

# PANDEMIC EUGENICS: DISCRIMINATION, DISABILITY, & DETENTION DURING COVID-19

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The hidden blueprint of eugenics continues to shape the treatment of captive and vulnerable populations throughout the current pandemic. Though nominally discredited, eugenic thinking continues to guide our twenty-first century incarceration policies and our discriminatory treatment of detained, disabled, and neglected populations. During COVID-19, our unrecognized reliance on eugenics has caused a cascade of disasters: disregard for the welfare of incarcerated people who have fought COVID-19 without supplies, social distancing ability, or compassionate release; hospital rationing policies which limit use of ventilators, hospital beds, and other medical devices by disabled and elderly individuals; the skyrocketing death toll in nursing and long-term care homes; and the profound neglect of group home residents, including children in foster care and the cognitively and developmentally disabled.

These inequitable practices follow a pattern consistent with the philosophy of eugenics. Our society has isolated a class of “unfit” and “unvalued” people, whose lives and dignity are treated as less worthy than others. This article reveals the hidden eugenic thinking supporting our mistreatment of disabled, captive, and vulnerable individuals during the pandemic, and proposes broad and longer-lasting solutions to this legacy of discrimination.

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## INTRODUCTION

An invisible blueprint of eugenic philosophy has guided our approach to battling COVID-19, resulting in discriminatory treatment of captive and vulnerable populations. Indeed, “the long tail of eugenics still explains our twenty-first-century incarceration policies.”<sup>1</sup> Tragically, this long tail also explains our callous treatment of individuals during the pandemic who are either physically confined, less able to control their living conditions, or both; specifically, those who are residing in institutions, care facilities, group homes or corrections facilities. The legacy of eugenic thinking still leads to various troubling outcomes, including an almost complete abandonment of prisoners, who have suffered explosive COVID spread without safeguards or treatment. Likewise, the extraordinary death toll in long-term care homes and psychiatric institutions reflects the societal disregard for individuals residing in such organizations, who were too often ignored when it came time to distribute personal protective equipment (PPE) and institute proper safety measures. Finally, the long-standing neglect of intellectually- and developmentally disabled individuals and foster care children in group residential homes has had a damaging and dangerous effect. Although the pandemic has shone a spotlight on the long-lasting power of eugenic philosophy, eugenic practices have affected these populations for over a century. Eugenics is so deeply embedded in our thinking that it can be extremely difficult to tease out, strand by strand.

America’s historically-embraced philosophy of eugenics, although nominally-discredited,<sup>2</sup> has shaped our response to the COVID epidemic in ways both subtle and overt. Eugenic philosophy, more formally defined as selective breeding in order to increase desirable heritable characteristics,<sup>3</sup> is a global scientific and social movement focusing on the manipulation of the racial

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1. Laura I Appleman, *Deviancy, Dependency, & Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 420 (2018).

2. Although eugenics fell out of mass popularity following WWII and the Nazi’s embrace of the practice, the philosophy underlying such beliefs and practices were never truly rejected. *See id.* at 448.

3. *See* Laura Rivard, *America’s Hidden History: The Eugenics Movement*, SCITABLE (Sept. 14, 2014), <https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444/>.

and ethnic stock to improve society.<sup>4</sup> Put another way, eugenic philosophy is a combination of policies “influenced by core beliefs that many of the worst social problems facing America could be solved by segregating, sterilizing, or even eliminating the physically, mentally, and morally disabled.”<sup>5</sup> Our COVID-19 policies help reify this philosophy by creating a literal underclass of the “unfit” and “unvalued,” whose lives are treated as less valuable. Accordingly, our eugenics-based approach to this pandemic is not an aberration, but instead a reflection of our long-held but little discussed eugenic beliefs, established in the late nineteenth century and still endemic today. The remnants of eugenic philosophy repeatedly surface in modern legal and medical practice, most evident in the treatment of populations we seem to minimally value.<sup>6</sup>

The standard history of American law and medicine gives short shrift to the role of eugenics.<sup>7</sup> Following *Buck v. Bell*, which legitimized sterilization of those deemed “mentally unfit,” 32 states passed eugenic sterilization laws in the first few decades of the twentieth century.<sup>8</sup> Innumerable human medical experiments were performed upon the disabled, the incarcerated, and the aged, frequently funded by the federal government.<sup>9</sup> We have long since given up espousing the philosophy of eugenics. And yet

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4. Jonathan Simon, *The Criminal Is to Go Free: The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 787 (2020).

5. Jonathan Simon, *The Long Tail of Eugenics*, JOTWELL (Nov. 5, 2019), <https://crim.jotwell.com/the-long-tail-of-eugenics/> (reviewing Laura I Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L. J. 417 (2018)).

6. Simon, *supra* note 4, at 788.

7. Cf. generally THOMAS LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* (2016); PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *Buck v. Bell** (2008) (detailing factual and legal history of *Buck v. Bell*); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980) (discussing influence of eugenics on progressive American law); Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS. L. REV. 195, 204-234 (2020); Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 LAW & HIST. REV. 63, 64 (1998) (discussing minimal mention of eugenics in criminal justice history).

8. Appleman, *supra* note 1, at 448.

9. Laura I Appleman, *The Captive Lab Rat: Human Medical Experimentation in the Carceral Era*, 61 B.C. L. REV. 1,8 (2020).

eugenics, and the racist belief system it created, is burrowed deeply into the inner workings of both law and medicine.<sup>10</sup>

The COVID-19 global pandemic has laid bare the inextricably entwined roots of the legal and medical professions, both supported by eugenic thinking. This Article will reveal the hidden motivations behind our discriminatory treatment of captive and vulnerable populations during COVID-19 and highlight the legacy of eugenics present in our government response to the pandemic. Part I traces the hidden role of eugenic philosophy in both past and present approaches to law and medicine, detailing its strong influence throughout the past 100 years. Part II scrutinizes our reaction to COVID-19, exposing the neglect and discrimination against those populations we still view as “lesser” and “unworthy.” Specifically, Part II looks at incarcerated people, individuals under correctional control, nursing home residents, institutionalized patients, and those living in long-term care. Part III discusses some legal responses to our insufficient COVID-19 measures, including lawsuits brought to halt medical rationing plans, legal attempts for early inmate release, and the proposed COVID-19 Safer Detention Act. Part IV calls for improvement in our approach to treating disabled, captive, and vulnerable populations. This would include a new Commission on Ethics and Eugenics, overseeing all health services, medical treatment, and new research experiments proposed for such individuals. In addition, Part IV advocates for increased educational efforts to teach the true history of eugenics. Finally, this Article concludes with a call to scrutinize our medical and legal practices for the taint of eugenic thinking.

This effort is among the first to expose how both the philosophy and actual practice of eugenics is still occurring today, particularly for certain populations.<sup>11</sup> We can only eradicate the stains of the past by teaching the truth of our history, flawed as it may be. Although we have begun the painful task of examining how eugenics has influenced our past decision making, we have not yet reckoned with how this corrosive philosophy still affects our present. Only by identifying, exposing, and eradicating all

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10. See Simon, *supra* note 4, at 787-88; see generally Karen Norrgard, *Human Testing, The Eugenics Movement, and IRBs*, 1 NATURE EDUC. 170 (2008).

11. Cf. Jonathan Simon, *The Criminal Is to Go Free: The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787 *passim* (2020).

traces of eugenics can we ensure that our approaches to issues of medical and legal ethics are free from structural and systemic discrimination.

### **PART I: PAST IS PROLOGUE: TRACING THE HIDDEN BLUEPRINT OF EUGENICS**

Our response to the COVID-19 pandemic has resulted in startling neglect and mistreatment towards vulnerable populations residing in correctional facilities, alternative corrections, psychiatric institutions, long-term care facilities, and foster-care group homes. This is largely attributable to the subliminal blueprint of eugenics underlying our legal and medical treatment of the disabled, detained, and dependent. Despite its absence in the customary narratives of law<sup>12</sup> and medicine, the continuing force of eugenics cannot be dismissed, as it drives many of our historical and current medical actions.

Standard American history gives short shrift to the powerful role of eugenics in creating forms of detention, such as our criminal justice system and institutions for people with disabilities. Indeed, our checkered past, which includes using human subjects for experimentation, is tangled with our history of imprisonment. Although embarrassing to recall, “historians have shown that eugenics made a massive and lasting influence on American law and society and on criminal justice in particular.”<sup>13</sup> Eugenic philosophy has guided our past decisions to detain and incarcerate individuals with psychiatric disabilities, those with developmental and physical disabilities, and the “socially undesirable.”<sup>14</sup> From the very beginning of the United States, segregation and detention have been used to control those on the margins: the poor (in almshouses, workhouses, and ghettos), minorities (in convict labor farms and correctional institutions), and those who are disabled (in cages, asylums, and hospitals).<sup>15</sup> Eugenic philosophy was the blueprint for these decisions, and its long tail still shapes the contours of much of the modern regulatory state.<sup>16</sup>

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12. With the exception of disability law and some aspects of family law.

13. Simon, *supra* note 4, at 790.

14. Appleman, *supra* note 1, at 419.

15. *Id.*

16. Simon, *supra* note 4, at 790.

Theories of eugenics began to circulate in the late nineteenth century, and reached full fruition during the Progressive Era.<sup>17</sup> Eugenic theory was closely intertwined with the late nineteenth century idea that social problems, including insanity, dependency, poverty, and disability, were fundamentally individual and moral in nature.<sup>18</sup> Following the Civil War, the burgeoning field of hereditary science provided Americans an easy way to stratify and inculcate on the basis of class and race. Hereditary differentiation quickly became a means to socially control those considered “inferior”<sup>19</sup> and deserving of fewer resources.<sup>20</sup> In this way, scientific racism and eugenics became fundamental in supporting certain societal ordering—one that valorized certain races, ethnicities, and genetic fitness—as natural and inevitable.<sup>21</sup> Thus, eugenics functioned simultaneously as “a scientific and a social movement.”<sup>22</sup>

By the advent of the Progressive Era, various legal, sociological, and scientific eugenic theories flourished, largely focused on dividing the “fit” from the “unfit.”<sup>23</sup> The common thread? Widespread societal assumptions about the appropriate treatment for those individuals categorized as “unfit,” “undesirable,” or “unemployable.”<sup>24</sup> Those considered “inferior” because of disability, mental illness, or congenital illness were viewed by the public as a continuing “threat to the vitality of the nation.”<sup>25</sup> The very existence of these “unfit” individuals posed a threat to the United States, because they would not only cost money to support, but also might spread their “degenerate” hereditary traits through reproduction, weakening the American stock.

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17. Appleman, *supra* note 1, at 436.

18. See LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 69-110 (2020); DAVID MITCHELL AND SHARON SNYDER, *CULTURAL LOCATIONS OF DISABILITY* 101-05 (2006); PAUL LOMBARDO, *THREE GENERATIONS, NO IMBECILES* 7-19 (2002); John Sutton, *The Political Economy of Madness: The Expansion of the Asylum in Progressive America*, 56 *AM. SOC. REV.* 665, 669 (1991).

19. See Mary Nash, *Social Eugenics and Nationalist Race Hygiene in Early 20<sup>th</sup> Century Spain*, 15 *HIST. EUR. IDEAS* 741, 741 (1992).

20. LOMBARDO, *supra* note 7, at 11.

21. See Nash, *supra* note 19, at 741.

22. LEONARD, *id.* at 112.

23. Appleman, *supra* note 1, at 437.

24. *Id.*

25. Harry G. Hutchison, *Waging War on the “Unfit”? From Plessy v. Ferguson to New Deal Labor Law*, 7 *STAN. J. C.R. & C.L.*, 1, 4 (2011).

Indeed, policy makers used eugenics to help distinguish and separate the different types of “inferior” persons (certain undesirable members of society), in order to better control and contain them by imposing involuntary custodial care (the asylum, the work farm, the prison).<sup>26</sup> This was to shrink the costs of supporting the mentally and physically disabled.<sup>27</sup> Instead, resources were to go to those who were most worthy of both surviving and thriving, as it was the fittest, in their view, who *deserved* to populate the earth—a contrast between “the beasts that prey and those they prey upon, between those of the animals that have to work hard for their food and the sedentary parasites that cling to their bodies and suck their blood.”<sup>28</sup>

Eugenic philosophy was prevalent among Anglo-American educated elites throughout the first three decades of the twentieth century. This elite class included powerful community figures such as scientists, politicians, clergy, doctors, and lawyers.<sup>29</sup> The focus of eugenics was to ensure that “everything possible is done to have fewer hereditary defectives.”<sup>30</sup> Progressive belief systems were remarkably stable in their disdain towards disability, dependency, and deviancy,<sup>31</sup> with the majority of reformers viewing eugenic thinking as common intellectual ground.<sup>32</sup>

State policies and legal proceedings codified eugenic thinking and helped crystallize such beliefs.<sup>33</sup> The codification of eugenic philosophy led to a major expansion of the criminal justice system. This included the institution of probation and parole, indeterminate sentencing, juvenile courts, and proactive policing techniques.<sup>34</sup> These forms of correctional control, still used widely today, required the preventive incapacitation of those deemed permanent or habitual offenders—in other words, those whom

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26. Appleman, *supra* note 1, at 436, 444.

