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Samuel R. Bagenstos

University of Michigan School of Law, sambagen@umich.edu

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THE NEW EUGENICS

Samuel R. Bagenstos[†]

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INTRODUCTION

During the first third of the Twentieth Century, the eugenics movement played a powerful role in the politics, law, and culture of the United States. The fear of “the menace of the feebleminded,”¹ the notion that those with supposedly poor genes “sap the strength of the State,”² and other similar ideas drove the enthusiastic implementation of the practices of excluding disabled individuals from the country, incarcerating them in ostensibly beneficent institutions, and sterilizing

[†] Frank G. Millard Professor of Law, University of Michigan Law School.

1. See Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 L. & SOC. INQUIRY 541, 570 (1998) (“The ‘menace of the feebleminded’ emerged as a national crisis with the rapidly growing popularity of the Binet-Simon Intelligence (IQ) test in the 1910s. ‘It is universally conceded,’ declared one observer in the Forum, ‘that a high proportion of habitual criminals, paupers, prostitutes, vagrants, and incapables generally are mentally defective; that feeble-mindedness is the keystone of the whole miserable arch; that of all characteristics it is the most certain in its heredity, yielding a self-perpetuating, self-increasing army of miserables.’”)(internal citations omitted); Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63, 90 (1998) (“By the mid-teens, the discourse of ‘the menace of the feebleminded’ had spilled over from welfare circles and professional journals into popular culture, popularized by the propaganda of the Carnegie Institution’s Eugenics Record Office and a pulp heap of books on rural ‘misfits.’ Legislatures responded to the panic by passing a wave of commitment and sterilization laws for the ‘mentally defective.’”).

2. *Buck v. Bell*, 274 U.S. 200, 207 (1927). *Buck* is “one of the most reviled decisions in the entire Supreme Court canon.” Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 106 (2005). For particularly insightful commentary on the decision, see generally ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2016) (detailing how *Buck v. Bell* became a case brought before the Supreme Court); see generally Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986) (providing background and analysis of the rhetoric Oliver Wendell Holmes used in authoring the *Buck v. Bell* opinion); see generally Paul Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985) (examining the role that Aubrey Strode, Irving Whitehead, and Albert Priddy played in passing the Virginia sterilization law and in the conduct of the *Buck v. Bell* lawsuit).

them.³ By the 1930s, with the rise of Adolf Hitler in Germany, eugenic ideas had begun to be discredited in American public discourse. And after the Holocaust, when it became clear just how much Hitler had looked to American eugenic practices as a model, our Nation seemed to turn away from them in horror.⁴

But eugenic ideas and practices never went away, and they have been increasingly prominent during the last half decade. The election of Donald Trump was the crucial turning point, though his election perhaps did more to reveal the lingering eugenicism in American society than to bring it into being. Trump himself has repeatedly endorsed eugenicist ideas.⁵ His administration relied on eugenics-era precedents in seeking to bar immigration by those who might become a “public charge.”⁶ And both he and his administration—at times explicitly, other times tacitly—endorsed a “herd immunity” approach to the COVID-19 pandemic that subordinated the interests of older people, those with disabilities, and members of racial minority groups to others.⁷

These developments highlight the persistence of eugenics in the politics, law, and culture of the United States, nearly a century after the

3. See generally EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE* (2003) (describing how American corporate philanthropies launched a national campaign in support of ethnic cleansing in the United States); see generally DANIEL KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* (1998) (explaining how the study and practice of eugenics has developed since the late nineteenth century); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 71–118 (1997) (explaining how the birth control movement was, in part, founded on the racist motivation of curbing the Black population); see also Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1428–30 (1981).

4. See generally STEFAN KÜHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM* (1994) (discussing the connections between American eugenics and Nazi practices); see generally JAMES Q. WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017) (explaining how American race laws inspired the Nazi regime to create the Nuremberg Laws).

