiny, and social media and other corporate policies outside First-Amendment protection, should be explored.

A second area that deserves particular attention is the Democratic Party’s response to bigotry distractions. On the one hand, efforts to call out racism and other forms of bigotry have been at least partially successful in shifting public sentiment. However, anti-bigotry is sometimes used by politicians who do not believe in the underlying tenets, and may itself be a distraction from broad areas of agreement such as over housing costs and corporate crime. Indeed, the Democratic Party may have reframed its political strategy around calling out bigotry, rather than rallying around issues of economic justice and class that could unite working people around common goals. Are there other responses to bigotry a party could take that sow less division, such as through a more intersectional message that includes class appeals?

Lessons might be learned from efforts to forcefully name sexual harassment in the #MeToo movement. An effective individual strategy against harassment, people are advised, is to state calmly and directly that the conduct at issue is not appreciated.¹⁰³ #MeToo became a widespread movement after actress Alyssa Milano called on everyone who had experienced harassment to share their stories on social media.¹⁰⁴ The hashtag, invented by activist Tarana Burke, invokes both the

personal experience of “me” and the solidarity of “too.” The transparency of so many shared stories has been regarded favorably by significant percentages of Americans, although Pew data also indicate that support is much less among males and especially among Republicans.¹⁰⁵ Therefore, we pose as a question for further research whether naming bigotry distractions could help mitigate them. To our knowledge, there has been no sustained effort to identify bigotry distractions, even as calling out dog-whistles and race-baiting has been frequent.

Further attention needs to be paid to how accusations of bigotry can also distract. As an example of a “general anti-bigotry distraction,” in the 2016 primary contest against Bernie Sanders, Hillary Clinton discredited Bernie Sanders’s message of economic equality for all by accusing him of not directly confronting racism and sexism.¹⁰⁶ In one telling exchange, which was thought to be a key moment in the primary contest:¹⁰⁷

Hillary Clinton: Not everything is about an economic theory, right? If we broke up the big banks tomorrow — and I will, if they deserve it, if they pose any systemic risk I will — would that end racism?

Crowd: No!

Clinton: Would that end sexism?

Crowd: No!

Clinton: Would that end discrimination against the LGBT community?

Crowd: No!

Clinton: Would that make people feel more welcoming to immigrants overnight?

Crowd: No!

Clinton: Will that solve our problem with voting rights, as Republicans are trying to strip them away?

Crowd: No!¹⁰⁸

Of course, political rivals must find critiques as part of their competition, but Hillary Clinton’s rhetoric arguably divided voters, loosely, based on social identity and class. Rather than running predominantly on issues relating to economic inequality and corporate power, Clinton appears to have emphasized social identity issues in the primary against Bernie Sanders, and against Trump, her most-used issue against Trump was race.¹⁰⁹ This angle suggests that Clinton leaned into appeals to identity while failing to develop the more broad-based issues of economic justice from which identity is often used to distract. This is not to say her anti-racist critiques were incorrect, as Trump significantly invoked bigotry, as described above, and

Sanders made class, rather than race, the center of his campaign,¹¹⁰ which may have limited his appeal to Black voters.¹¹¹ But this divide cost the Democratic Party deeply in 2016. As the Center for American Progress noted in 2017, the Democratic party “must go beyond the ‘identity politics’ versus ‘economic populism’ debate.”¹¹² In other words, Democratic politicians are not wholly innocent in shifting discourse away from areas of public agreement.

There may also be specific anti-bigotry distractions in health policy — i.e., the manipulative use of anti-racism and other equality terms to undermine health reform. For example, after FDA proposed a menthol cigarette ban on corporations — projected to have benefits of up to \$322 billion every year¹¹³ from reducing American deaths (let alone other benefits) — the ACLU issued a statement and sent FDA a coalition-letter stating that the ban would have “serious racial justice implications” by triggering criminalization; the ACLU even invoked the death of George Floyd.¹¹⁴ The ACLU said this even though Black Americans are the predominant users of menthol cigarettes and therefore stand to gain tremendously from the rule, which would save more than 100,000 Black lives over forty years, according to FDA projections.¹¹⁵ The ACLU’s position may be in part driven by its legacy of friendly relationships with the tobacco industry.¹¹⁶ The tobacco industry has also allied with anti-immigration groups to warn that the menthol cigarette ban will, by fueling black-market sales, “lin[e] the pockets of the Mexican cartels” when the “border is at a crisis point.”¹¹⁷ Therefore, the tobacco industry may be involved in multiple types of bigotry and anti-bigotry distractions with regard to this rule.