27. *Id.* at 447.

28. Francis Galton, *Eugenics: Its Definition, Scope, and Aim*, AM. J. SOC., Vol. X, No.1 (1904), <http://galton.org/essays/1900-1911/galton-1904-am-journ-soc-eugenics-scope-aims.htm>.

29. See DANIEL KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 57-58, 60, 64 (1985).

30. See A EUGENICS CATECHISM, AM. EUGENICS SOC'Y 2-3, 10 (1926), <https://www.uvm.edu/~eugenics/primarydocs/oraesec000026.xml>.

31. Appleman, *supra* note 1, at 433.

32. Simon, *supra* note 4, at 791.

33. Appleman, *supra* note 1, at 433.

34. Simon, *supra* note 4, at 791.

eugenics had classified as hereditarily criminally defective.<sup>35</sup> Those who could not be rehabilitated due to inbred criminal tendencies had to be overseen for a lifetime.<sup>36</sup>

The spread of eugenic thinking also spurred a redefinition of disabilities, both mental and physical, transforming people deemed “unfit” from their status as community outsiders into societal dangers.<sup>37</sup> The fear of a “rising tide of feeble-mindedness,”<sup>38</sup> spawned from indiscriminate “degenerate” breeding, was entangled with the fear that the national intelligence of the Anglo-American world was in decline.<sup>39</sup> Simultaneously, the fear of a growing population of disabled individuals increased, for they would supposedly bankrupt and overtake local communities.<sup>40</sup> As a result, more “permanent” solutions were sought to stem the flood, including the establishment of asylums, sterilization, and euthanasia, to segregate the “defective” from the flow of community life.<sup>41</sup>

Such imprisonment of the vulnerable, whether through asylum, institution, or prison, were then effectively combined with widespread sterilization schemes.<sup>42</sup> Sterilization intended to eradicate the inherited aspects of mental illness, degenerate criminality, and intellectual and developmental disability.<sup>43</sup> Isolation and segregation, combined with a rigorous sterilization regime, would help “annihilate the hideous serpent of hopelessly vicious protoplasm.”<sup>44</sup> Once appropriately disposed of, these “inferior” individuals would no longer be a bother to society, and their genes would eventually die out.<sup>45</sup>

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35. Simon, *supra* note 4, at 805-06.

36. *Id.*

37. LOMBARDO, *supra* note 7, at 15.

38. *A Rising Tide of Feeble-mindedness*, CHI. TRIB., Feb. 2, 1923, at 8.

39. Appleman, *supra* note 1, at 448.

40. *Id.* at 447.

41. See, e.g., Walter Fernald, Address, *The Burden of Feeble-Mindedness*, 611 BOS. MED. & SURGICAL J. 911, 913–14 (1912) (discussing “widespread prevalence of feeble-mindedness” and “large numbers of feeble-minded persons” in Massachusetts); Appleman, *supra* note 1, at 442, 448.

42. Appleman, *supra* note 1, at 446.

43. Laura I Appleman, *Deviancy, Dependency, & Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 446 (2018).

44. CHARLES B. DAVENPORT, *EUGENICS: THE SCIENCE OF HUMAN IMPROVEMENT BY BETTER BREEDING* 34 (1910).

45. Appleman, *supra* note 1, at 446.

This type of eugenic thinking strongly influenced Progressive era public health policies.<sup>46</sup> The beginning collection of data, along with advances in the field of statistics, were used by public health officials to attempt to control disease and track health.<sup>47</sup> Both public health policies and eugenicists contended that preventing disease spread was more efficient than finding cures, whether that was a vaccine (public health) or sterilization to prevent inferior reproduction (eugenicists).<sup>48</sup> Public health physicians also adopted eugenics as a practical way to apply the insights of medicine.<sup>49</sup> Ultimately, the public health movement emphasized population-based solutions for health problems, and most practitioners agreed that prevention of social problems was a “necessary condition for social progress.”<sup>50</sup> The passage of eugenics based public health laws—such as denial of marriage certificates to “defectives” and mandatory sterilization laws—exemplified this cooperation.<sup>51</sup>

These discriminatory and destructive attitudes reached their zenith in the two decades before World War II. World War II and the effort to defeat Nazism stemmed the overt tide of enthusiasm for eugenic rhetoric, since Nazi policies not only embraced American eugenics but implemented it to horrifying levels.<sup>52</sup> Nonetheless, many of the radical, brutal therapies used to treat the disabled continued indiscriminately throughout the 1940s, including mass sterilization, malarial fever therapy (injecting the patient with malaria to “cure” syphilis), lobotomies, shock treatments to induce painful convulsions, and other types of outrageous human medical experiments.<sup>53</sup>

Following World War II, the Anglo-American elite moved away from outright endorsement of eugenics, but never internally

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46. See Martin Pernick, *Eugenics and Public Health in American History*, 87 AM. J. PUB. HEALTH 1767, 1768 (1997) (“Public health agencies and eugenics organizations often overlapped in goals and methods, programs, and personnel.”).

47. See *Public Health in the Progressive Era*, OHSU HIST. COLLECTIONS, <https://www.ohsu.edu/historical-collections-archives/public-health-progressive-era> (last visited Apr. 6, 2021).

48. See Paul Lombardo, *Eugenics and Public Health: Historical Connections and Ethical Implications*, in OXFORD HANDBOOK OF PUBLIC HEALTH ETHICS 642-43 (2019).

49. *Id.* at 643-44.

50. *Id.* at 644.

51. *Id.* at 646-47.

52. Appleman, *supra* note 1, at 448.

53. *Id.* at 449-50.

repudiated it.<sup>54</sup> As such, the blueprint of eugenics can still be traced in law and healthcare. The longstanding emphasis on an individual's community "value" continues to frame treatment of those with disabilities, the aged, and the incarcerated.

The standard historical narrative tells us that American eugenic policies ended in the 1960s and 1970s.<sup>55</sup> Although some of America's most obvious eugenics policies—such as highly restrictive immigration laws, state-wide mandatory sterilization statutes, and interracial marriage restrictions—were dismantled or erased,<sup>56</sup> much of its infrastructure remained. Indeed, the "pervasiveness and persistence"<sup>57</sup> of American eugenic thinking following World War II is startling in its breadth and power.<sup>58</sup>

What has been called the "second wave of eugenics"<sup>59</sup> still relied heavily on sterilization initiatives following WWII. This *sub rosa* continuation of eugenic principles and philosophy included policy organizations like Birthright, Inc., the renamed Sterilization League of New Jersey espousing sterilization, racial discrimination, and carefully selected human breeding beginning in 1943.<sup>60</sup> Over 31 states had sterilization programs enduring well into the 1970s, with the most prominent programs in California, Virginia, and North Carolina.<sup>61</sup> Eugenics-based sterilization programs clearly targeted minority women during the 1960s and 1970s.<sup>62</sup> But other groups' fitness to survive and reproduce were also targeted, including the poor, those with disabilities, and those who had been convicted of criminal acts.<sup>63</sup>

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54. Simon, *supra* note 4, at 791.

55. See ALEXANDRA STERN, *EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN AMERICA* 183-84 (2005).

56. *Id.* at 184.

57. See Roberta Bivins, *Book Review: Eugenic Nation*, 50 *MED. HIST.* 544, 545 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1592626/>.

58. Appleman, *supra* note 1, at 461.

59. See Kevin Begos, *The American Eugenics Movement After World War II, Part I*, *INDYWEEK* (May 18, 2011), <https://indyweek.com/news/american-eugenics-movement-world-war-ii-part-1-3/>.

60. See *generally Association for Voluntary Sterilization Records*, UNIV. MINN. LIBR., <https://archives.lib.umn.edu/repositories/11/resources/2395> (last visited Apr. 6, 2021).

61. See Kim Severson, *Thousands Sterilized, a State Weights Restitution*, *N.Y. Times* (Dec. 9, 2011), <https://www.nytimes.com/2011/12/10/us/redress-weighed-forced-sterilizations-in-north-carolina.html>.

62. Begos, *supra* note 59.

63. *Id.*

Medical practices based on eugenic beliefs have continued well into the twenty-first century. Repeated sterilizations performed on incarcerated women in California prison systems, for example, continued until roughly 2010.<sup>64</sup> From 2006-2010, state-funded doctors sterilized approximately 148 women held in California correctional facilities, with evidence of roughly 100 more sterilizations dating back to the late 1990s.<sup>65</sup> The imprisoned women alleged that prison medical staff coerced them, particularly targeting women who were Black and Latina,<sup>66</sup> along with those deemed likely to recidivate.<sup>67</sup> California's long history of forced sterilization was implemented through a robust program in selective breeding—designed to prevent “habitual criminals, inmates of insane asylums and sexual deviants”<sup>68</sup> from having children.

Eugenic practices continue to abound. In 2017, Glenwood Resource Center, an Iowa residential home for the seriously intellectually disabled, performed unauthorized medical experiments on residents.<sup>69</sup> Glenwood staff conducted two types of experiments on residents without their consent.<sup>70</sup> The first experiment involved overhydrating residents, some of whom were on feeding tubes, causing physical harm to their nervous systems, skin, and cardiovascular systems.<sup>71</sup> The second involved psychological re-

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64. See Corey G. Johnson, *Female Inmates Sterilized in California Prisons without Approval*, CENT. INVEST. REP. (July 7, 2013), <https://www.revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/>.

65. *Id.*

66. See Shilpa Jindia, *Belly of the Beast: California's Dark History of Sterilizations*, GUARDIAN (June 30, 2020), <https://www.theguardian.com/us-news/2020/jun/30/california-prisons-forced-sterilizations-belly-beast>.

67. Johnson, *supra* note 64.

68. Specifically, “California made it legal for state officials to asexualize those considered feeble-minded, prisoners exhibiting sexual or moral perversions, and anyone with more than three criminal convictions.” This included castrations and ovary removal. Tom Abate, *State's little-known history of shameful science / California's role in Nazis' goal of 'purification'*, SFGATE (Mar. 10, 2003), <https://www.sfgate.com/business/article/State-s-little-known-history-of-shameful-science-2663925.php>.

69. See *Iowa Violated Constitutional Rights of People with Disabilities at Glenwood Resource Center*, GAZETTE (Dec. 22, 2020), <https://www.thegazette.com/subject/news/government/feds-iowa-violated-constitutional-rights-of-people-with-disabilities-at-glenwood-resource-center-20201222>.

70. *Id.*

71. See Rachel Droze, *DOJ Report on Glenwood Resource Center Details Human Experiments, Lack of Communication with State*, WE ARE IOWA (December 23, 2020), <https://www.weareiowa.com/article/news/local/local-politics/glenwood-resource->

search on impulsivity, with plans for a third set of experiments incorporating sexual arousal of residents.<sup>72</sup> These experiments continued for two years before they were exposed.<sup>73</sup>

Most recently, allegations arose regarding sterilization of undocumented women held at the Mexican border.<sup>74</sup> A facility gynecologist allegedly performed sterilization surgeries and other procedures on detained female immigrants, procedures which the women neither sought nor fully understood.<sup>75</sup> The detainees' lack of consent and understanding obviously raises serious ethical concerns.<sup>76</sup>

Both the penal state and public health practices have been strongly influenced by eugenic thinking. In this vein, a few criminal justice scholars have contended that eugenics have helped “drive the punitive turn of the late twentieth century and the rise of mass incarceration,”<sup>77</sup> leaving us with structural and racial inequity that is difficult to dismantle. Similarly, public health scholars have begun to re-examine the role that eugenics has played in shaping modern public health, noting how eugenic thinking became “a norm embedded in public health concepts, structures and interventions.”<sup>78</sup> The shameful yet persistent legacy of eugenics continues, undergirding much of the treatment of

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center-department-of-justice-report-human-experimentation-iowa-department-of-human-services/524-a0a15b9d-482a-4792-b246-11b4b30834a6.

72. *Iowa Violated Rights*, *supra* note 69.

73. *Id.*

74. See Catherine Shochet, *In a Horrifying History of Forced Sterilizations, Some Fear the U.S. is Starting a New Chapter*, CNN (September 18, 2020), <https://www.cnn.com/2020/09/16/us/ice-hysterectomy-forced-sterilization-history/index.html>.

75. See Nomaan Merchant, *More Migrant Women Say They Didn't OK Surgery in Detention*, AP (September 18, 2020), <https://apnews.com/article/georgia-archive-only-on-ap-immigration-f2008d23c5f9087f4214d9722dfb097e>.

76. *Id.*

77. *E.g.*, Simon, *supra* note 4, at 800; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 44 (2016).