5. See Marina Fang & JM Rieger, *This May Be the Most Horrible Thing That Donald Trump Believes*, HUFF. POST (Sept. 28, 2016), https://www.huffpost.com/entry/donald-trump-eugenics_n_57ec4cc2e4b024a52d2cc7f9; see also Heather Digby Parton, *Trump's Eugenics Obsession: He Thinks He Has "Good German Genes," Because He's A Fascist*, SALON (Sept. 21, 2020), <https://www.salon.com/2020/09/21/trumps-eugenics-obsession-he-thinks-he-has-good-german-genes-because-hes-a-fascist/>; see also Gregory J. Wallace, *Trump's "Good Genes" Speech Echoes Racial Eugenics*, HILL (Sept. 25, 2020), <https://thehill.com/opinion/civil-rights/518031-trumps-good-genes-speech-echoes-racial-eugenics>.

6. See Miriam Jordan, *Trump's 'Public Charge' Immigration Rule Is Vacated by Federal Judge*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/2020/11/02/us/trump-immigration-public-charge.html>.

7. See Joyce Frieden, *White House Appears to Endorse Herd Immunity Strategy for COVID-19*, MEDPAGE TODAY (Oct. 12, 2020), <https://www.medpagetoday.com/infectiousdisease/covid19/89082>.

end of the original eugenics era. Or so I argue. I begin, in Part I, by discussing the Trump Administration's public charge rule limiting immigration. Although the future of that policy is now uncertain following the election of Joe Biden to the presidency, the Trump Administration's rule powerfully demonstrates the resilience of eugenic thinking in American policymaking. I then turn, in Part II, to the COVID-19 pandemic. Trump's response to the pandemic is best understood as resting significantly on eugenic ideas. But what is more important than Donald Trump's own actions is that the eugenic ideas underlying them seem to have been widely endorsed—perhaps by only a minority of the populace, but by a large and vocal minority with substantial support from many business and state-government entities. This widespread support for a eugenicist response to COVID is among the most frightening aspects of the pandemic for the long-term *moral* health of our Nation.

I. EUGENICS & IMMIGRATION: THE TRUMP ADMINISTRATION'S PUBLIC CHARGE RULE

As Douglas Boynton points out in his authoritative history of disability and United States migration policy, federal immigration law has contained provisions restricting entry of some disabled individuals at least since the late 19th Century. In 1882, Congress “mandate[ed] the exclusion of any ‘lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge’ (which applied to persons with physical disabilities).”⁸ Congress steadily ratcheted up immigration restrictions on disabled persons as the eugenics movement became more powerful. As Baynton describes it:

Determining the capacity for self-support was up to immigration officials, although their scope for judgment was narrowed in 1891 when “likely to become a public charge” became the criterion, and further still in 1907 when officials were directed to exclude anyone having a “mental or physical defect being of a nature which may affect the ability of such alien to earn a living.” So-called lunatics and idiots were joined in 1903 by epileptics, as well as those who had been “insane within five years previous” or had experienced “two or more attacks of insanity at any time,” and in 1907 by “imbeciles” and “feeble-minded persons.” In 1917 Congress thought it prudent to consider one previous “attack” of insanity sufficient cause, and to add people of “constitutional psychopathic inferiority,” meaning the “various unstable individuals on the border line between sanity and insanity, such as moral imbeciles,

8. DOUGLAS C. BAYNTON, *DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS* 18 (2016) (quoting Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214).

pathological liars, many of the vagrants and cranks, and persons with abnormal sex instincts.”⁹

Baynton shows that these increasingly stringent exclusions were not based on empirical evidence that disability made people unable to work or take care of themselves but were instead based on eugenic presuppositions.¹⁰ As Mark Weber puts it, “[t]he eagerness to exclude immigrants with disabilities dovetailed with the contemporary ideology of eugenics, a pseudo-science that promoted the breeding of an optimal human race.”¹¹ He explains that those who crafted and applied these disability-based exclusions “were frightened of degeneracy.”¹² Immigration officials, in the words of another commentator, “saw minor forms of disability as not only a barrier to work, but also as a condition that would infect America.”¹³ These views aligned well with eugenic premises, in which “those dependent on public support represented the antithesis of fit citizens,” and in which “economic dependence” was understood to flow from “hereditary mental weakness.”¹⁴