Distraction may also be fed by misinformation. Health communication and social media scholarship has directed extensive recent attention to methods for combating misinformation. Articles have considered the role of community engagement in influencing vaccine uptake,¹¹⁸ the positive and negative impacts of social media influencers,¹¹⁹ and the importance of trusted messengers such as physicians sending consistent communications.¹²⁰ Legal scholars have also considered the First Amendment questions raised by legislation and explored possibilities for voluntary self-regulation; Ira Rubinstein and Tomer Kenneth have argued that regulation of algorithmic amplification is permissible even if direct speech regulation might not be.¹²¹

Finally, forming coalitions including less marginalized voters may be a critical strategy, building on ideas of intersectionality¹²² and/or interest convergence.¹²³ The majority of Americans are not straight white men.

So, people who have been subjected to discrimination in some form could address distraction by building alliances toward improving public discourse and steering toward solving pressing policy problems. There has been substantial literature on white women, 52% of whom cast ballots for Trump in the 2016 election despite several comments by Trump that suggested sexist bigotry (e.g. “grab ‘em by the p****”). Indeed, Trump proved regressive on reproductive health care and equal pay initiatives for women.¹²⁴ Efforts to engage white women in a dialogue about the negative impact of distraction bigotry on health law and policy, access to health care, and reproductive health care could be valuable. To a degree these steps are already occurring; in the wake of the *Dobbs* decision, poll data

Jon Hanson and Jacob Lipton have elaborated at length why Americans do and do not see injustice in particular situations and how that shapes public policy.¹²⁶ Bigotry distractions tend to activate a sense of injustice that pulls in the wrong direction and may undermine support for reforms that would further justice. For example, invocations of race and crime, or gender and restrooms, have diverted health policy from evidence-based practices, often leading to exacerbation of existing injustices and scapegoating of marginalized groups.

Hanson and Lipton note that many injustices are invisible, for a variety of reasons. Ironically, our research suggests that bigotry distractions can even make injustices to oneself more difficult to see. Many

Ironically, our research suggests that bigotry distractions can even make injustices to oneself more difficult to see. Many authors have written about the idea of voters acting against their interest, such as by electing politicians who gut environmental regulations leading to more air and water pollution, who undermine health care, or who cut taxes on the wealthy while increasing fines and fees for low- and middle-income individuals. Hence why the same voter might articulate, “Keep your government hands off my Medicare” while voting for cutting various benefits to “welfare queens.” But also, bigotry distractions make the injustices to minorities the most invisible by paradoxically painting them as disfavored others or even villains. In these ways, bigotry distractions blunt progressive social change, with dire consequences for health and equity in the U.S.

suggest growing support for abortion rights among many sectors of the U.S. population.¹²⁵

Conclusion

Bigotry distractions are a significant threat to health reform and to progressive change writ large. Political candidates and policymakers with worse arguments on the merits can lean into bigoted assertions (both explicit and implicit) to generate support for actively harmful policies. In this way, bigotry distractions may threaten democratic debate by (1) moving public discussion from the merits to superficial human fears, and (2) displacing and otherizing particular groups of people from the benefits of being a full American. And bigotry distractions entrench the status quo by diverting attention from the things that matter, for which there is often broad agreement.