78. Paul Weindling, *Conceptualising Eugenics and Racial Hygiene as Public Health Theory and Practice*, in CONCEPTUALISING PUBLIC HEALTH: HISTORICAL AND CONTEMPORARY STRUGGLES OVER KEY CONCEPTS 4 (2018), <https://radar.brookes.ac.uk/radar/file/ce1462f7-119b-4898-a82e-70b20f811649/1/Conceptualising%20eugenics%20and%20racial%20hygiene%20as%20public%20health%20theory%20and%20practice%20-%202018%20-%20Weindling.pdf>.

the captive and vulnerable, in times of crisis and in times of peace.<sup>79</sup>

## PART II: MODERN PANDEMIC EUGENICS

Our treatment of the captive and vulnerable in the midst of a long-running pandemic starkly exemplifies how an underlying eugenic philosophy still structures health care for those who are disabled, detained, or imprisoned. The State's minimal effort put forth to protect these members of our community belies our reliance on eugenic thinking. Specifically, the State continues to prioritize the healthy, free, and able-bodied over the medically fragile, incarcerated, and disabled. With COVID-19 still spreading through the United States, we neglect these populations at our own peril.

### A. JAILS AND PRISONS

COVID-19 has been a global catastrophe that has impacted everyone. The pandemic, however, has disproportionately threatened the health and safety of individuals in formal correctional facilities. The risk of COVID-19 infection in jails and prisons has been aptly described as "lethally systemic."<sup>80</sup> Prisons and jails are almost perfectly configured to harbor COVID-19 outbreaks, since most correctional facilities are overcrowded, located in aging buildings lacking decent sanitation and medical care, and have high concentrations of older individuals with multiple underlying conditions.<sup>81</sup> When combined, these factors increase the possibility for widespread virus infection and severe symptoms, with minimal capabilities for treatment.<sup>82</sup> Penal institutions also see a constant influx of staff, guards, and healthcare workers in and out of facilities, not to mention the prisoners themselves.<sup>83</sup> Ac-

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79. See Cassie DaCosta, *The New Documentary "Belly of the Beast" Explores the Epidemic of Forced Sterilizations within the Female Prison Population of California*, DAILY BEAST (May 18, 2020), <https://www.thedailybeast.com/inside-americas-horrifying-modern-day-eugenics-movement>.

80. See Lee Kovarsky, *Pandemics, Risks and Remedies*, 106 VA. L. REV. ONLINE 71, 71 (2020).

81. See Kelly Davis, *Coronavirus in Jails and Prisons*, THE APPEAL (July 8, 2020), <https://theappeal.org/coronavirus-in-jails-and-prisons-27/>.

82. See Abene Clayton, *'People Are Terrified': A Coronavirus Surge Across California's Prisons Renews Calls for Releases*, GUARDIAN (December 29, 2020), <https://www.theguardian.com/us-news/2020/dec/29/california-coronavirus-cases-prison-system>.

83. See Davis, *supra* note 81.

cordingly, correctional facilities have rapidly become hotspots for infection.<sup>84</sup> At last count, 378,812 inmates have tested positive for COVID-19, and approximately 2,263 have died.<sup>85</sup> As Justice Sotomayor wrote: “[I]nmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm.”<sup>86</sup>

A rational response to the COVID-19 pandemic would have been to release some current inmates, especially individuals near the end of their sentences, those with health conditions, those of advanced age, and those convicted of non-violent crimes. This would have protected the lives of the released by allowing them to live safely at home, as well as protecting both facility employees and people who remained incarcerated by reducing the population density. Unfortunately, that was not the U.S. approach. Rather than value the lives of incarcerated people in the face of a deadly pandemic, we continue to “lock up and lock out more people than any other country on earth.”<sup>87</sup>

## 1. PRISONS

People incarcerated in prisons have experienced far higher rates of COVID-19 infection and death than the United States population at large.<sup>88</sup> Infection has spread quickly in prisons, due to confinement in very tight (often overcrowded) quarters, extremely limited access to PPE, and high rates of preexisting respiratory and cardiac conditions.<sup>89</sup> In addition, many state prisons are failing to take even simple precautionary measures to halt the spread of the virus. For example, in the East Moline Correctional Center in Illinois, the prison staff do not take inmates’ temperatures, allow inmates to eat in the cafeteria together, and

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84. Kovarsky, *supra* note 80, at 71. See also *Covid-19 Infection Tracking in NYC Jails*, LEGAL AID SOC. (May 20, 2020) <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (showing that coronavirus infection rates for inmates (9.18%) and staff (12.45%) in New York’s DOC much higher than the general NY state population (1.85%).

85. See *Totals for February 4, 2021*, COVID PRISON PROJECT, <https://covidprisonproject.com/data/national-overview/> (last visited on Apr. 6, 2021).

86. *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (2020).

87. See Michelle Alexander, *Let Our People Go*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/opinion/coronavirus-prison-outbreak.html>.

88. See Caitlin Hoffman, *Coronavirus Infections and Death Rate Higher Among Incarcerated People*, JOHNS HOPKINS UNIV. HUB (July 8, 2020), <https://hub.jhu.edu/2020/07/08/coronavirus-infection-and-death-rates-higher-in-prisons/>.

89. *Id.*

have not provided inmates with basic sanitation supplies such as hand sanitizer.<sup>90</sup> Likewise, at the Mississippi Department of Corrections, there are no sanitation protocols for telephones and minimal access to soap and cleaning supplies. CDC flyers provided the only COVID-19 education for inmates.<sup>91</sup>

Simply being imprisoned can rapidly exacerbate the spread of COVID-19. The infection rate for inmates is roughly 5.5 times higher than the rate for the general U.S. population, and the death rate is three times as high.<sup>92</sup> Infection rates in many prisons rose to almost 65% by the beginning of June 2020.<sup>93</sup>

The most shocking example is California's San Quentin prison, which suffered a massive increase in coronavirus infection (over 1,400 cases) after the prison received a transfer of infected inmates.<sup>94</sup> As of December 2020, San Quentin has had 2,243 cases and twenty-eight COVID-19 related deaths.<sup>95</sup> The San Quentin outbreak was so disastrous that in October 2020, the California Court of Appeals ordered a 50 percent reduction in inmate population.<sup>96</sup> The result of the San Quentin COVID-19 spread harmed not just the inmates and staff, but also the entire population of California, as corrections transferred seriously-ill inmates to outside hospitals. The secondary effect of confinement-accelerated infection not only burdens the community and health care workers, but also can facilitate community spread.<sup>97</sup> As of the end of Octo-

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90. See Hunter Nagai, East Moline Corr. Ctr., IL, *COVID-19 Jail/Prison Policies*, UCLA L. COVID BEHIND BARS DATA PROJECT, <https://law.ucla.edu/academics/centers/criminal-justice-program/ucla-covid-19-behind-bars-data-project> (last visited Apr. 6, 2021).

91. *Id.*

92. See Hoffman, *supra* note 88 (after adjusting for age/sex differences between prison inmates and general population).

93. *Id.*

94. See Adamu Chan, *The View from Inside San Quentin State Prison*, SLATE (July 6, 2020), <https://slate.com/human-interest/2020/07/san-quentin-coronavirus-outbreak-prison-diary.html>.

95. See Jaskiran Soomal, "COVID-19 Could Only Have Reached Death Row Via Staff. Many of Us Believe This Was Intentional," DAVISVANGUARD (Dec. 20, 2020), <https://www.davisvanguard.org/2020/12/staff-intentionally-introduced-covid-19-to-san-quentin-death-row/>.

96. See Kristen Sze, *California Court of Appeals Orders 50% Population Reduction at San Quentin Prison*, ABC7NEWS (Oct. 20, 2020), <https://abc7news.com/san-quentin-prison-coronavirus-outbreak-inmates-covid-hadar-aviram/7198733/>.

97. See Eric Westervelt, "Shocking, Heartbreaking" Coronavirus Outbreak in Calif. Prison Alarms Health Experts, NPR (June 27, 2020), <https://www.npr.org/2020>

ber 2020, over 15,306 COVID-19 positive cases emerged in California state prisons alone.<sup>98</sup>

Conditions in federal prisons have been equally alarming. The federal Bureau of Prisons (BOP), which imprisons over 163,000 people, reported 229 inmate and three staff deaths due to COVID-19, with actual numbers of inmate deaths likely much higher.<sup>99</sup> The missteps by the BOP have been numerous and deadly. First, BOP staff have ignored or minimized inmates' COVID-19 symptoms, mixing both sick and healthy people together in slapdash quarantines.<sup>100</sup> Second, the BOP also transferred thousands of inmates between prisons in February and early March, spreading the virus cross-county.<sup>101</sup> Third, BOP did not even follow its own pandemic response plan, failing to space out prisoners, and only testing approximately thirteen percent of incarcerated individuals.<sup>102</sup> Finally, and most troubling, BOP inmates were quarantined either in filthy, formerly-abandoned buildings, or in tents prone to rainstorm flooding.<sup>103</sup>

Even these startling numbers may very well be undercounted, as many prisons have either failed to track COVID-19 cases or purposely ignored them, some are not reporting any cases, and others not even testing inmates.<sup>104</sup> A combination of dangerous conditions has created a perfect storm of infectious transmissions in correctional facilities.

Neglecting COVID-19 in prisons has resulted not only in a rampant spread of the virus within institutional walls, but also increased the rate of infection outside, putting inmates, staff, and the community at much higher risk.<sup>105</sup> Indeed, only five states

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/06/27/884149444/shocking-heartbreaking-coronavirus-outbreak-in-ca-prison-alarms-health-officials.

98. Sze, *supra* note 96.

99. See *UCLA Law COVID-19, BEHIND BARS DATA PROJECT, FED. FACILITIES*, <https://uclacovidbehindbars.org/federal> (last visited Apr. 6, 2021).

100. See Keri Blakinger and Keegan Hamilton, "I Begged Them to Let Me Die:" *How Federal Prisons Became Coronavirus Death Traps*, MARSHALL PROJECT (June 18, 2020), <https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps>.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. See Emily Widra & Dylan Hayre, *Failing Grades: States Responses to COVID-19 in Jails and Prisons 2*, ACLU PRISON POL. INITIATIVE (June 25, 2020),

(Massachusetts, Michigan, Tennessee, West Virginia, and Vermont) completed comprehensive testing of the inmate population in state prisons.<sup>106</sup> Thirty-six states provided PPE to prisoners consisting solely of masks.<sup>107</sup> Given the 1.3 million individuals currently incarcerated in state prisons,<sup>108</sup> this COVID-19 response is woefully inadequate. As of December 28, 2020, over 1,700 jail and prison inmates have died from COVID-19,<sup>109</sup> and over 275,000 have been infected.<sup>110</sup> These numbers will surely continue to increase unless more steps are taken to protect prisoners.

There are a variety of steps that state and federal government could have taken to limit COVID-19 spread, which created a prison mortality rate twice as high as the adjusted mortality rate of the general population.<sup>111</sup> Governors could have commuted sentences of medically vulnerable prisoners.<sup>112</sup> Corrections departments could have increased how many prisoners are eligible for early release.<sup>113</sup> Legislatures could have passed laws requiring the release of aged or ill prisoners.<sup>114</sup> States and the BOP could have also ensured that, at minimum, prisons obtained proper PPE and sanitizing tools, healthcare, and mass testing supplies.<sup>115</sup>

Why have states and the federal government been so slow to safeguard prisoners from this deadly virus? This hesitancy to protect is rooted in our long, eugenic history of neglecting and abusing the incarcerated.<sup>116</sup> To truly understand our failure to shield

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[https://www.aclu.org/sites/default/files/field\\_document/failing\\_grades\\_states\\_responses\\_to\\_covid-19\\_in\\_jails\\_prisons\\_063020.pdf](https://www.aclu.org/sites/default/files/field_document/failing_grades_states_responses_to_covid-19_in_jails_prisons_063020.pdf).

106. *Id.* at 5.

107. *Id.* at 15-20 (Appendix A).

108. *Id.* at 8.

109. See Madeleine Carlyle, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020), <https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines/>.

110. *See id.*

111. See Deniz Araturk, *What Prisons Could Still Do to Save Lives*, WILSON CTR. SCI. & JUST. (Sept. 18, 2020), <https://wcsj.law.duke.edu/2020/09/what-prisons-could-still-do-to-save-lives/>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. See Shobana Shankar, *For Mississippi to Fix Its Prisons, It Must Recognize Their Dehumanizing, Eugenic Roots*, WASH. POST (Jan. 29, 2020). In part, the

the incarcerated from the virus, it is critical to trace “the history of eugenics from its beginning, through its inexorable intertwining with the criminal justice system . . . to understand how we arrived at our current level of mass incarceration.”<sup>117</sup>

Most correctional facilities were originally created with an underlying eugenic vision, leading to their evolution “into a permanently dangerous, violent environment.”<sup>118</sup> Principles of eugenic philosophy, particularly in the Progressive Era, developed into tenets of both criminal law and health law, as detailed above.<sup>119</sup> Leading social elites such as judges, attorneys, social workers, prison officials, and other Progressive leaders used eugenic science to help contain certain dangerous individuals and eradicate crime, incarcerating them to improve society.<sup>120</sup>

The twinned eugenic fears of “born criminality” and “feble-mindedness”<sup>121</sup> were used to justify harsh institutional control of Black people and “lesser” whites.<sup>122</sup> Indeed, eugenics held that the state had a duty to “identify and sort out the unfit as part of an effort to regulate breeding and promote racial progress.”<sup>123</sup> And even those Progressive reformers who did not fully embrace eugenics still felt it rational to focus crime-fighting efforts on the individuals believed to be unfit.<sup>124</sup> This understanding helped develop and nurture the emerging carceral state,<sup>125</sup> one that still gives short shrift to inmate rights, dignity, and personal safety.