Although rooted in the eugenics era, the explicit disability-based exclusions remained on the books long after eugenics had been discredited. It was not until 1990—the same year it adopted the Americans with Disabilities Act—that “Congress deleted the provisions excluding paupers, beggars, vagrants, persons with some health impairments, and those with physical diseases or defects affecting their ability to earn a living.”¹⁵ And even then, Congress “retained the public charge provision and various health-related grounds for denial of admissibility, excluding persons with various communicable diseases.”¹⁶

The public charge provision states that “[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”¹⁷ In making that determination, the statute provides, the government shall “at a minimum” consider the following

9. *Id.*

10. *See id.* at 20–21.

11. Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER RACE & JUST. 153, 157 (2004).

12. *Id.* at 159; *see also* Anna Shifrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363, 1382 (2020) (“The public charge standard for inadmissibility became a vessel for eugenics-based ideas about who was capable of work, thus targeting the mentally and physically disabled, and paupers.”).

13. Faber, *supra* note 12, at 1383.

14. Lindsay, *supra* note 1, at 570.

15. Weber, *supra* note 11, at 162–63.

16. *Id.* at 163.

17. 8 U.S.C. § 1182(a)(4)(A) (2021).

factors: “age,” “health,” “family status,” “assets, resources, and financial status,” and “education and skills.”¹⁸ But the statute does not precisely describe *how* the government should assess those factors. As a result, the executive branch has substantial latitude—as a practical if not a legal matter—to give content to the public charge determination.

By keeping the public charge provision on the books, Congress left in place a weapon that could be used for a eugenic revival. The Clinton Administration sought to limit the risk by exercising its executive authority to narrow application of the public-charge exclusion to those individuals who received “public cash assistance for income maintenance” or are “institutionaliz[ed] for long-term care at government expense.”¹⁹ The administration explicitly said that receipt of Medicaid (other than for long-term institutionalization), food stamps, or housing assistance, among other forms of cash benefits “should not be considered for public charge purposes.”²⁰ But the government was not able to finalize its interpretation in regulations before President Clinton left office; that interpretation appeared in subregulatory guidance only.²¹

By placing its liberalization of the public charge test only in subregulatory guidance, the Clinton Administration left an easy opening for a subsequent administration determined to re-impose eugenic restrictions. And the Trump Administration readily fit that description. President Trump’s lead adviser on these issues, Stephen Miller, aggressively pushed along a variety of fronts to restrict immigration.²² Tightening the public charge exclusion became a “pet project” of Miller’s.²³ Indeed, “Miller liked to tell people that he had been advocating for the public charge rule since he was fifteen.”²⁴

In August 2019, the Trump Administration issued the final regulation for which Miller had been pushing.²⁵ The new Trump rule dramatically expanded the application of the public charge exclusion,

18. § 1182(a)(4)(B)(i).

19. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (May 26, 1999).

20. *Id.* at 28693.

21. See Mark C. Weber, *Of Immigration, Public Charges, Disability Discrimination, and, of All Things, Hobby Lobby*, 52 ARIZ. ST. L.J. 245, 254–55 (2020).

22. See Nick Miroff & Josh Dawsey, *The Adviser Who Scripts Trump’s Immigration Policy*, WASH. POST (Aug. 17, 2019), <https://www.washingtonpost.com/graphics/2019/politics/stephen-miller-trump-immigration/>.

23. JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP’S ASSAULT ON IMMIGRATION 309 (2019).

24. *Id.* at 310.