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References

- For a sociologist's statement of this puzzle, see Arlie Russell Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (2016).
- A. Kirzinger, A. Kearney, M. Stokes and M. Brodie, "KFF Health Tracking Poll — May 2021: Prescription Drug Prices Top Public's Health Care Priorities," *KFF* (Jun. 3, 2021), available at <<https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-may-2021/>> (last visited Apr. 24, 2024).
- Press Release, American Lung Association, "New Poll: Voters Overwhelmingly Support Stricter Limits on Smog," available at <<https://www.lung.org/media/press-releases/new-poll-smog>> (last visited Apr. 23, 2024).
- Report, Data for Progress, "Corporate Crackdown Project: Voters Want to Crack Down on Corporate Crime," available at <https://www.filesforprogress.org/memos/voters_want_crack_down_corporate_crime.pdf> (last visited Apr. 23, 2024).
- A. Sheffey and J. Kaplan, "80% of Americans Think the Federal Minimum Wage is Too Low, New Poll Finds," *Business Insider* (Mar. 16, 2021), available at <<https://www.businessinsider.com/80-percent-americans-think-minimum-wage-is-too-low-2021-3>> (last visited Apr. 23, 2024).
- M. B. Ferranta, "80% Of Americans Support Paid Family and Medical Leave, Yet Less Than 20% Have Access," *Forbes* (Feb. 20, 2020), available at <<https://www.forbes.com/sites/marybethferranta/2020/02/20/80-of-americans-support-paid-family-and-medical-leave-yet-less-than-20-have-access/?sh=646223263d9b>> (last visited Apr. 23, 2024).
- R. Weissman and J. Claybrook, *The Corporate Sabotage of America's Future and What We Can Do About It* (Public Citizen, 2023), at 7.
- This phrase is from the famous footnote four, *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).
- L. Stephens-Dougan, "The Persistence of Racial Cues and Appeals in American Elections," *Annual Review of Political Science* 24 (2021): 301–320, available at <<https://www.annualreviews.org/content/journals/10.1146/annurev-polisci-082619-015522>> (last visited May 23, 2024).
- Id.*
- J. A. Powell, "The Race and Class Nexus: An Intersectional Perspective," *Minnesota Journal of Law and Equality* 25, no. 2 (2007): 355–428.
- Id.*, at 371–72.
- L. Glickman, "How White Backlash Controls American Progress," *The Atlantic*, May 21, 2020, available at <<https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/>> (last visited May 23, 2024).
- Id.*
- See Powell, *supra* note 13, at 378.
- J. Adkins, "These People are Frightened to Death: Congressional Investigations and the Lavender Scare," *Prologue Magazine* 48, No. 2 (2016), available at <<https://www.archives.gov/publications/prologue/2016/summer/lavender.html>> (last visited Apr. 23, 2024).
- "The A.P.A. Ruling on Homosexuality," *The New York Times* (Dec. 23, 1973), available at <<https://www.nytimes.com/1973/12/23/archives/the-issue-is-subtle-the-debate-still-on-the-apa-ruling-on.html>> (last visited Apr. 25, 2024).
- J. Dreschlet, "Out of DSM: Depathologizing Homosexuality," *Behavioral Science* 5, no. 4 (2015): 565–575, available at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779/>> (last visited Apr. 23, 2024).
- See Adkins, *supra* note 16.
- Id.*
- Id.*
- Id.*
- Exec. Order No. 10450, 3 F.R. 936 (1949–1953), available at <https://www.dni.gov/files/NCSC/documents/Regulations/EO_10450.pdf> (last visited Apr. 23, 2024).
- "Here & Now, Inside the Life of Eisenhower's 'Mystery Man'—Smart, Efficient, Secretly Gay," *WBUR* (Jun. 26, 2019), available at <<https://www.wbur.org/hereandnow/2019/06/26/robert-cutler-eisenhower-gay-federal-employees>> (last visited Apr. 24, 2024).
- See Adkins, *supra* note 18.
- D.K. Johnson, "Review [Untitled]," *American Journal of Sociology* 110, no. 3 (2004): 848–850 (book review), available at <<https://www.jstor.org/stable/10.1086/428333>> (last visited Apr. 24, 2024).
- W. Sturkey, "The Hidden History of the Civil Rights Act of 1960, Black Perspectives (Feb. 8, 2018), available at <<https://www.aaihs.org/the-hidden-history-of-the-civil-rights-act-of-1960/>> (last visited Apr. 24, 2024).
- L. Glickman, "How White Backlash Controls American Progress," *The Atlantic*, May 21, 2020, available at <<https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/>> (last visited Apr. 23, 2024).
- Id.*
- See Powell, *supra* note 13, at 397.
- L. G. Bedolla and K. L. Haynie, "The Obama Coalition and the Future of American Politics," *Politics, Groups, and Identities* (2013)
- I. Haney-López, *Merge Left* (New York: The New Press, 2019).
- Id.* at 24
- S. Laderman, "How Richard Nixon Captured White Rage — and Laid the Groundwork for Donald Trump," *Washington Post* (Apr. 21, 2021), available at <<https://www.washingtonpost.com/outlook/2019/11/03/how-richard-nixon-captured-white-rage-laid-groundwork-donald-trump/>> (last visited Apr. 24, 2024).
- Haney-López, *supra* note 32, at 24.
- Id.*
- Id.*
- Id.* at 35.
- M. McCormack, "The Rise and Fall of Homophobia," in *The Declining Significance of Homophobia: how Teenage Boys are Redefining Masculinity and Heterosexuality* (Oxford Scholarship Online, 2012): at 57–68, available at <<https://academic.oup.com/book/6579/chapter/150547830>> (last visited Apr. 25, 2024).
- K. Alfonseca, "With Anti-LGBTQ Laws Proliferating, Older Activists Say History is Repeating Itself," *ABC News* (Oct. 1, 2022, 10:25 AM), available at <<https://abcnews.go.com/US/anti-lgbtq-laws-proliferating-older-activists-history-repeating/story?id=90278754>> (last visited Apr. 24, 2024).
- See McCormack, *supra* note 41.
- R. Socarides, "Why Bill Clinton Signed the Defense of Marriage Act," *The New Yorker: News Desk* (March 8, 2013), available at <<https://www.newyorker.com/news/news-desk/why-bill-clinton-signed-the-defense-of-marriage-act>> (last visited Apr. 14, 2024).
- A. Nagourney and J. W. Peters, "How a Campaign Against Transgender Rights Mobilized Conservatives," *The New York Times* (Apr. 16, 2023), available at <<https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html>> (last visited Apr. 25, 2024).