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failure to protect prisoners is due to extremely retributivist attitudes towards those convicted of crimes, viewing inmates as deserving of all punishment, even severe illness and death.

117. Appleman, *supra* note 1, at 436.

118. Shankar, *supra* note 116.

119. “[C]riminality remained intimately connected to racial identity and biological makeup.” ANTHONY GRASSO, PUNISHMENT AND PRIVILEGE: THE POLITICS OF CLASS, CRIME, AND CORPORATIONS IN AMERICA 165 (2018), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=4860&context=edissertations>.

120. See Miroslava Chávez-García, *Youth of Color and California’s Carceral State: The Fred C. Nelles Youth Correctional Facility*, J. AM. HIST. 47, 48, 50 (2015).

121. Appleman, *supra* note 1, at 443.

122. Shankar, *supra* note 116.

123. ANTHONY GRASSO, PUNISHMENT AND PRIVILEGE: THE POLITICS OF CLASS, CRIME, AND CORPORATIONS IN AMERICA 159 (2018).

124. Simon, *supra* note 4, at 798.

125. Chávez-García, *supra* note 120, at 48.

Ultimately, as Shankar observed, “we cannot save prisoners’ lives without first believing that they are worth saving.”<sup>126</sup> Our reasons for assuming, consciously or subconsciously, that the criminally convicted are less worthy of human dignity and proper treatment stem in large part from the blueprint of eugenics upon which we continue to depend.

## 2. JAILS

Jails function similarly to prisons as an incarcerative setting premised on eugenic beliefs and values. Not only do jails imprison many individuals serving shorter sentences for minor felonies and misdemeanors, but they also detain numerous citizens who are legally innocent, who simply cannot afford bail. Incarcerating individuals merely charged with crimes, who have not yet been found guilty, is frequently based on the fear that they will continue to commit crimes unless they are temporarily removed from society. But both the fear and the science underlying this judicial determination—that people who are arrested and indicted for crimes are usually dangerous—has its roots in the eugenic belief system. The imposition of bail and pre-trial detention because of a specious fear of “dangerousness” harks directly back to the eugenic-based fears of the “unfit,” who would endanger society if they were not caged. The reasoning may be different, but the rhetoric is the same.

Unfortunately, jails have proven to be another ideal breeding ground for the rapid spread of COVID-19, due to the punishing conditions of most state and local jails. Pretrial detainees often suffer harsher conditions of confinement than convicted defendants.<sup>127</sup> Even before the arrival of COVID-19, jails frequently presented dangerous and unhealthy environments, far more than prisons for a number of reasons.<sup>128</sup> Many jails are unequipped to treat major health issues on site.<sup>129</sup> Because most detainees are not jailed for long periods of time, providing adequate healthcare has not been a priority, nor has connecting them to treatment in

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126. Deniz Arıturk, *What Prisons Could Still Do to Save Lives*, DUKE L., WILSON CTR. SCI. & JUST. (Sept. 18, 2020), <https://wcsj.law.duke.edu/2020/09/what-prisons-could-still-do-to-save-lives/>.

127. See Laura I Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1312 (2012).

128. *Id.* at 1318.

129. *Id.* at 1318-19.

the community upon release.<sup>130</sup> Finally, many jails function as revolving doors, with individuals frequently circulating between the facility and the community.

Jails are often more overcrowded than prisons, with some facilities lacking cells or separate rooms, instead packing defendants into tight quarters with bunk beds.<sup>131</sup> Inside the jail facility, physical distancing is all but impossible.<sup>132</sup> Detainees live in packed cells with open communal toilets and close sleeping quarters.<sup>133</sup> In fact, some jails contain double the amount of residents they were built to hold.<sup>134</sup> Due to the extreme space issues inherent in most jail facilities, jails cannot effectively social distance.<sup>135</sup>

Controlling the spread of COVID-19 in jails, however, is just as important as controlling prison spread. An epidemiological study of COVID-19 found that keeping individuals out of jail can save both their lives and the lives of the people in the community surrounding them.<sup>136</sup> This reality is based on two reasons. First, jails, unlike prisons, have a frequent churn, with individuals cycling in and out of these short-term facilities on a daily basis.<sup>137</sup> U.S. jails are turnstiles for accused and incarcerated individuals, counting approximately 10.7 million admissions per year.<sup>138</sup>

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130. See Ram Sabraham et al., *Incarceration's Front Door: The Misuse of Jails in America* 17, VERA INST. OF JUST. (July 2015), [https://www.vera.org/downloads/publications/incarcerations-front-door-report\\_02.pdf](https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf).

131. See Tyler Hicks, *As Covid-19 Cases Surge, Some Incarcerated People Remain Behind Bars*, TEX. OBSERVER (June 29, 2020), <https://www.texasobserver.org/pretrial-covid-dallas-electronic-monitoring/>.

132. See Ashley Remkus, *Alabama Jail Refuses Inmates COVID-19 Masks Because 'They're Going to Eat Them,'* ALABAMA.COM (July 9, 2020), <https://www.al.com/news/2020/07/alabama-jail-refuses-inmates-covid-19-masks-because-theyre-going-to-eat-them.html>.

133. See John Cheves, *Kentucky's Overcrowded Jails Could Be 'Petri Dishes' for Coronavirus, Officials Fear*, GRANT COUNTRY NEWS (Mar. 25, 2020), <https://www.grantky.com/content/kentucky%E2%80%99s-overcrowded-jails-could-be-%E2%80%98petri-dishes%E2%80%99-coronavirus-officials-fear>.

134. *Id.*

135. See *Reducing Jail & Prison Populations During the COVID-19 Pandemic*, BRENNAN CTR. (Jan. 22, 2021), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

136. See *Covid-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails* 2, ACLU ANALYTICS (Apr. 2020), <https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19>.

137. *Id.*

138. *Id.*

Second, jail staff also interact on a daily basis with both incarcerated individuals and their families, along with various community members.<sup>139</sup> Jails are COVID-19 vectors for local communities.<sup>140</sup> For example, the rate of inmate infection at the local jails in New York City in early July (after NY's peak of COVID-19 infection) was 7.86%, compared to 2.62% in the city as a whole.<sup>141</sup> Add in infected corrections staff, and the rate of infection jumps to 11.79%.<sup>142</sup> Yet, these "high-transmission hubs" have not been recognized as critical junctures for control of COVID transmission.<sup>143</sup>

A few states have realized jails are potential COVID-19 transmission hubs and significantly decreased their jail populations.<sup>144</sup> Reducing overcrowding is the best way to prevent COVID-19 spread in jails, and the best way to shrink jail populations is releasing people through bail, probation, or reducing arrests.<sup>145</sup>

Those detained in jails have disproportionately suffered from the spread of COVID-19. Although many jails have reduced some of their overcrowding, the confines are still fairly packed. In addition, the amount of PPE provided to jail inmates is often minimal. For example, in Alabama, the Madison County jail refused to provide masks for its residents, despite a diagnosed case of COVID-19, because of concerns that "they're going to eat them," or use the metal on the masks to injure themselves, each other, or jail staff.<sup>146</sup> Similarly, cleaning supplies for inmates to sanitize their cells are frequently in short supply or non-existent; residents are ordered to clean their own rooms but are given few supplies.<sup>147</sup>

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139. *Id.*

140. *Id.*

141. See *COVID-19 Infection Tracking in NYC Jails*, LEGAL AID SOC'Y (July 3, 2020), <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/>.

142. See *ACLU Covid-19 Model*, *supra* note 136, at 3.

143. *Id.*

144. See *Widra & Hayer*, *supra* note 105, at 7.

145. See *Responses to the COVID-19 Epidemic*, PRISON POL. INITIATIVE (July 14, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html> (detailing ways states have reduced jail populations).

146. See *Remkus*, *supra* note 132.

147. See David King, *Pandemic Leads to Early Prisoner Release, But Finding Housing for Them Remains Difficult*, SHELTERFORCE (May 11, 2020), <https://shelterforce.org/2020/05/11/pandemic-leads-to-early-prisoner-release-but-finding-housing-for-them-remains-difficult/>.

Even when defendants are granted bail, they are not always able to leave jail facilities. Some simply cannot afford to pay bail, even when it is a low amount. Although California has ordered judges to free defendants accused of lower-level felonies by reducing their bail to \$0, New York recently suspended the rule limiting jail time to six days for those not indicted by a grand jury.<sup>148</sup> Some courts, including those in Florida, New York, Iowa, and New Jersey, have simply stopped convening grand juries due to the threat of COVID-19. New York's bewildering response to the cessation of grand juries has been to keep defendants in jail, despite the threat of infection.<sup>149</sup>

Even those preliminarily released from jail are not always free to go. In Texas, for example, individuals granted pre-trial release must wear electronic monitors to track their movements in the community.<sup>150</sup> The Texas tracking companies, however, have refused to work with—or even touch—defendants infected with COVID-19.<sup>151</sup> Thus, despite having been granted bail, these individuals cannot leave the correctional facility.<sup>152</sup> And even if a pre-trial detainee is released from jail, societal reentry can be very challenging, given that the individual is released into a pandemic and lockdown.<sup>153</sup>

### 3. THE FAILURE OF COMPASSIONATE RELEASE

The compassionate release of state and federal prison inmates has been quite limited.<sup>154</sup> Only twenty-one states overall have released inmates from state correctional facilities, and a mere twelve states have released inmates from local correctional facilities.<sup>155</sup> California, for example, only released 7,000 inmates

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148. See Simone Weichselbaum, *Can't Make Bail, Sit in Jail Even Longer Thanks to Coronavirus*, MARSHALL PROJECT (May 1, 2020), <https://www.themarshallproject.org/2020/05/01/can-t-make-bail-sit-in-jail-even-longer-thanks-to-coronavirus>.

149. *Id.*

150. See Hicks, *supra* note 131.

151. *Id.*

152. *Id.*

153. King, *supra* note 147.

154. See *Prison Inmate Release Responses in Response to the Coronavirus (COVID-19) Pandemic, 2020*,

BALLOTPEDIA (July 1, 2020), [https://ballotpedia.org/Prison\\_inmate\\_release\\_responses\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020](https://ballotpedia.org/Prison_inmate_release_responses_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020).

155. *Prison Inmate Release Responses in Response to the Coronavirus (COVID-19) Pandemic, 2020*,

from its state prisons and 3,500 from its rehabilitation and correctional control facilities. All of the released prisoners were incarcerated for non-violent crimes, and most had already been scheduled for release over the next six months.<sup>156</sup> Given that California has approximately 115,000 people incarcerated at any one time,<sup>157</sup> the percentage of released inmates to those still incarcerated was very low (although, of course, meaningful to each released individual).

Likewise, in Texas, early release via parole is possible for mentally ill, disabled, and terminally ill individuals, or those who require long-term care. These inmates can qualify for medically recommended intensive supervision.<sup>158</sup> The Texas parole board, however, rarely approves that type of parole, even in the midst of a global pandemic.<sup>159</sup> Texas even refused early release for the individuals residing at the geriatric prison in Houston.<sup>160</sup>

Similarly, the federal release effort has been minimal. Although former-Attorney General William Barr twice gave orders to federal prisons to release medically vulnerable prisoners or transfer such inmates to home confinement, the Department of Justice resisted.<sup>161</sup> Overall, fewer than three percent of federal prisoners have been sent to home confinement.<sup>162</sup>

Meaningful reduction of America's prison population and a slowdown of the rate of COVID-19 transmission will require the release of not just nonviolent drug offenders, but also those individuals convicted of violent crimes.<sup>163</sup> Even amidst the pandemic, this has been a difficult selling point.

Moreover, simply releasing incarcerated inmates does not solve the problem of COVID-19 spread in correctional facilities.

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BALLOTPEDIA (July 1, 2020), [https://ballotpedia.org/Prison\\_inmate\\_release\\_responses\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020](https://ballotpedia.org/Prison_inmate_release_responses_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020).

156. *Id.*

157. *California's Prison Population*, PUB. P. INST. OF CA. (July 2019), <https://www.ppic.org/publication/californias-prison-population/>.

158. *See* Davis, *supra* note 81.

159. *Id.*

160. *Id.*

161. *See* Blakinger and Hamilton, *supra* note 100.

162. *Id.*

163. *See* Barbara Bradley Hagerty, *Releasing People from Prison is Easier Said than Done*, ATLANTIC (July 2020), <https://www.theatlantic.com/ideas/archive/2020/07/releasing-people-prison/613741/>.