25. See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41292 (Aug. 14, 2019).

well beyond the narrow scope it had under the 1999 guidance. In enumerating the types of government benefits that can make their recipients a public charge, the new rule explicitly includes Medicaid, food stamps, housing assistance, and other forms of public assistance that had been excluded under the 1999 guidance.²⁶ It defined a public charge as including anyone who was likely to receive any of the enumerated benefits for more than twelve months total in any thirty-six-month period.²⁷ The preamble to that rule specifically endorsed the use of an immigrant's disability as a basis for determining that the individual would be a public charge.²⁸ And, as the Seventh Circuit explained, "the Rule brands as a *heavily* weighted negative factor a medical condition that is likely to require extensive medical treatment or interfere with the person's ability to provide for herself, attend school, or work."²⁹

The Seventh Circuit found the conclusion "inescapable that the Rule penalizes disabled persons":

All else being equal—education and skills, work history and potential, health besides disability, etc.—the disabled are saddled with at least two heavily weighted negative factors directly as a result of their disability. Even while DHS purports to follow the statutorily-required totality of the circumstances test, the Rule disproportionately burdens disabled people and in many instances makes it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge.³⁰

The Trump Administration's public charge rule is best understood as a revival of eugenics in immigration policy—of a piece with Trump's suggestion that the United States should not accept immigrants from what he called "shithole countries."³¹ And, indeed, the administration made no effort to hide the eugenic pedigree of its new rule. The preamble to the final public charge rule explicitly invoked eugenics-era cases involving the exclusion of disabled individuals. It stated that consideration of an immigrant's disability in admissions determinations "is not new and has

26. *See id.* at 41501.

27. *See id.* at 41502.

28. *See id.* at 41383.

29. *Cook Cnty., Illinois v. Wolf*, 962 F.3d 208, 227 (7th Cir. 2020) (citing 84 Fed. Reg. at 41504).

30. *Id.* at 228.

31. DAVIS & SHEAR, *supra* note 23, at 223; *see* John-Pierre Maeli, *Trump Reintroduces An Immigration Policy With A Dark Past*, ARCDIGITAL (Oct. 11, 2018), <https://arcdigital.media/trump-reintroduces-an-immigration-policy-with-a-dark-past-eaafa595cdad> ("Trump is restructuring immigration policy to exclude poor and disabled people. It is a retrogression, a rebirth of an older, darker American immigration policy—one founded on eugenics, xenophobia, and ableism.").

been part of public charge determinations historically.”³² In support of that proposition, the preamble cited four cases, all decided between 1911 and 1922—the height of the eugenics movement in the United States.³³ And it described those cases in ways that highlighted their eugenic nature.³⁴ For those who worried that the new public charge rule marked a signal moment in a eugenic revival, these citations seemed to be designed to send a clear message: “So what? What are you going to do about it?”

The future of the Trump Administration’s public charge rule is very much in doubt. On November 2, 2020—the day before the presidential election—the federal district court for the Northern District of Illinois issued an order vacating the rule for violating the Administrative Procedure Act.³⁵ The government immediately appealed that holding, and the Seventh Circuit issued an administrative stay.³⁶ News reports say that the new Biden Administration intends to reverse Trump’s public charge rule.³⁷ The judicial vacatur of Trump’s rule may give Biden more room to act quickly on this matter. But even if the Trump Administration’s action is swiftly reversed, the fact that a presidential administration worked so hard to put in place a policy with clear roots in the eugenics movement is extremely worrisome. And we can expect to see proposals to reimpose it in future administrations.

II. COVID & EUGENICS

Perhaps the Trump public charge rule can be explained as resulting from the traits of two individuals: Donald Trump’s longtime affinity for eugenic ideas, and Stephen Miller’s aggressive hatred of immigration. But the eugenic response to COVID-19 cannot be so easily cabined to a few people. To be sure, President Trump and his administration followed a strategy that is best understood as tacitly—if not explicitly—eugenic. But here Trump’s actions drew strength from the widespread support for

32. 84 Fed. Reg. at 41368.

33. *See id.* at 41368, n.407 (citing *Ex parte Mitchell*, 256 F. 229 (N.D.N.Y. 1919)).

34. *See id.* (describing *Barlin* as “sustaining the exclusion of three impoverished immigrants, the first because he had a ‘rudimentary’ right hand affecting his ability to earn a living, the second because of poor appearance and ‘stammering’ such that made the alien scarcely able to make himself understood, and the third because he was very small for his age,” and describing *Canfora* as “ruling that an amputated leg was sufficient to justify the exclusion of a sixty year old man even though the man had adult children who were able and willing to support him”).