44. M. Barbaro and A. Nagourney, "How the G.O.P. Picked Trans Kids as a Rallying Cry," *The New York Times* (Jun. 1, 2023), available at <<https://www.nytimes.com/2023/06/01/podcasts/the-daily/anti-trans-bills.html>> (last visited Apr. 25, 2024).
45. *Id.*
46. M. R. Ulrich, "Practicing Medicine in the Culture Wars — Gender-Affirming Care and the Battles over Clinician Autonomy," *NEJM* 390, no. 9 (2024): 779–781.
47. National Center for Transgender Quality, "Trump's Record of Action Against Transgender People," available at <<https://transequality.org/the-discrimination-administration>> (last visited Apr. 24, 2024).
48. C. Pepin-Neff and A. Cohen, "President Trump's Transgender Moral Panic," *Policy Studies* 42, no. 3 (2021): 1–16.
49. See 2024 Anti-Trans Bills Tracker, available at <<https://trans-legislation.com/>> (last visited Dec. 18, 2023).
50. J. Yurcaba, "From Drag Bans to Sports Restrictions, 75 Anti-LGBTQ Bills Have Become Law in 2023," *NBC News: Out Politics and Policy* (Dec. 17, 2023), available at <<https://www.nbcnews.com/nbc-out/out-politics-and-policy/75-anti-lgbtq-bills-become-law-2023-rcna124250>> (last visited Apr. 24, 2024).
51. For a compendium of moral panics, see The Editors, "Moral Panics: A Syllabus," JStor Daily (Nov. 8, 2022), available at <<https://daily.jstor.org/moral-panics-a-syllabus/>> (last visited May 28, 2024).
52. S. Kornhaber, "Trump's Plan to Police Gender," *The Atlantic* (Jan. and Feb. 2024), available at <<https://www.theatlantic.com/magazine/archive/2024/01/trump-lgbtq-transgender-community-protections/676139/>> (last visited Apr. 25, 2024).
53. A. Seitz-Wald and J. Yurcaba, "Trump Vows to 'Stop' Gender Affirming Care for Minors if Re-elected President," *NBC News: 2024 Election* (Jan. 31, 2023), available at <<https://www.nbcnews.com/politics/2024-election/trump-vows-stop-gender-affirming-care-minors-re-elected-president-rcna68461>> (last visited Apr. 24, 2024).
54. *Id.*
55. B. Farrington, "DeSantis Signs Bills Targeting Drag Shows, Transgender Kids and The Use of Bathrooms and Pronouns," *APNews* (May 22, 2023, 12:23 PM), available at <<https://apnews.com/article/desantis-florida-lgbtq-education-health-668a7e5fe5cf22ab8cca324b00644119>> (last visited Apr. 24, 2024).
56. Z. Aleem, "Ron DeSantis Boosts a Video That All but Calls for Eliminating Trans People," *MSNBC: Opinion* (Jul. 3, 2023, 6:37 PM), available at <<https://www.msnbc.com/opinion/msnbc-opinion/ron-desantis-ad-video-trans-lgbtq-rcna92392>> (last visited Apr. 24, 2024).
57. *Id.*
58. Alliance Defending Freedom (@ADFLegal), Twitter (Aug. 10, 2023, 5:05 PM), available at <<https://twitter.com/ADFLegal/status/1689744683583352832>> (last visited Apr. 24, 2024).
59. A. Blake, "How the Republican Party has Shifted against Transgender Right," *The Washington Post: The Fix* (May 1, 2023), available at <<https://www.washingtonpost.com/politics/2023/05/01/republicans-transgender-rights-polls/>> (last visited Apr. 24, 2024).
60. J. W. Peters, "A Conservative Push to Make Trans Kids and School Sports the Next Battleground in the Culture War," *The New York Times* (Nov. 3, 2019), available at <<https://www.nytimes.com/2019/11/03/us/politics/kentucky-transgender-school-sports.html>> (last visited Apr. 25, 2024).
61. A. Walker, "Transphobic Discourse and Moral Panic Convergence: A Content Analysis of My Hate Mail," *Criminology* 61 (2023): 994–1021.
62. See Pepin-Neff and Cohen, *supra* note 50.
63. L. Heintz, "Inside the Right-Wing Movement to Ban Trans Youth from Sports," *TIME: Politics* (May 16, 2022), available at <<https://time.com/6176799/trans-sports-bans-conservative-movement/>> (last visited Apr. 24, 2024).