Many people released from prisons and jails have difficulty finding safe, affordable housing.<sup>164</sup> This is an underappreciated but critical issue when releasing prisoners en masse, because early release individuals must have a housing plan arranged before they may leave prison.<sup>165</sup> If inmates cannot find appropriate housing or complete their parole or probation programs, then they must stay incarcerated until they do, pandemic or no.<sup>166</sup> Securing special post-release housing is difficult under normal circumstances; arranging it in the middle of a pandemic can be nearly impossible, given the overflow of inmates needing to be housed, the reluctance of some organizations to place released individuals due to overcrowding, and a general paralysis related to the emergency.<sup>167</sup>

In addition, even the state and federal prisons permitting pandemic-based early release of inmates failed to lessen any of the onerous regulations required for an inmate's release.<sup>168</sup> In other words, the numerous requirements necessary for inmates to complete before their actual release from prison, even when release is formally granted, must still be fulfilled. These mandatory requirements include taking special release courses while still incarcerated,<sup>169</sup> securing an employment offer before release,<sup>170</sup> completing a drug or alcohol program,<sup>171</sup> undergoing mandated programming such as Tennessee's "therapeutic community programming" for substance use disorder,<sup>172</sup> and completing educa-

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164. See King, *supra* note 147.

165. *Id.*

166. See Beth Schwartzapfel, *COVID-19 Has Trapped Thousands of Parolees in Prison*, SLATE (May 7, 2020), <https://slate.com/news-and-politics/2020/05/covid-19-probation-parole-limbo.html>.

167. See David King, *Pandemic Leads to Early Prisoner Release, But Finding Housing for Them Remains Difficult*, SHELTERFORCE (May 11, 2020).

168. See Schwartzapfel, *supra* note 166.

169. *Id.*

170. *What Type of Release Plan Must Be in Order*, FAQs, U.S. PAROLE COMM., <https://www.justice.gov/uspc/frequently-asked-questions#q27> (last visited May 18, 2021).

171. See Emily Widra & Wendy Sawyer, *When Parole Doesn't Mean Release: The Senseless "Program Requirements" Keeping People Behind Bars During A Pandemic*, PRISON P. INITIATIVE (May 21, 2020), <https://www.prisonpolicy.org/blog/2020/05/21/program-requirements/>.

172. See *Substance Use Disorder Program*, TN DEPT OF CORR., <https://www.tn.gov/correction/redirect—rehabilitation/redirect—offender-health-care/substance-use-disorder-program.html> (mandatory program lasting 9-12 months).

tion, life skills, and employment training.<sup>173</sup> Although these curricula might prove useful, such required courses should be postponed or eliminated, in order to more easily free parolees from COVID-19.<sup>174</sup>

In sum, although early prisoner release due to the pandemic is a common sense necessity, prisons hinder an individual's ability to seek release using standard bureaucratic measures.<sup>175</sup> Specifically, the current mechanisms governing prisoner release are "too slow, require too much multilateral unanimity, and vest discharge powers in the wrong institutions."<sup>176</sup>

This disregard of inmate needs is especially harsh, because incarcerated people suffer disproportionately from serious health problems.<sup>177</sup> Individuals under correctional control are particularly vulnerable to COVID-19, including those with lung disease, asthma, serious heart conditions, diabetes, and renal or liver disease, along with various other immunocompromising conditions.<sup>178</sup> At least 20,000 individuals in jails alone are elderly (over the age of 60),<sup>179</sup> and the prison population is rapidly graying.<sup>180</sup> Add in overcrowding, general poor health, lack of sanitation, failure to test and properly quarantine, a constantly shifting inmate population, and the like, and a perfect storm of contagion and transmission swirls and kills.

This cavalier treatment of the incarcerated and their health is par for the course in American history. Incarcerated lives are treated as lesser. Correctional facility residents have frequently

173. See Widra and Sawyer, *supra* note 171.

174. *Id.*

175. *Id.*

176. See Kovarsky, *supra* note 80, at 73.

177. See Pete Wagner & Emily Widra, *Five Ways the Criminal Justice System Could Slow the Pandemic*, PRISON P. INITIATIVE (March 27, 2020), <https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/>.

178. Pete Wagner & Emily Widra, *Five Ways the Criminal Justice System Could Slow the Pandemic*, PRISON P. INITIATIVE (March 27, 2020), <https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/>.

179. See Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON P. INITIATIVE (March 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (with 381 county jails that report DOB, 2,413/79,556 detainees (3%) were at least 60 years old on 3/21. Using the PPI 2020 estimate of 631,000 total county jail pop., scales to ~20,000 current detainees 60+ years old).

180. See Emily Widra, *The Graying of U.S. Prisons, 2001-2016*, PRISON POL'Y. INITIATIVE, [https://www.prisonpolicy.org/graphs/graying\\_prisons\\_2001\\_2016.html](https://www.prisonpolicy.org/graphs/graying_prisons_2001_2016.html) (last visited Apr. 6, 2021).

been seen as less than human, given their captivity, their limited freedoms, their poverty, and their criminal status.<sup>181</sup>

#### 4. FAILING TO INCLUDE INCARCERATED INDIVIDUALS IN VACCINE PRIORITY TIMELINE

One relatively simple way that incarcerated individuals could be protected from COVID-19 is by prioritizing them for the COVID vaccine. Prison and jail inmates, however, were not prioritized in federal distribution criteria.<sup>182</sup> Instead, only correctional staff were prioritized for the first phase of vaccines, and federal prisons set aside the vaccines distributed solely for these workers.<sup>183</sup>

The failure to prioritize inmates seems shortsighted given that prison outbreaks frequently spur community spread. The porous nature of prisons and jails means that spread within a correctional facility quickly permeates outside. In addition, many correctional facilities are located in rural areas, which often have fewer health care resources to treat patients.<sup>184</sup>

Although the American Medical Association<sup>185</sup> and the National Academies of Sciences, Engineering, and Medicine have argued for inclusion of prisoners on vaccine priority,<sup>186</sup> the placement of prisoners on the federal vaccine priority list did not change.<sup>187</sup> Only seven states designated inmates, along with those living in congregate care, to be in the first group for vac-

181. See Appleman, *supra* note 9, at 16.

182. See Roni Rabyn, *Prisons are COVID Hot-Beds. When Should Inmates Get the Vaccine?*, N.Y. TIMES (Nov. 30, 2020) <https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html?action=click&module=Spotlight&pgtype=Homepage>.

183. *Id.*

184. See Jordyn Hyatt, *Send First Vaccines to Pennsylvania's Prisons*, PHILA. INQUIRER (Dec. 7, 2020), <https://fusion.inquirer.com/opinion/commentary/coronavirus-vaccine-distribution-pennsylvania-prison-inmates-20201207.html>.

185. See Erin Schumaker, *Prisons Should Be Covid-19 Vaccine Priority: Experts*, ABC NEWS (Dec. 4, 2020), <https://abcnews.go.com/Health/prisons-covid-19-vaccine-priority-health-experts/story?id=74501889>

186. *Figure: A Phased Approach to Vaccination Allocation for Covid-19*, NAT'L ACAD. SCI., <https://www.nap.edu/resource/25917/FIGURE%20-%20A%20Phased%20Approach%20to%20Vaccine%20Allocation%20for%20COVID-19.pdf> (last visited Apr. 6, 2021).

187. See Rabyn, *supra* note 182.

cines.<sup>188</sup> Several other states placed prisoners into their second tranche of vaccine priority.<sup>189</sup> However, the majority ignored incarcerated people's forced vulnerability.

Another possibility was to prioritize giving the vaccine to inmates who are high risk due to medical conditions or advanced age.<sup>190</sup> This solution, however, does not take into account that all people confined under correctional control are highly susceptible to the virus, given the living conditions and lack of spacing. Although one prominent bioethicist has urged vaccine prioritization, because the "ethical obligation is to protect the lives of prisoners, not just see them as sources of disease," this was not the prevailing rule.<sup>191</sup> This, of course, ties back to the eugenic beliefs underlying our general treatment of incarcerated individuals, that they must be held captive to halt the spread of crime, disease, and poverty.<sup>192</sup>

## B. ALTERNATIVE CORRECTIONS

Although frequently overlooked in the national dialogue about corrections, many individuals are currently sentenced to alternative corrections in lieu of incarceration.<sup>193</sup> Out of the 6.7 million adults engaged in the criminal legal system, approximately 4.5 million people are under correctional control outside of prisons and jails, and roughly 2.1 million people are on probation.<sup>194</sup> Alternative corrections is an expansive and ever-growing universe, including probation, parole, diversion, halfway houses, and work camps. These forms of correctional control often have little supervision or oversight, particularly when they are run by private, for-profit companies.<sup>195</sup> Such lack of oversight is particularly

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188. See Jamiles Lartey, et. al *Should Prisoners Get COVID-19 Vaccines Early*, MARSHALL PROJECT (Dec. 3, 2020), <https://www.themarshallproject.org/2020/12/03/should-prisoners-get-covid-19-vaccines-early>.

189. *Id.* Oregon recently moved inmates to the top of its priority list. See David Williams, *Federal Judge Moves Oregon Prisoners Ahead of Seniors on Covid-19 Vaccination List*, CNN (Feb. 4, 2021), <https://www.cnn.com/2021/02/03/us/oregon-prison-coronavirus-vaccine-trnd/index.html>.

190. Rabyn, *supra* note 183.

191. *Id.*

192. See LOMBARDO, *supra* note 48, at 648.

193. See generally Laura I Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, & Criminal Justice Debt*, 55 HARV. C.R. – C.L. L. REV. 1 (2020).

194. *Id.* at 2.

195. *Id.*

true of alternative corrections sites such as halfway houses, work camps, and drug recovery programs.<sup>196</sup>

The sites of alternative correctional control have become hotspots for COVID spread. In Houston, for example, the Leidel Comprehensive Sanction Center has continually ignored a coronavirus epidemic among its residents.<sup>197</sup> The residents point to the lack of proper cleaning and sanitation, limited medical access, and inadequate food.<sup>198</sup> The explosion of COVID-19 at the Leidel Center exemplifies the troubling risks faced by halfway houses and other alternative corrections facilities during the pandemic.<sup>199</sup> These men are sent to such centers from various nationwide prisons, sharing small, intimate rooms, bathrooms, and dining areas.<sup>200</sup> There is a constant influx of staff and residents who leave each day for work.<sup>201</sup> As of June 2020, the Bureau of Prisons officially counted 301 cases in over fifty-seven federal halfway houses, which is likely a fraction of the real number of cases.<sup>202</sup> COVID-19 spread is particularly likely to be true in federal halfway houses run by private, for profit companies such as the GEO group, which is notorious for providing poor living conditions.<sup>203</sup>

The residents' mandated labor worsens the COVID-19 spread in alternative corrections facilities. Many are required to work in meatpacking or chicken processing plants.<sup>204</sup> These work sites have become COVID hot spots,<sup>205</sup> remaining open during the pandemic due to their "critical infrastructure" status within the food and agriculture sector.<sup>206</sup>

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196. *Id.* at 13-18, 19-23.

197. Liliana Segura, *How the Coronavirus Became a Death Sentence at a Geo Group Halfway House*, THE INTERCEPT (July 3, 2020), <https://theintercept.com/2020/07/03/halfway-house-pandemic-coronavirus-geo-group/>.

198. *Id.*

199. *Id.*

200. Liliana Segura, *How the Coronavirus Became a Death Sentence at a Geo Group Halfway House*, THE INTERCEPT (July 3, 2020).

201. *Id.*

202. *Id.*

203. Appleman, *supra* note 194, at 17.

204. *Id.* at 19-23.

205. See Lewis Kendall, *Revealed: Covid-19 Outbreaks at Meat-Processing Plants Kept Quiet*, GUARDIAN (July 1, 2020), <https://www.theguardian.com/environment/2020/jul/01/revealed-covid-19-outbreaks-meat-processing-plants-north-carolina>.

206. See Meat and Poultry Workers and Employers, *Interim Guidance from CDC and OSHA*, CDC (July 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

Conditions and spread at halfway houses have also been almost entirely ignored during the pandemic, although they are a major part of post-release sentencing and part of the criminal justice system's network of correctional control.<sup>207</sup> Halfway houses are particularly at risk because most of their residents are required to work outside the facility every day, often in close quarters in offsite factories.<sup>208</sup>

Like jails, the conditions inside the halfway houses are easy vectors for the virus.<sup>209</sup> Residents live in jail-like conditions, sleep in closely spaced bunk beds, and share poorly-serviced group bathrooms.<sup>210</sup> Many do not have masks to wear, nor any hand sanitizer, thermometers, or medical personnel available.<sup>211</sup> COVID-19 testing is sparse, and many administrators do not share results of positive tests.<sup>212</sup> In some halfway houses, all cleaning must be done by the inmates themselves.<sup>213</sup> Although some of the residents have been released to home confinement due to COVID, others have been stranded at the residence, with few staff and resources.<sup>214</sup> The lack or absence of any protection or social distancing at halfway houses greatly increases the risk that COVID-19 will spread.<sup>215</sup>

Worse, although most halfway house residents are sentenced to these community correctional facilities for approximately six months, their release is now uncertain due to COVID-19.<sup>216</sup> Many

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207. *Id.*

208. See Brian Doherty, *Prisoner in Ohio Halfway House Complains About Lack of COVID-19 Preparations. He's Sent Back to Prison. Now Ohio Prisons are Exploding with COVID-19*, REASON (Apr. 23, 2020), <https://reason.com/2020/04/23/prisoner-in-ohio-halfway-house-complains-about-lack-of-covid-19-preparations-hes-sent-back-to-prison-now-ohio-prisons-are-exploding-with-covid-19/>.