35. *See Cook Cnty., Ill. v. Wolf*, No. 19 C 6334, 2020 U.S. Dist. LEXIS 203434, at *25 (N.D. Ill. Nov. 2, 2020).

36. *See Cook Cnty., Ill. v. Wolf*, No. 20-3150 (7th Cir. filed Nov. 3, 2020).

37. *See, e.g., Camilo Montoya-Galvez, Biden Plans Sweeping Reversal of Trump’s Immigration Agenda, from Deportations to Asylum Policy*, CBS NEWS (Nov. 11, 2020, 4:00 PM), <https://www.cbsnews.com/news/biden-immigration-policy-agenda-trump-reversal-deportation-asylum/>.

eugenic ideas across a broad swath of the populace. Although the eugenics-informed approach to the pandemic probably did not draw the support of a majority, it was endorsed by a large and vocal minority with many well-placed and influential allies. The breadth and intensity of support for the eugenic approach is a particularly worrisome portent.

Eugenics can be detected in the response to COVID-19 at several levels. In the early days of the pandemic, as case counts spiked in certain affected areas of the country, and hospitals began to be overwhelmed, attention focused on the “crisis standards of care” that health systems had set up to ration scarce life-saving treatments. In many states, it turned out, the crisis standards explicitly disqualified individuals with various pre-existing disabilities from receiving those treatments or sent them to the back of the line—even when the disabilities would not make life-saving treatments ineffective.³⁸ Disabilities targeted by the state crisis standards included such conditions as “profound mental retardation” and “spinal muscular atrophy.”³⁹

The deprioritization of individuals with pre-existing disabilities reflected the view that scarce life-saving treatments should be allocated to those individuals who will receive a greater benefit from them. Health systems sent “older persons and people with disabilities” to the back of the line, because they sought to “prioritize those who had the best chance of recovery in the event of a mass outbreak.”⁴⁰ A necessary premise, then, was that the disabilities that trigger exclusion or deprioritization from treatment are conditions that reduce the quality or expected length of life. But that premise rests on biases and stereotypes about disability that are not empirically reliable.⁴¹

Many advocates and bioethicists challenged the singling out of disability and age for adverse treatment in crisis standards of care. The bioethicists Bo Chen and Donna McNamara argued that the rationing

38. For a general discussion of this controversy, and an argument that crisis standards like these violate the federal disability discrimination laws, see Samuel R. Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols*, 130 *YALE L.J. F.* 1, 6–9 (2020).

39. See *id.* at 2. For good journalistic collections of these policies, see Amy Silverman, *People with Intellectual Disabilities May Be Denied Lifesaving Care Under These Plans as Coronavirus Spreads*, *PROPUBLICA* (Mar. 27, 2020, 5:00 AM), <https://www.propublica.org/article/people-with-intellectual-disabilities-may-be-denied-lifesaving-care-under-these-plans-as-coronavirus-spreads>; see also Liz Essley Whyte, *State Policies May Send People with Disabilities to the Back of the Line for Ventilators*, *CTR. FOR PUB. INTEGRITY* (Apr. 8, 2020), <https://publicintegrity.org/health/coronavirus-and-inequality/state-policies-may-send-people-with-disabilities-to-the-back-of-the-line-for-ventilators/> [<https://perma.cc/4EL5-BG9H>].

40. Bo Chen & Donna Marie McNamara, *Disability Discrimination, Medical Rationing and COVID-19*, *ASIAN BIOETHICS REV.*, at 1 (2020).