64. C. Pepin-Neff, "Anti-Trans Moral Panics Endanger All Young People," *Scientific American: Opinion* (May 19, 2023), available at <<https://www.scientificamerican.com/article/anti-trans-moral-panics-endanger-all-young-people/>> (last visited Apr. 24, 2024).
65. B. Knoll, "Timing is Everything: How World Wars and The Red Scare Delayed Universal Healthcare in America," *Clinical Correlations* (Feb. 24, 2021).
66. E.g., Congressional Budget Office, "The Tax Treatment of Employment Based Health Insurance" (March 1994), at 6, available at <https://www.cbo.gov/sites/default/files/103rd-congress-1993-1994/reports/1994_03_taxtreatmentofinsurance.pdf> (last visited May 28, 2024).
67. Knoll, *supra* note 67.
68. C. Marks, "Inside the American Medical Association's Fight Over Single Payer Health Care," *The New Yorker: Annals of Medicine* (Feb. 22, 2022), available at <<https://www.newyorker.com/science/annals-of-medicine/the-fight-within-the-american-medical-association>>. An earlier effort to establish universal health care in California after World War I had fallen prey to anti-German sentiment and fears of German infiltration. See generally P. Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry* (New York: Basic Books, 2017).
69. J. Lepore, "The Lie Factory," *The New Yorker: American Chronicles* (Sept. 17, 2012), available at <<https://www.newyorker.com/magazine/2012/09/24/the-lie-factory>> (last visited Apr. 24, 2024).
70. E.g., M. Freedland, *Witch Hunt in Hollywood: McCarthyism's War on Tinseltown* (London: JR Books Ltd., 2009).
71. See R.D. Schremmer and J.F. Knapp, "Harry Truman and Health Care Reform: The Debate Started Here," *Pediatrics Perspectives* 127 (2011): 388–401, at 399.
72. National Library of Medicine: Education, available at <<https://www.nlm.nih.gov/exhibition/forallthepeople/img/OB11286.jpg>> (last visited Apr. 25, 2024).
73. Guide to the National Physicians' Committee for the Extension of Medical Service, Records 1947–1949, available at <<https://www.lib.uchicago.edu/e/scr/findingaids/view.php?eadid=ICU.SPCL.CRMS24>> (last visited Apr. 24, 2024).
74. *Id.*
75. J. E. Zelizer, "How Medicare was Made," *The New Yorker: News Desk* (Feb. 15, 2015), available at <<https://www.newyorker.com/news/news-desk/medicare-made>> (last visited Apr. 24, 2024).
76. J. Connor, "Howls of 'Socialism!' Killed Truman Health Insurance," *History Net* (Jul. 8, 2019), available at <<https://www.historynet.com/howls-of-socialism-killed-truman-health-insurance>> (last visited Apr. 25, 2024).
77. Legislation Introduced: Federal Wagner-Murray-Dingell Bill, *Medical Care Research & Review* 3, no.7 (1946), available at <<https://doi.org/10.1177/107755874600300702>> (last visited May 28, 2024).
78. P. Starr, *Remedy and Reaction: The Peculiar American Struggle over Health Care Reform* (New Haven: Yale University Press, 2012): at 41.
79. Social Security Amendments of 1965, P.L. 89-97, 79 Stat. 286, July 30, 1965, §§1801–02.
80. Zelizer, *supra* note 77.
81. H. R. Res. 322, 89 Cong. Rec. 7201 (April 7, 1965); See T. S. Jost, "Remarks at the Yale Law School Conference on the Law of Medicare and Medicaid," (Nov. 7, 2014) (copy on file with the authors); D. G. Smith and J. D. Moore, *Medicaid Politics and Policy* (Transaction Publishers, 2011) (discussing how opposition to national health insurance was rooted in racism because southern states were fearful that the federal government would use national health programs as a mechanism for desegregation).
82. Social Security Amendments of 1965, *Congressional Record* (July 6, 1965) 15601.
83. Remarks of Senator Curtis, *Congressional Record* (July 8, 1965) 15873.