209. See Segura, *supra* note 197.

210. See Joseph Neff, *Photos Show No Social Distancing in Federal Halfway House*, MARSHALL PROJECT (May 15, 2020), <https://www.themarshallproject.org/2020/05/15/photos-show-no-social-distancing-in-federal-halfway-house>.

211. *Id.*

212. See Lauren Gill, *Halfway House Residents Describe 'A Scary Situation' As Coronavirus Sweeps The U.S.*, THE APPEAL (Mar. 31, 2020), <https://theappeal.org/halfway-house-residents-describe-a-scary-situation-as-coronavirus-sweeps-the-u-s/>.

213. See Segura, *supra* note 197.

214. *Id.*

215. See Joseph Neff, *Photos Show No Social Distancing in Federal Halfway House*, MARSHALL PROJECT (May 15, 2020).

216. Gill, *supra* note 212.

of the residents do not have any place to live if released, which lengthens their stay.<sup>217</sup>

Not only are the people within halfway houses put at risk of COVID-19 spread, but the greater community's immunological health is compromised by unsafe conditions. For example, the Topeka, Kansas, community suffered a COVID-19 outbreak as a result of the hazardous conditions within the Leavenworth Center. Several women residing at the federal halfway house were working at Triumph Foods, a pork-processing plant which suffered widespread virus infection.<sup>218</sup> Cases rose so quickly at the plant that they began to infect the surrounding Kansas City, Missouri area.<sup>219</sup> Unsurprisingly, Leavenworth-area residents were also exposed to COVID, and almost all the women who worked at the plant tested positive.<sup>220</sup> When a population is oppressed by eugenics policies, the whole community suffers as a result.

Drug and alcohol rehabilitation houses are also sites of heightened potential transmission. Designed for communal living, residents share bedrooms, bathrooms, common rooms, kitchens, and supplies.<sup>221</sup> The client base of these houses complicates any sanitary precautions, since many residents tend to cycle in and out of emergency departments, addiction treatment centers, homeless shelters, and correctional facilities, all of which expose people to high virus levels.<sup>222</sup> Additionally, many of the residents have compromised lung capacity, since long-term use of substances like tobacco, cannabis, and crack cocaine reduce lung function and increase susceptibility to respiratory infections.<sup>223</sup> Likewise, those who have abused drugs and alcohol may be more susceptible to COVID-19 due to weak immune systems and existing infec-

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217. *Id.*

218. See Liliana Segura, *GEO Group's Blundering Response to the Pandemic Helped Spread Coronavirus in Halfway Houses*, THE INTERCEPT (June 17, 2020), <https://theintercept.com/2020/06/17/halfway-house-coronavirus-geo-group/>.

219. *Id.*

220. *Id.*

221. See Chris Vogner, *I Found Shelter from Coronavirus and Loneliness in a Halfway House*, L.A. TIMES (June 15, 2020), <https://www.latimes.com/opinion/story/2020-06-15/coronavirus-pandemic-halfway-house-houston>.

222. See Lipi Roy, *Addiction Treatment Facilities: Are They Prepared for the COVID-19 Coronavirus Outbreak?*, FORBES (Mar. 16, 2020), <https://www.forbes.com/sites/lipiroy/2020/03/16/addiction-treatment-facilities-are-they-prepared-for-covid-19/#67edb9ae44ea>.

223. *Id.*

tions such as chronic lung disease, hepatitis C, or HIV.<sup>224</sup> These types of residential treatment facilities have suffered from widespread COVID-19 infection, sometimes requiring them to go into total lockdown to try to prevent spread.<sup>225</sup>

This reckless treatment of those sentenced to work farms, halfway houses, and rehabilitation sites parallels treatment given 100 years ago, when eugenicists enthusiastically promoted the long-term detention and sequestration of the impoverished, the addicted, and the criminally convicted.<sup>226</sup> We tend to ignore those undergoing community corrections, viewing them in the same negative light as the incarcerated, precisely as we did in the past.

Frequently overlooked by the media, the public, and the criminal justice system, halfway houses, drug and alcohol rehabilitation sites, and community corrections facilities have all been loci of COVID-19 spread. In many ways, these alternative corrections sites have an even higher danger of spreading COVID-19 than jails and prisons, given that so many residents rotate through them and out.<sup>227</sup> Like so much in the alternative corrections world, there is a vast undergirding of correctional control operating just under the radar, with potential to be a tremendous nexus of virus spread and replication.

### C. NURSING HOMES

Long-term adult care facilities have been notoriously deadly hubs during the pandemic. Approximately forty percent of all COVID-19 deaths in the United States have been linked to nurs-

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224. See Martha Bebinger, *Opioid Addiction Is 'A Disease of Isolation,' So Pandemic Puts Recovery at Risk*, NPR (Mar. 27, 2020), <https://www.npr.org/sections/health-shots/2020/03/27/820806440/opioid-addiction-is-a-disease-of-isolation-so-pandemic-puts-recovery-at-risk>.

225. See Shelly Conlon, *The Arch Halfway House Goes on Full Lockdown as COVID-19 Cases Climb to 16*, SIOUX FALLS ARGUS LEADER (Apr. 20, 2020), <https://www.argusleader.com/story/news/2020/04/20/arch-halfway-house-goes-full-lockdown-covid-19-cases-climb-16/5168549002/>.

226. Appleman, *supra* note 1, at 441-44.

227. See Rachel Dissell and John Caniglia, *Coronavirus Concerns Leave Halfway Houses Scrambling for Guidance, Ways to Protect Residents, Staff and the Public*, CLEV. PLAINS DEALER (Mar. 19, 2020), <https://www.cleveland.com/coronavirus/2020/03/coronavirus-concerns-leave-halfway-houses-scrambling-for-guidance-ways-to-protect-residents-staff-and-the-public.htm>.

ing homes.<sup>228</sup> Up through November 2020, 100,033 residents and staff at long-term care facilities have died from COVID-19.<sup>229</sup> In at least twenty-three states, the majority of COVID-19 deaths have occurred in adult long-term care facilities.<sup>230</sup> Ultimately, deaths in nursing homes and long-term care facilities may comprise at least 50% of the total coronavirus deaths nationwide.<sup>231</sup>

The neglect of vulnerable, aged individuals fits into the eugenics playbook, as many Progressives viewed the elderly (particularly the impoverished elderly) as unfit, sequestering them in poorly-resourced asylums.<sup>232</sup> The casual abandonment of many seniors to the ravages of COVID-19 in poorly regulated nursing and care homes parallels the institutionalization and disregard of elderly citizens during the pinnacle of eugenic thinking.

State and federal response to this high infection and death rate, however, has been minimal. The protection of vulnerable seniors and other at-risk adults from the coronavirus was grossly inadequate.<sup>233</sup> Even before the coronavirus, American nursing homes were poorly staffed. Many underreported their nursing and caretaking staffing levels to regulators for years.<sup>234</sup> Essential medical tasks, such as repositioning patients to avoid bedsores (which can cause hospitalization), were often left undone, leaving significant gaps in care.<sup>235</sup>

These preexisting deficiencies created an ideal petri dish for COVID spread. Coupled with existing supply shortages, poor reporting of COVID-19 infections, failure to adequately monitor disease symptoms, and improper compliance with mask wearing,

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228. See Priya Chidambaram, *COVID-19 Has Claimed the Lives of 100,000 Long-Term Care Residents and Staff*, KFF (Nov. 25, 2020), <https://www.kff.org/policy-watch/covid-19-has-claimed-the-lives-of-100000-long-term-care-residents-and-staff/>.

229. *Id.*

230. *Id.*

231. See Brenda Gazzar, 'Pandemic within a pandemic: What's fueling LA County's coronavirus death toll in nursing homes?', L.A. DAILY NEWS (June 20, 2020), <https://www.dailynews.com/2020/06/20/pandemic-within-a-pandemic-whats-fueling-la-countys-coronavirus-death-toll-in-nursing-homes/>.

232. Appleman, *supra* note 1, at 446.

233. See Priya Chidambaram, *COVID-19 Has Claimed the Lives of 100,000 Long-Term Care Residents and Staff*, KFF (Nov. 25, 2020).

234. See Jordan Rau, 'It's Almost Like a Ghost Town.' Most Nursing Homes Overstated Staffing for Years, N.Y. TIMES (July 7, 2018), <https://www.nytimes.com/2018/07/07/health/nursing-homes-staffing-medicare.html>.

235. *Id.*

COVID-19 infection exploded in long-term care home facilities.<sup>236</sup> The high rates of infection and deaths within facilities have not abated since the pandemic began.

In one Massachusetts veterans care facility, for example, a staffing shortage led the management to combine two locked dementia wards,<sup>237</sup> mixing infected residents with those who tested negative.<sup>238</sup> Seventy-six of these residents died.<sup>239</sup> Moreover, staff members at this home were specifically directed not to wear masks and gowns while caring for ill patients.<sup>240</sup> On September 25, 2020, two former leaders of the facility were indicted on charges of criminal neglect, connected to these COVID deaths.<sup>241</sup>

A cavalcade of missteps has plagued nursing home experiences with management of COVID-19. Often, nurses were required to bring in their own medical supplies like thermometers and blood pressure cuffs to treat failing residents,<sup>242</sup> because so many facilities were under-provisioned and understaffed.<sup>243</sup> There were major failures to isolate properly potentially-infected residents.<sup>244</sup> Additionally, multiple states failed to provide enough coronavirus tests to use on residents.<sup>245</sup>

Many facilities also downplayed potential infections,<sup>246</sup> since a publicized COVID outbreak would hurt their image and bottom

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236. See Nic Querolo, *COVID Ravaging Long-Term Care Centers at Fastest Pace Since May*, BLOOMBERG (Nov. 18, 2020), <https://www.bloomberg.com/news/articles/2020-11-18/covid-ravaging-long-term-care-centers-at-fastest-pace-since-may>.

237. See MARK PEARLSTEIN, *THE COVID-19 OUTBREAK AT THE SOLDIER'S HOME IN MT. HOLYOKE* 114–16 (2020), <https://www.mass.gov/doc/report-to-governor-baker-re-holyoke-soldiers-home/download>.

238. See Ellen Barry, *'Total Pandemonium': What Went Wrong at a Veterans' Home Where 76 Died*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/holyoke-soldiers-home.html?searchResultPosition=5>.

239. *Id.*

240. See PEARLSTEIN, *supra* note 237, at 84-87.

241. See *Criminal Charges Are Filed After 76 Deaths at Massachusetts Veterans' Home*, N.Y. TIMES (September 25, 2020), <https://www.nytimes.com/2020/09/25/world/covid-19-coronavirus.html?action=click&module=Top%20Stories&pgtype=Homepage#link-2bb4231b>.

242. *Id.*

243. See E. Tammy Kim, *This Is Why Nursing Homes Failed So Badly*, N.Y. TIMES (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/opinion/sunday/covid-nursing-homes.html>.

244. *Criminal Charges Filed*, *supra* note 241.

245. See Gazzar, *supra* note 231.

246. See Chris Kirkland, *Pandemic Exposes Systemic Staffing Problems at U.S. Nursing Homes*, REUTERS (June 10, 2020), <https://www.reuters.com/article/us-health->

line. This attitude, combined with a failure to explain what was happening to families, outside agencies, and even first responders, only made things worse.<sup>247</sup> Several nursing homes have punished whistleblowers and watchdogs, exacerbating the crisis.<sup>248</sup>

Compounding the problem, several states allowed hospitals to send COVID-19 patients into nursing homes and long-term care facilities, ultimately increasing infections and deaths.<sup>249</sup> New York, for example, issued a state directive in March 2020 permitting COVID-19 patients to be placed in nursing homes in order to free up hospital beds.<sup>250</sup> The order required nursing homes to readmit former residents with COVID-19 who were released from hospitals, as well as accept new “medically stable” residents, whether or not they were infected with COVID-19.<sup>251</sup> The nursing homes were also explicitly barred from testing new or returning residents for the coronavirus.<sup>252</sup> Minnesota also sent recovering COVID-19 patients from the hospital directly to nursing homes, and then faced a similar explosion of infections and deaths.<sup>253</sup>

No one seems willing to take responsibility for high COVID rates in long term care facilities, but everyone is eager to assign blame.<sup>254</sup> With at least 15,000 nursing home deaths in New York

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coronavirus-nursinghomes-speci/special-report-pandemic-exposes-systemic-staffing-problems-at-u-s-nursing-homes-idUSKBN23H1L9.