41. For an extended discussion, see Bagenstos, *supra* note 38, at 8–21.

policies, and the arguments that had been offered in support of those policies, were “reflective of eugenics ideology as [they] indicate[] that the lives of persons with disabilities are less valuable.”⁴² The disabled policy analyst and activist Alice Wong described those crisis standards as an example of how eugenics was not “a relic” but instead was “alive today, embedded in our culture, policies, and practices.”⁴³ The National Council on Disability put the matter powerfully:

Once again, society, including physicians, is already accepting the conclusion that this group will be denied the right to life due to a lack of resources. Once again, it is a forgone conclusion that people with disabilities are the most expendable group. Once again, as in previous natural disasters and medical crises, people with disabilities are being told to prepare to die.⁴⁴

This part of the story has a bit of a happy ending. Activists across the country mobilized to challenge state crisis standards of care that threatened to send older and disabled people to the back of the line for lifesaving COVID treatments. They filed a series of complaints with the Office for Civil Rights (OCR) at the United States Department of Health and Human Services.⁴⁵ And OCR responded.⁴⁶ In March 2020, the agency issued a bulletin interpreting federal antidiscrimination law to require that “persons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person’s relative ‘worth’ based on the presence or absence of disabilities or age.”⁴⁷ Rather, the bulletin said, decisions “concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient based on the best available

42. Chen & McNamara, *supra* note 40, at 4; *see also* Katrina N. Jirik, *Disability and Rationing of Care amid COVID-19*, HARV. L. PETRIE-FLOM CTR: BILL OF HEALTH (Apr. 13, 2020), <https://blog.petrieflom.law.harvard.edu/2020/04/13/disability-and-rationing-of-care-amid-covid-19/> (“This is updated eugenic thought, whereby you have only the survival of the fittest, with an assumed understanding of what ‘the fittest’ actually entails.”).

43. Alice Wong, *I’m Disabled and Need a Ventilator to Live. Am I Expendable During This Pandemic?*, VOX (Apr. 4, 2020, 10:20 AM), <https://www.vox.com/first-person/2020/4/4/21204261/coronavirus-covid-19-disabled-people-disabilities-triage>.

44. Letter from Neil Romano, Chairman, Nat’l Council on Disability, to Roger Severino, Dir., Off. for C.R. (Mar. 18, 2020) (available at <https://ncd.gov/publications/2020/ncd-covid-19-letter-hhs-ocr>).

45. For a frequently updated collection of these complaints, their dispositions, and other relevant documents, *see COVID-19 Medical Rationing & Facility Visitation Policies*, CTR. FOR PUB. REPRESENTATION, <https://www.centerforpublicrep.org/covid-19-medical-rationing/> (last visited Feb. 20, 2021) [hereinafter *COVID-19 Policies*].

46. *Bulletin: C.R., HIPAA, and the Coronavirus Disease 2019 (COVID-19)*, U.S. DEP’T OF HEALTH & HUM. SERVS. 1 (Mar. 28, 2020), https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf?fbclid=IwAR351WokrC2uQLIPxDR0eiAizAQ8Q-XwhBt_0asYiXi91XW4rnAKW8kxcog.

47. *Id.*

objective medical evidence.”⁴⁸ And OCR has negotiated agreements with states to remove the most explicit and egregious exclusions and deprioritizations of people with disabilities in their crisis standards.⁴⁹ Although the risk of excluding disabled people from life-saving treatment remains, these legal interventions have substantially mitigated it.

There is another respect, however, in which the response to the COVID-19 pandemic has carried overtones of eugenics. And here the law has not been as much of a help. Outbreaks have been especially significant in congregate settings: nursing homes, jails, prisons, farmworker camps, meatpacking plants, and other facilities in which people must live or work in close proximity to other people.⁵⁰ Disabled people and members of racial minority groups disproportionately live and work in settings like these.⁵¹

To some extent, of course, the risks to those in congregate settings are biological and architectural—the virus transmits most readily in confined places,⁵² and that is how these facilities were designed. But the social model of disability teaches us that we cannot ignore the role of human choice in shaping the environment.⁵³ We need not confine disabled individuals to nursing homes and other congregate facilities; we could provide them services in their own homes, or in apartments they share with only one or two others. Where state funds pay for institutionalized services, the Americans with Disabilities Act *requires* that disabled individuals have the option of receiving those services in less congregate settings where that is appropriate.⁵⁴ When states fail to move people out of inappropriate confinement in nursing homes—despite both the ADA’s requirements and the pandemic’s pressing risks

48. *Id.*

49. See *COVID-19 Policies*, *supra* note 45.

50. See *Congregate Settings*, VA. DEP’T OF HEALTH, <https://www.vdh.virginia.gov/coronavirus/schools-workplaces-community-locations/congregate-settings/> (last visited Apr. 24, 2021).