84. J. D. Pomfret, "Camping Issues—VI: Positions of Nominees Differ Sharply on Poverty and Medical Care of Aged," *The New York Times* (Oct. 30, 1964), at 24, available at <<https://times-machine.nytimes.com/timesmachine/1964/10/30/issue.html>> (last visited Apr. 25, 2024).
85. See G. Brockell, "Three Civil Rights Workers were Missing. Sen. Eastland Said it was Fake News," *Washington Post* (June 21, 2019), available at <<https://www.washingtonpost.com/history/2019/06/21/three-civil-rights-workers-were-missing-sen-eastland-said-it-was-fake-news/>> (last visited May 28, 2024).
86. Here are the votes of Democratic senators from Southern states: Richard Russell – Abstained; Harry Byrd – Nay (Statistically Notable Vote); Allen Ellender – Abstained; Joseph Hill – Yea; James Eastland – Nay (Statistically Notable Vote); Spessard Holland – Nay (Statistically Notable Vote); John Sparkman – Yea; John Stennis – Nay (Statistically Notable Vote); Russel Long – Yea; George Smathers – Yea; Samuel Ervin – Nay (Statistically Notable Vote); Strom Thurmond – Nay; Robert Byrd – Yea.
87. See L. T. Nolen, A. L. Beckman, and E. Sandoe, "How Foundational Moments in Medicaid's History Reinforced Rather Than Eliminated Racial Health Disparities," *Health Affairs Forefront* (Sept. 1, 2020), available at <<https://www.healthaffairs.org/doi/10.1377/hblog20200828.661111/full/#:~:text=Multiple%20studies%20have%20demonstrated%20the,conditions%2C%20and%20improved%20mental%20health>> (last visited Apr. 24, 2024).
88. S. Somers and J. Perkins, "The Ongoing Racial Paradox of the Medicaid Program," *Journal of Health and Life Sciences Law* 16, no. 1 (2022): 96–112.
89. C. Provost and P. Hughes, "Medicaid: 35 years of Service," *Health Care Finance Review* 22, no. 1 (2000): 141–174.
90. J. D. Moore and D. G. Smith, "Legislating Medicaid: Considering Medicaid and Its Origins," *Health Care Finance Review* 27, no. 2 (2005):45–52, at 46, (discussing the predecessor Kerr-Mills Act), available at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194918/>> (last visited Apr. 24, 2024).
91. I. Mhaidat, M. R. Taherian, S. S. H. Nazari, A. Mosavi-Jarrah, H. Yeganeh, N. A. A. M. A. Marzouqi, and S. A. Rahman, "Effect of Cognitive-Behavioural Therapy on Resilience and Relapse in Adult Patients With Substance Use Disorder: A Systematic Review Protocol," *BMJ Open* (2023), available at <<https://pubmed.ncbi.nlm.nih.gov/37173114/>> (last visited May 28, 2024); A. T. McLellan, D.C. Lewis, C.P. O'Brien, et al. "Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation," *JAMA* 284, no. 13 (2000): 1689–1695, available at <<https://jamanetwork.com/journals/jama/fullarticle/193144>> (last visited May 28, 2024).
92. 42 U.S.C. § 12210(a).
93. 42 U.S.C. § 3602(h)(3).
94. L. N. Sacco, "Drug Enforcement in the United States: History, Policy, and Trends," Congressional Research Service, October 2, 2014, available at <<https://fas.org/spp/crs/misc/R43749.pdf>> (last visited Apr. 24, 2024).
95. D. Baum, "Legalize It All," *Harper's Magazine*, April 2016, available at <<https://harpers.org/archive/2016/04/legalize-it-all/>> (last visited Apr. 25, 2024).
96. 21 U.S.C. § 812 (2022).
97. 21 U.S.C. § 844 (a) (2022).
98. NORML, "Marijuana Arrests Fall Precipitously Nationwide in 2020," Sept. 27, 2021, available at <<https://norml.org/blog/2021/09/27/marijuana-arrests-fall-precipitously-nationwide-in-2020/>> (last visited May 28, 2024).
99. R. Jones, "From the President: Coming and Going — Racial Disparity in the Punishment and Profit of Marijuana," *The Champion* (December 2017), available at <<https://www.nacdl.org/Article/December2017-FromthePresidentComingandGoing>> (last visited May 28, 2024).
100. For a VA criticism of medical marijuana use for PTSD, see M. Hill, M. Loflin, K. Browne, and S. D. Norman, "Cannabis Use and PTSD Among Veterans, Veterans Administration PTSD," National Center for PTSD, available at <https://www.ptsd.va.gov/professional/treat/cooccurring/marijuana_ptsd_vets.asp> (last visited May 28, 2024).