247. See Ellis & Hicken, *COVID-19 Is Ravaging Nursing Homes. Government Records Show Why*, CNN (Apr. 24, 2020), <https://www.cnn.com/2020/04/24/us/nursing-homes-coronavirus-invs/index.html>.

248. *Id.*

249. See Luis Ferré-Sadurní and Amy Julia Harris, *Does Cuomo Share Blame for 6,200 Virus Deaths in N.Y. Nursing Homes?*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/08/nyregion/nursing-homes-deaths-coronavirus.html?searchResultPosition=1>.

250. *Id.*

251. See *Hospital Discharges and Admissions to Nursing Homes*, N.Y. STATE DEPT OF HEALTH (Mar. 25, 2020), [https://coronavirus.health.ny.gov/system/files/documents/2020/03/doh\\_covid19\\_nhadmissionsreadmissions\\_-032520.pdf](https://coronavirus.health.ny.gov/system/files/documents/2020/03/doh_covid19_nhadmissionsreadmissions_-032520.pdf).

252. *Id.* at 1 (“Nursing Homes are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.”).

253. See Olga Khazan, *The U.S. Is Repeating Its Deadliest Pandemic Mistake*, ATLANTIC (July 6, 2020), <https://www.theatlantic.com/health/archive/2020/07/us-repeating-deadliest-pandemic-mistake-nursing-home-deaths/613855/>.

254. See Jesse McKinley and Luis Ferre-Sadurni, *Blame Spreads for Nursing Home Deaths Even as N.Y. Contains Virus*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/nyregion/nursing-homes-deaths-cuomo.html?action=click&module=Top%20Stories&pgtype=Homepage>; see also *Factors Associated with Nursing Home Infections and Fatalities in New York State During*

state alone,<sup>255</sup> the discussion within states has shifted from responsibility within the nursing homes to which parties are eligible to sue.<sup>256</sup> In addition, the FBI is investigating whether Governor Andrew Cuomo and his aides purposefully gave false data to the Justice Department on New York's nursing home COVID-19 deaths.<sup>257</sup> Allegations have been made that the Cuomo administration drastically understated the number of nursing home deaths to the public.<sup>258</sup>

The nationwide deaths have been so high that Congress has launched a general investigation to scrutinize the practices of long-term care facilities in Florida.<sup>259</sup> The Congressional investigation alleges a “widespread and persistent” pattern of deficiencies that include “chronic understaffing, low wages, lack of paid sick leave, improper hand hygiene and poor disease prevention practices – all of which have contributed to the crisis.”<sup>260</sup> Many of these care homes have demonstrated severe deficiencies in infection control that placed residents' health and safety in “immediate jeopardy,” including staff members who routinely failed to wash their hands, wear masks, or follow isolation protocols.<sup>261</sup>

In response to these high infection and death rates, local and national public health regulators eventually began to implement regulations to protect older patients residing in congregate settings.<sup>262</sup> These new rules included banning visitors and imple-

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*the COVID-19 Global Health Crisis* 3, N.Y. STATE DEPT' OF HEALTH (July 20, 2020), [https://health.ny.gov/press/releases/2020/docs/nh\\_factors\\_report.pdf](https://health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf) (finding staff infections were main driver of spreading COVID-19 to residents).

255. See J. David Goodman, *FBI Investigating Whether Cuomo Aides Gave False Data on Nursing Homes*, N.Y. Times (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/nyregion/cuomo-nursing-homes-covid.html>.

256. McKinley & Ferre-Sadurni, *supra* note 255.

257. See Goodman, *supra* note 255.

258. See *id.*

259. See Julie Ochoa & Daylina Miller, *Congress Investigates Owner of 69 Long-Term Care Facilities in Florida after Coronavirus Deaths*, WUSF NEWS (June 22, 2020), <https://wusfnews.wusf.usf.edu/post/congress-investigates-owner-69-long-term-care-facilities-florida-after-coronavirus-deaths>.

260. See Julie Ochoa & Daylina Miller, *Congress Investigates Owner of 69 Long-Term Care Facilities in Florida After Coronavirus Deaths*, WUSF NEWS (June 22, 2020).

261. *Id.*

262. See SCOTT GOLDBERG ET AL., CLINICAL INFECTIOUS DISEASES, PRESYMPTOMATIC TRANSMISSION OF SARS-COV-2 AMONGST RESIDENTS AND STAFF AT A SKILLED NURSING FACILITY: RESULTS OF REAL-TIME PCR AND SEROLOGIC

menting resident and staff screening.<sup>263</sup> Nonetheless, most skilled nursing and long-term care facilities have reported high infection and death rates, due to a combination of factors: the lack of attention paid to asymptomatic transmission occurring with both residents and staff; the difficulty in social distancing memory-impaired residents; and failing to adhere to other sanitary protocols.<sup>264</sup>

Even the PPE that has belatedly been shipped to many nursing homes was substandard quality. After many promises, FEMA sent boxes of PPE supplies to various Medicaid and Medicare-certified nursing and long-term care homes across the country in May, providing two shipments of a 14-day supply of surgical masks, gowns, gloves, goggles, and other eye protection.<sup>265</sup> When the shipments were opened, however, staff discovered that the supplies were useless or low quality such as “[e]xpired surgical masks, [i]solation gowns that resemble oversize trash bags [with no openings for hands], [e]xtra-small gloves that are all but useless for the typical health worker’s hands.”<sup>266</sup> The insufficient FEMA provisioning reflects the halfhearted federal effort to protect nursing home residents.<sup>267</sup> In general, the failure to safeguard elderly and medically fragile individuals can be traced back to the eugenic disregard for those who were considered unfit, sequestered away in asylums and institutions. The tremendous neglect suffered by nursing home residents during COVID-19 has its direct antecedents in our eugenic approach to the captive and vulnerable.

Despite the horrifying illness and death rate in nursing and long-term care homes, the national outcry has been muted. The public lack of a response reflects a defeatist acceptance that long-

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TESTING 4 (2020), [https://academic.oup.com/cid/article/doi/10.1093/cid/ciaa991/5871989#XxWe71\\_6CdI.twitter](https://academic.oup.com/cid/article/doi/10.1093/cid/ciaa991/5871989#XxWe71_6CdI.twitter).

263. *Id.* at 4.

264. *Id.* at 8-9.

265. See *Coronavirus Pandemic Response: PPE Packages for Nursing Homes*, FEMA (May 2, 2020), <https://www.fema.gov/news-release/2020/05/02/coronavirus-pandemic-response-ppe-packages-nursing-homes>.

266. See Andrew Jacobs, *FEMA Sends Faulty Protective Gear to Nursing Homes Battling Virus*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/health/coronavirus-nursing-homes-PPE.html?action=click&module=Top%20Stories&pgtype=Homepage>.

267. See Brian New, *Nursing Homes Receive ‘Unusable’ Gowns, Gloves and Masks From FEMA*, CBS DFW (June 22, 2020), <https://dfw.cbslocal.com/2020/06/22/texas-nursing-homes-unusable-gowns-gloves-masks-fema/>.

term residents are a population who will necessarily succumb to COVID-19.<sup>268</sup>

Also disturbing, some of the medical establishment has begun using nursing home and long-term care residents as convenient populations upon which to test experimental coronavirus treatments. In Pennsylvania, various nursing homes administered hydroxychloroquine to their residents without even bothering to test them for COVID-19.<sup>269</sup> For example, in the Southeastern Veterans Home, approximately thirty residents received the drug, eleven of whom did not test positive for the virus.<sup>270</sup> Hydroxychloroquine was seemingly randomly prescribed, with little proof that the drug would be effective.<sup>271</sup> As the nursing home's former medical director commented, "the risks and potential benefits were completely unknown — no real scientific studies were conducted."<sup>272</sup>

Hydroxychloroquine carries some serious risks and side effects, including vision changes, muscle weakness, and irregular heart rhythms, sometimes leading to death.<sup>273</sup> Given the age and general health conditions of many residents, the drug was prescribed without any parameters.<sup>274</sup> Despite these serious risks, none of the nursing homes giving the medication to residents received informed consent from either the patients or their families.<sup>275</sup> Some homes did not even tell families that the drug was

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268. See Kimiko de Freytas-Tamura, *If It's Here, It's Here: America's Retirees Confront the Virus in Florida*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/20/us/coronavirus-florida-elderly.html> (noting Florida required nursing home/assisted care facilities to test staff biweekly, but not long-term care).

269. See Vinny Vella, *Nursing Homes Treating Coronavirus Patients with Malaria Drug*, GOV. TECH. (May 11, 2020), <https://www.govtech.com/em/safety/Nursing-Homes-Treating-Coronavirus-Patients-with-Malaria-Drug.html>.

270. See Shawn Mulcahy, *Southeastern Veterans' Center, Pa. Facility That Gave Residents Hydroxychloroquine, Cited for Infection-Control Failures*, TODAY HEADLINE (July 21, 2020), <https://todayheadline.co/southeastern-veterans-center-pa-facility-that-gave-residents-hydroxychloroquine-cited-for-infection-control-failures/>.

271. See Debbie Cenziper and Shawn Mulcahy, *The 'Covid Cocktail': Inside A Pa. Nursing Home That Gave Some Veterans Hydroxychloroquine Even Without Covid-19 Testing*, WASH. POST (July 7, 2020), <https://www.washingtonpost.com/business/2020/07/07/covid-cocktail-inside-pa-nursing-home-that-gave-some-veterans-hydroxychloroquine-even-without-covid-19-testing/>.

272. *Id.*

273. See Vella, *supra* note 269.

274. See Cenziper & Mulcahy, *supra* note 271.

275. See Vella, *supra* note 269.

being administered at all.<sup>276</sup> Experimental treatments on patients without consent violates Pennsylvania state law.<sup>277</sup>

One resident filed a lawsuit alleging that such prescriptions violated “every national and international protocol on the ethical performance of medical experimentation.”<sup>278</sup> Plaintiffs alleged that “unsanctioned and unsupervised biomedical research”<sup>279</sup> upon captive and vulnerable patients replicated some of “the horrors of Nazi experimentation on human subjects.”<sup>280</sup>

Other experimental COVID-19 drugs and treatments are being tested in nursing or long-term care homes. Restorbio is running a Phase III clinical trial of its experimental drug, RTB101, in a number of Rhode Island nursing homes.<sup>281</sup> RTB101, or Dactolisib,<sup>282</sup> is an oral, selective, and potent TORC1 inhibitor, an anti-neoplastic agent which was previously tested as a tool against clinically symptomatic respiratory infections.<sup>283</sup> Those Phase III trials were not successful in combating respiratory infections.<sup>284</sup> This failure of the drug, however, did not stop Restorbio from engineering another Phase III trial in nursing home residents over the age of sixty-five.

Considering that RTB101 failed to improve elderly people’s respiratory disease,<sup>285</sup> the company’s decision to retry it as a coronavirus treatment is questionable. As the American Society

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276. *Id.*

277. *Id.*

278. See Hannah Albarazi, *Pa. Faces Suit Over Nursing Home’s COVID-19 Drug Studies*, LAW 360 (Apr. 28, 2020), <https://www.law360.com/articles/1268158/pa-faces-suit-over-nursing-home-s-covid-19-drug-studies>.

279. See Vella, *supra* note 269.

280. *Id.*

281. See *Phase 3 Study to Determine if RTB101 Reduces the Severity of COVID-19 in Older Adults Residing in Nursing Homes*, CLINICAL TRIALS (June 1, 2020), <https://clinicaltrials.gov/ct2/show/NCT04409327>.

282. *Id.*

283. See Steve Hill, *Disappointing Results for ResTORbio Human Trial*, LIFESPAN (Nov. 18, 2019), <https://www.lifespan.io/news/disappointing-results-for-restorbio-human-trial/>.

284. *Id.*

285. See Joanne Fogg and Jason Plieth, *Puretech’s Cautionary Tale About Pivotal Study Read-Across*, EVALUATE, (November 18, 2019), <https://www.evaluate.com/vantage/articles/news/trial-results/puretechs-cautionary-tale-about-pivotal-study-read-across>.

Healthcare Pharmacists (ASHP)<sup>286</sup> noted: “Given the lack of pharmacokinetic and safety data for the high favipiravir dosages proposed for treatment of COVID-19, the drug should be used with caution at such dosages, since it is associated with QT prolongation (heart issues).”<sup>287</sup> Presumably, Restorbio hopes to salvage their investment by repurposing RTB101 as a COVID-19 treatment.

Finally, when COVID-19 cases threatened to skyrocket in the early weeks of the pandemic, many states implemented ventilator and ICU-bed rationing plans, either prioritizing nondisabled patients or generally excluding a variety of patients with certain disabilities or above a certain age.<sup>288</sup> States backed off such rationing plans when numbers improved over the summer, but once case counts began rising in the late fall and winter, many began planning rationing protocols once again.<sup>289</sup> In Oregon, for example, a hospital denied ventilator use to a disabled woman to treat COVID-19, pushing instead for a waiver to deny her care entirely.<sup>290</sup> This was only one of numerous instances of Oregon health care rationing COVID-19 treatment to people with disabilities.<sup>291</sup> Such discriminatory practices have happened all over the country, negatively affecting elderly individuals as well.<sup>292</sup> The denials of care have been specifically linked to a healthcare provider’s determination that the affected individuals have a “low quality of

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286. The ASHP represents over 55,000 pharmacists who serve as patient care providers in acute and ambulatory settings. *See About, ASHP*, <https://www.ashp.org/About-ASHP> (last visited Apr. 7, 2021).