51. For elaboration on these points, see Lindsay F. Wiley & Samuel R. Bagenstos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 ARIZ. ST. L.J. 505, 531–35 (forthcoming 2021).

52. *Science Brief: SARS-COV-2 and Potential Airborne Transmission*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-sars-cov-2.html>.

53. See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 428–30 (2000).

54. See *Olmstead v. L.C.*, 527 U.S. 581, 605–07 (1999). For discussions of the *Olmstead* holding and its implications, see, e.g., Samuel R. Bagenstos, *Taking Choice Seriously in Olmstead Jurisprudence*, 40 J. LEGAL MED. 1, 3–5 (2020); Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 31–34 (2012).

to life and health—that bespeaks a lack of concern with those individuals. And the lack of concern carries overtones of eugenics.⁵⁵

But the lack of concern is not just passive. In the spring of 2020, when COVID cases were overwhelming the state’s hospitals, New York issued an order that required nursing facilities to admit infected individuals who were medically stable and who had been discharged from acute-care hospitals.⁵⁶ The expressed goal of the policy was to “open up crucial [hospital] beds,” but the result was to encourage deadly COVID outbreaks in nursing facilities.⁵⁷ Although the policy may not have had any eugenic intent, its effect was to sacrifice the lives of those eligible for nursing-home care—older and disabled people—in the interest of COVID-infected individuals who were younger and had no pre-existing disabilities. By treating disabled lives as disposable in the interest of the nondisabled population, the policy had strong eugenic overtones.

The same can be said of the failure to implement substantial population reductions in jails and prisons to stem the tide of COVID in those facilities,⁵⁸ and of the law’s persistent failure to protect workers in high-risk settings.⁵⁹ In each of these cases, law and policy—through actions and inactions—impose the risks of the pandemic on people who are disproportionately disabled and members of racial minority groups. Once again, the pattern of outcomes raises suspicions that eugenic ideology is at work, at least below the surface.

55. See, e.g., Austin S. Kilaru & Rebekah E. Gee, *Structural Ageism and the Health of Older Adults*, JAMA HEALTH F. 1, at 2 (Oct. 16, 2020) (arguing that confining older people to nursing homes rather than serving them in the community is a reflection of “structural ageism”—“the explicit or implicit bias against older persons arising from policies, attitudes, and actions of social institutions”); Charles Sabatino, *It’s Time to Defund Nursing Homes*, J. OF THE ABA COMM’N ON L. & AGING, (July 23, 2020) (arguing that “the COVID-19 pandemic ravaging nursing home residents underscores a deep-seated ageism inherent in our institutional model of nursing home care”). On the connection between continuing institutionalization of disabled individuals and the premises of the eugenics movement, see Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 405–07 (1991).

56. See Joaquin Sapien & Joe Sexton, “*Fire Through Dry Grass*”: Andrew Cuomo Saw COVID-19’s Threat to Nursing Homes. Then He Risked Adding to It, PROPUBLICA (June 16, 2020, 6:00 AM), <https://www.propublica.org/article/fire-through-dry-grass-andrew-cuomo-saw-covid-19-threat-to-nursing-homes-then-he-risked-adding-to-it>.

57. *Id.*

58. For a continually updated collection of resources on efforts to reduce populations of penal facilities to stem COVID risks, see *COVID-19 Behind Bars Data Project*, UCLA L., <https://law.ucla.edu/academics/centers/criminal-justice-program/ucla-covid-19-behind-bars-data-project> (last visited Feb. 20, 2021).