101. E.g., M. O. Bonn-Miller, S. Sisley, P. Riggs, B. Yazar-Klosinski, J. B. Wang, M. J. E. Loflin, B. Shechet, Colin Hennigan, R. Matthews, A. Emerson, and R. Doblin, "The Short-Term Impact of 3 Smoked Cannabis Preparations versus Placebo on PTSD Symptoms: A Randomized Cross-Over Clinical Trial," *PLOS ONE* (Mar. 21, 2021), available at <<https://doi.org/10.1371/journal.pone.0246990>> (last visited Apr. 24, 2024).
102. For a summary of the contemporary cognitive science work on bigotry, see N. S. Kteily and A. P. Landry, "Dehumanization: Trends, Insights, And Challenges," *Trends in Cognitive Sciences* 26, no. 3 (2022): 222–240.
103. E.g. Wisconsin Department of Workforce Development, *Steps Harassment Victims Can Take* (Dec. 21, 2023), available at <<https://dwd.wisconsin.gov/er/civilrights/discrimination/victimsteps.htm>> (last visited Apr. 25, 2024).
104. D. Rhode, "#MeToo: Why Now? What Next?" *Duke Law Journal* 60 (2019): 377–417, at 394.
105. A. Brown, "More Than Twice as Many Americans Support Than Oppose the #MeToo Movement," Pew Research Center (Sept. 29, 2022), available at <<https://www.pewresearch.org/social-trends/2022/09/29/more-than-twice-as-many-americans-support-than-oppose-the-metoo-movement/>> (last visited Apr. 24, 2024).
106. R. Grimm, "The Squad,' Part 1: The Rise and (First) Fall of Bernie," *The Intercept* (December 5, 2023, 6:00 am), available at <<https://theintercept.com/2023/12/05/deconstructed-squad-audio-bernie-sanders/>> (last visited Apr. 24, 2024).
107. Z.B. Wolf, "Could Bernie Sanders Have Won a Primary That Wasn't 'Rigged'? Um." CNN (Nov. 4, 2017), available at <<https://www.cnn.com/2017/11/04/politics/bernie-sanders-2016-election-donna-brazile/index.html>> (last visited May 28, 2024). Reports suggest that one of Clinton's effective strategies was framing Sanders as a single-issue candidate on economic justice, who gave insufficient attention to combatting bigotry. See, e.g., D. Weigel, "Clinton in Nevada 'Not Everything Is About an Economic Theory,'" *The Washington Post* (Feb. 13, 2016), available at <<https://www.washingtonpost.com/news/post-politics/wp/2016/02/13/clinton-in-nevada-not-everything-is-about-an-economic-theory>> (last visited May 28, 2024).
108. Grimm, *supra* note 106.
109. L. Drutman, "How Race and Identity Became the Central Dividing Line in American Politics," *Vox: Polyarchy* (Aug. 30, 2026, 10:40 am), available at <<https://www.vox.com/polyarchy/2016/8/30/12697920/race-dividing-american-politics>> (last visited Apr. 25, 2024). Clinton herself was viewed as an economic incrementalist who stated in 2016, "I want to really marry the public and the private sector." G. Packer, "Hillary Clinton and the Populist Revolt," *The New Yorker* (Oct. 24, 2016), available at <<https://www.newyorker.com/magazine/2016/10/31/hillary-clinton-and-the-populist-revolt>> (last visited Apr. 25). Her nuanced economic policies were critiqued for not responding to American economic angst; for example, she did not endorse a \$15 minimum wage, but rather a \$12 minimum with states having the option to set higher ones. J. Tankersley, "Hillary Clinton has a Very Detailed Plan for the Economy. That May Be a Problem," *The Washington Post* (Jul. 29, 2016, 8:15 pm), available at <<https://www.washingtonpost.com/news/wonk/wp/2016/07/29/hillary-clinton-has-a-very-detailed-plan-for-the-economy-that-may-be-a-problem/>> (last visited Apr. 25, 2024).
110. S. W. Thrasher, "Bernie Sanders Isn't Winning Minority Votes—and it's His Own Fault," *The Guardian* (May 3, 2016, 2:21 pm), available at <<https://www.theguardian.com/commentisfree/2016/may/03/bernie-sanders-failure-diversity-hispanic-black-voters>> (last visited Apr. 25, 2024).

111. S. Kornacki, 2016: “Clinton, Sanders and Black Voters Pick the Winner,” NBC News: Elections (Jul. 29, 2019, 8:06 AM), *available at* <<https://www.nbcnews.com/politics/elections/2016-clinton-sanders-black-voters-pick-winner-n1029631>> (last visited Apr. 25, 2024).
112. R. Griffin, R. Teixeira and J. Halpin, “Voter Trends in 2016: A Final Examination,” *Center for American Progress* 20 (Nov. 1, 2017), *available at* <<https://www.americanprogress.org/article/voter-trends-in-2016/>> (last visited Apr. 25, 2024).
113. Tobacco Product Standard for Menthol in Cigarettes, 87 *Fed. Reg.* 26454 (Jul. 5, 2022).
114. ACLU, Coalition Letter of Concern to HHS on Menthol Cigarette Ban, Letter (Apr. 26, 2021), *available at* <<https://www.aclu.org/documents/coalition-letter-concern-hhs-menthol-cigarette-ban>> (last visited Apr. 25, 2024).
115. *Id.*
116. S. Glantz, “The ACLU has a long history of taking money from and supporting the tobacco industry,” *Stanton Glantz Blog* (Apr. 30, 2021), *available at* <<https://profglantz.com/2021/04/30/the-aclu-has-a-long-history-of-taking-money-from-and-supporting-the-tobacco-industry/>> (last visited Apr. 25, 2024).
117. D. Friedman and I. Dias, “Cartels, Hezbollah, Police Violence: How Big Tobacco Is Stoking Opposition to Menthol Cigarette Ban,” *Mother Jones* (Dec. 21, 2023), *available at* <<https://www.motherjones.com/politics/2023/12/menthol-cigarette-ban-cartels-hezbollah-racist-cops-how-big-tobacco-is-stoking-opposition-to-ban/>> (last visited Apr. 24, 2024).
118. S. Yang, R. Tao, M. Bhattar, L. Shen, M. Jones, A. Garbacz, and S. R. Passmore, “Designing and Testing Social Media Campaign Messages to Promote COVID-19 Vaccine Confidence Among Rural Adults: A Community-Engaged Approach Featuring Rural Community Leader and Clinician Testimonials,” *Preventive Medicine Reports* 10, no. 36 (2023): 102508.
119. D. Schmuck and D. Harff, “Popular Among Distrustful Youth? Social Media Influencers’ Communication About COVID-19 and Young People’s Risk Perceptions and Vaccination Intentions,” *Health Communications* (Dec 15, 2023): 1–14, *available at* <<https://pubmed.ncbi.nlm.nih.gov/38099315/>> (last visited Apr. 24, 2024).
120. J. Knudsen, M. Perlman-Gabel, I. G. Uccelli, J. Jeavons, and D. A. Chokshi, “Combating Misinformation as a Core Function of Public Health,” *New England Journal of Medicine Catalyst Innovations in Care Delivery* 4, no. 2 (Jan. 18, 2023), *available at* <<https://catalyst.nejm.org/doi/full/10.1056/CAT.22.0198>> (last visited Apr. 24, 2024).
121. L. Rubenstein and T. Kenneth, “Taming Online Public Health Misinformation,” *Harvard Journal on Legislation* (2023): 219–283.
122. See Haney-López, *supra* note 32, at 131.
123. D. A. Bell, Jr., “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” *Harvard Law Review* 93, no. 3 (1980): 518–33.
124. O. Ahmed, S. Phadke, and D. Boesch, “Women Have Paid the Price for Trump’s Regulatory Agenda,” *Center for American Progress* 20 (Sep. 10, 2020), *available at* <<https://www.americanprogress.org/article/women-paid-price-trumps-regulatory-agenda/>> (last visited Apr. 24, 2024).
125. K. Zernike, “How a Year Without Roe Shifted American Views on Abortion,” *The New York Times* (June 23, 2023), *available at* <<https://www.nytimes.com/2023/06/23/us/roe-v-wade-abortion-views.html>> (last visited Apr. 25, 2024) (summarizing poll data from multiple sources).
126. J.D. Hanson and J. Lipton, “Occupy Justice: Introducing the Injustice Framework,” *Harvard Law and Policy Review* 15, no. 2 (2021): 333–381.