59. See Wiley & Bagenstos, *supra* note 51 at 538–39; Lindsay F. Wiley & Samuel R. Bagenstos, *How the Law Harms Public Health*, DEMOCRACY J., at 3 (June 16, 2020, 4:59 PM), <https://democracyjournal.org/magazine/how-the-law-harms-public-health/>.

The suspicions are particularly heightened, because the eugenic ideology has not, in fact, been hidden below the surface. It has emerged whenever anyone has reassured people that the virus poses risks “only” to elderly people and those with pre-existing conditions. And from the earliest days of the pandemic, well-placed figures have explicitly argued that older and sicker people should be willing to sacrifice their lives and health in the interest of preserving economic growth—what I have called the “kill-grandma-to-save-the-Dow policy.”⁶⁰ As the journalist Sarah Jones argues, these views “are eugenics.”⁶¹ Those who endorse them “separate human life into categories. In one box, there are people worth saving. In the other, there are people we ought to let die.”⁶²

The same eugenic views seemed to underlie the Trump Administration’s turn toward a “herd immunity” strategy that would reopen the economy and allow the virus to spread as widely as possible.⁶³ Although those who endorsed such a strategy asserted that “vulnerable” people would be protected, we have no effective way of providing that protection in a reopened economy absent a vaccine.⁶⁴ A non-vaccine “herd immunity” strategy, then, boils down to eugenics yet again: “the ‘herd’ will survive, but for that to happen, other ‘weaker’ members of society need to be sacrificed.”⁶⁵ Indeed, the very idea of “herd immunity” developed in the early 20th Century in a way that “intersected with eugenic notions of racial difference at a time when eugenic racism was ascendant in the UK and the USA.”⁶⁶ That a presidential administration in 2020 endorsed that strategy—even if only tacitly—is a troubling sign of the resilience of eugenic ideals.

60. Samuel R. Bagenstos, *From Jobs to Health Care, COVID-19 Reveals the Moral Bankruptcy of Conservative Politics*, MICH. ADVANCE (Apr. 1, 2020), <https://www.michiganadvance.com/2020/04/01/samuel-r-bagenstos-from-jobs-to-health-care-covid-19-reveals-the-moral-bankruptcy-of-conservative-politics/>.

61. Sarah Jones, *Eugenics Isn't Going to Get Us Out of This Mess*, N.Y. MAG. (Mar. 25, 2020), <https://nymag.com/intelligencer/2020/03/eugenics-isnt-going-to-save-you-from-coronavirus.html>.

62. *Id.*

63. See Marc Lipsitch, Gregg Gonsalves, Carlos del Rio & Rochelle P. Walensky, *Trump Wants to Try for Herd Immunity. Without a Vaccine, It Could Kill Millions*, WASH. POST (Oct. 14, 2020), <https://www.washingtonpost.com/outlook/2020/10/14/herd-immunity-barrington-declaration/>.

64. See *id.*

65. Louis Philippe Romer & Vito Laterza, *Coronavirus, Herd Immunity and the Eugenics of the Market*, AL JAZEERA (Apr. 14, 2020), <https://www.aljazeera.com/opinions/2020/4/14/coronavirus-herd-immunity-and-the-eugenics-of-the-market>.

66. David Jones & Stefan Helmreich, *A History of Herd Immunity*, 396 LANCET 810, 811 (2020).

CONCLUSION

It might be tempting to treat the matters addressed in this essay as having been overtaken by events. After all, Donald Trump lost the 2020 election.⁶⁷ The policies he pursued—very much including his public charge rule and his tacit herd immunity strategy for dealing with the coronavirus—are likely to pass away with his administration. But it would be a mistake to assume that the danger has passed. Trump's policies, and particularly the public discourse surrounding the COVID-19 pandemic, reveal the persistence of eugenic ideas in the culture. Those ideas are broadly held—by a vocal and influential minority if not by a majority. To the extent that they persist, they will stand as an obstacle to disability justice.

67. Nick Bryant, *US election 2020: Why Donald Trump lost*, BBC (Nov. 7, 2020), <https://www.bbc.com/news/election-us-2020-54788636>.