287. *See Assessment of Evidence for COVID-19 Related Treatments, Favipiravir 5, ASHP COVID CTR.* (July 23, 2020), <https://www.ashp.org/-/media/assets/pharmacy-practice/resource-centers/Coronavirus/docs/ASHP-COVID-19-Evidence-Table.ashx>.

288. Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 33 (2020), [https://scholarship.law.upenn.edu/penn\\_law\\_review\\_online/vol169/iss1/3](https://scholarship.law.upenn.edu/penn_law_review_online/vol169/iss1/3).

289. *See R. Lin, L.A. County Outlines Wrenching Moves to Ration Healthcare if COVID-19 Hospital Crisis Worsens*, L.A. TIMES (Dec. 19, 2020), <https://www.latimes.com/california/story/2020-12-19/los-angeles-county-coronavirus-hospitalization-surge-rationing>.

290. *See Joseph Shapiro, Oregon Hospitals Didn’t Have Shortages. So Why Were Disabled People Denied Care*, NPR (Dec. 21, 2020), <https://www.npr.org/2020/12/21/946292119/oregon-hospitals-didnt-have-shortages-so-why-were-disabled-people-denied-care>.

291. *Id.*

292. *Id.*

life,” essentially not worth preserving or “wasting” PPE to treat.<sup>293</sup>

Such COVID-19 rationing protocols “inflict discrimination ‘by reason of’ or ‘on the basis of’ disability.”<sup>294</sup> Various states, in their hospital triage planning documents, have stated that certain disabilities would push an individual further down the list for ventilator use, in certain circumstances disqualifying them completely. Disqualifying or delaying critical medical care for disabled or elderly individuals on the basis that their lives are not “worthy” of saving or extending<sup>295</sup> is a fairly clear-cut tenet of eugenic philosophy.

Eugenic philosophy still undergirds much current state guidance to medical professionals regarding the rationing of treatment, medical equipment, and medication, since our “overt and implicit bias” against the disabled continues to shape the way we prioritize people for COVID-19 treatment.<sup>296</sup> This bias proves doubly true for experimentation on society’s captive and vulnerable populations in the search for a COVID-19 cure or treatment.<sup>297</sup> Although the toll of COVID-19 on nursing home residents and staff has been deadly, using this population as a convenient, captive group of test subjects, under emergency conditions, borders on the unethical. Obtaining informed consent from either nursing home patients or their medical proxies for these clinical trials simply may not suffice in the panic, fear, and desperation of an uncontrolled world-wide pandemic.

Our approach to nursing homes during the pandemic has followed the discriminatory blueprint of eugenic thinking. The disregard and neglect these residents have endured tragically parallels the long-standing eugenic beliefs that those who were aged or unfit should be parceled off to asylums to die. Unregulated or questionable medical experimentation performed on vulnerable residents during the midst of such neglect, without consent, links back to our eugenic past.

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293. Joseph Shapiro, *Oregon Hospitals Didn’t Have Shortages. So Why Were Disabled People Denied Care*, NPR (Dec. 21, 2020).

294. Samuel Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols*, 130 YALE L.J. F. 1, 5 (2020).

295. Shapiro, *supra* note 290.

296. *See* Bagenstos, *supra* note 294, 8-11.

297. *Id.*

#### D. PSYCHIATRIC HOSPITALS AND MENTAL INSTITUTIONS

Despite minimal media coverage and little public response, psychiatric hospitals and other mental-health institutions have also been hit hard by the spread of COVID-19. Like correctional facilities, alternative corrections, and nursing homes, psychiatric wards have been hotbeds for the spread of COVID-19, given most hospitals' close confines and revolving door of untested patients. Many psychiatric patients cycle through institutions with high COVID-19 rates, such as homeless shelters, emergency rooms, nursing homes, and jails.<sup>298</sup> In New York alone, over thirty-eight patients in psychiatric hospitals died from COVID-19 in the first few months of the pandemic.<sup>299</sup>

Controlling COVID-19 spread in psychiatric hospitals is particularly challenging due to the revolving door of patients and lack of patient segregation inside.<sup>300</sup> Enforcing social distancing and mask wearing for patients is extremely difficult, given certain psychiatric issues.<sup>301</sup> Poor personal hygiene is not uncommon, which makes it hard to follow COVID-19 safety regimes such as washing hands frequently.<sup>302</sup> Patient immunity can be seriously compromised due to some of their medications, which can interfere with their immune systems.<sup>303</sup> Staff have to worry about ingestion of alcohol-based hand sanitizer.<sup>304</sup> Windows are often sealed shut to prevent suicide.<sup>305</sup> The physical space of the hospitals themselves promotes the spread of COVID-19; "air systems are old, hallways are narrow, and shared bedrooms are in-

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298. See Brian Barnett and Jack Turbin, *COVID-19 Is Ravaging America's Psychiatric Facilities*, THE HILL (Apr. 27, 2020), <https://thehill.com/opinion/healthcare/494801-covid-19-is-ravaging-americas-psychiatric-facilities>.

299. See Tom Schuba, *State-Run Mental Hospitals See Smaller Toll From COVID-19, But 'The Threat Has Not Dissipated'*, CHICAGO SUN TIMES (May 19, 2020), <https://chicago.suntimes.com/coronavirus/2020/5/19/21264332/illinois-mental-health-hospitals-covid-19>.

300. See Danny Hakim, *"They Want to Forget Us": Psychiatric Hospital Workers Feel Exposed*, N.Y. TIMES (Apr. 24, 2020) <https://www.nytimes.com/2020/04/24/nyregion/coronavirus-new-york-psychiatric-hospitals.html>.

301. See Kit Ramgopal, *Coronavirus in a Psychiatric Hospital: "It's the Worst of All Worlds"*, CBS NEWS (Apr. 17, 2020), <https://www.nbcnews.com/health/mental-health/coronavirus-psychiatric-hospital-it-s-worst-all-worlds-n1184266>.

302. Barnett and Turbin, *supra* note 298.

303. Hakim, *supra* note 300.

304. Ramgopal, *supra* note 301.

305. Barnett and Turbin, *supra* note 298.

tionally spartan,” in order to foster patient interaction.<sup>306</sup> Patients cannot be forcibly secluded in their rooms.<sup>307</sup> There is little PPE available, despite staff workers’ need to sometimes physically restrain patients.<sup>308</sup> Accordingly, many staff workers and nurses have also contracted the virus.<sup>309</sup> In addition, there is diminished ability to test either patients or staff, due to rationed coronavirus tests.<sup>310</sup>

It has been challenging to obtain precise numbers regarding the spread of the coronavirus in psychiatric hospitals. As of April 2020, 63 state institutions had been infected with COVID-19, with approximately 1,450 cases.<sup>311</sup> Other than that, there are very few casualty statistics.<sup>312</sup>

Equally troubling, many psychiatric hospitals are turning away patients with serious mental illnesses due to the fear of COVID-19. Sometimes patients must languish in ERs for days, awaiting placement; some patients in danger must be sent home because hospitals have nowhere to send them.<sup>313</sup> Some patients needing psychiatric beds return to crowded homeless shelters, where the virus is prevalent.<sup>314</sup>

The poor conditions in mental hospitals nationwide have led to at least one federal lawsuit. In Baton Rouge, Louisiana, two current patients seek release from an institution where nine people have died from COVID-19.<sup>315</sup> The patients allege that the facility failed to maintain hygiene and did not isolate infected pa-

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306. Ramgopal, *supra* note 301.

307. See Masha Gessen, *Why Psychiatric Wards Are Uniquely Susceptible to the Coronavirus*, NEW YORKER (April 21, 2020), <https://www.newyorker.com/news/news-desk/why-psychiatric-wards-are-uniquely-vulnerable-to-the-coronavirus>.

308. See Barnett and Turbin, *supra* note 298.

309. Hakim, *supra* note 300.

310. See Elly Belle, *We Can’t Forget About Psychiatric Workers During the Covid-19 Outbreak*, HEALTHLINE (June 30, 2020), <https://www.healthline.com/health/mental-health/psychiatric-hospitals-during-covid-19#How-will-psych-wards-have-to-adjust-moving-forward-to-treat-patients?>.

311. Ramgopal, *supra* note 301.

312. Gessen, *supra* note 307.

313. See Barnett and Turbin, *supra* note 298.

314. See *id.*

315. See *Mental Hospital’s Poor Hygiene Led to Covid-19 Outbreak*, WBRZ 2 (May 15, 2020), <https://www.wbrz.com/news/lawsuit-mental-hospital-s-poor-hygiene-led-to-covid-19-outbreak/>.

tients.<sup>316</sup> Moreover, the patients claim that the institution is so infrequently cleaned that “maggots grow in drains.”<sup>317</sup> The lawsuit also claims that initial attempts at isolating patients stopped when the institution simply gave up.<sup>318</sup>

Although COVID-19 continues to spread in psychiatric hospitals, attention has largely moved elsewhere.<sup>319</sup> For example, Florida’s Department of Children and Families simply failed to report COVID-19 infections at the state’s largest mental hospital, until a local newspaper did an investigation.<sup>320</sup> Like the fate of psychiatric patients in general, the issue is too often forgotten. Following the blueprint of eugenic thinking has meant that once psychiatric residents are placed in wards, institutions, or asylums, they tidily disappear from view—resulting in permanent isolation for the “socially inadequate.”<sup>321</sup>

#### E. FOSTER CARE / GROUP HOMES FOR INTELLECTUAL/DEVELOPMENTAL DISABILITIES

Group care homes have been another largely overlooked setting for COVID-19 infection and death, whether for children in foster care or people with developmental or intellectual disabilities. Both populations have suffered greatly in these types of facilities during the recent pandemic, and yet public attention and awareness of these homes’ plight has been negligible.

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316. See Matt Sledge, *Louisiana Mental Hospital Patients Claim Isolation, Hygiene Lacking Amid Coronavirus Outbreak*, TIMES-PICAYUNE (May 13, 2020), [https://www.nola.com/news/coronavirus/article\\_f17e145a-956d-11ea-b348-434f49c401e9.html](https://www.nola.com/news/coronavirus/article_f17e145a-956d-11ea-b348-434f49c401e9.html).

317. *Id.*

318. *Id.*

319. See Michael Gormley, *Psychiatric Hospital Patients Vulnerable Amid Pandemic*, NEWSDAY (Apr. 27, 2020), <https://www.newsday.com/news/health/coronavirus/covid-19-psychiatric-hospital-new-york-1.44082128>.

320. Nada Hassanein, *I don’t want to die: Almost three dozen coronavirus cases now at Florida State Hospital*, TALLAHASSEE DEMOCRAT (July 22, 2020), <https://www.tallahassee.com/story/news/2020/07/22/almost-three-dozen-coronavirus-cases-now-florida-state-hospital/5485504002/>.

321. Appleman, *supra* note 1, at 446.

## 1. GROUP HOMES AND INSTITUTIONS FOR THE INTELLECTUALLY & DEVELOPMENTALLY DISABLED

Group homes and care facilities housing intellectually and developmentally disabled (IDD)<sup>322</sup> individuals have struggled with protecting residents from COVID-19. Because these homes are rarely in the public eye, little attention has been paid to the plight of those residing and working in congregate living settings. Approximately 66,000 people nationwide live in intermediate care facilities,<sup>323</sup> and an even higher number of individuals live in group homes, although the exact number is unclear.<sup>324</sup>

The toll the coronavirus has taken on people with IDD has been grave. One advocacy group has estimated that over 18,000 residents and staff members have perished from COVID-19, and another 90,000 have been infected.<sup>325</sup> Recent coronavirus death rates for all individuals with developmental disabilities have been estimated near fifteen percent, compared to 7.9% in New York City, especially for those living in congregate settings.<sup>326</sup> The higher death rate from COVID-19 holds not just for adults, but children as well.<sup>327</sup>

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322. In the US, “IDD typically includes more common disabilities such as intellectual disability, cerebral palsy, and Down syndrome, in addition to rare developmental disabilities, such as fragile X and Prader-Willi syndromes.” See Scott Landes & Margaret Turk, *COVID-19 Outcomes Among People with Intellectual and Developmental Disability Living in Residential Group Homes in New York State*, 13 *DISABILITY & HEALTH J.* 1, 1 (2020), <https://www.sciencedirect.com/science/article/pii/S193665742030100X>.

323. An intermediate care **facility** is one that provides, on a regular basis, health-related **care** and services to individuals who do not require the degree of **care** and treatment that a hospital or skilled nursing **facility** is designed to provide, but who because of their mental or physical condition require **care**. See *Intermediate Care Facilities for Individuals with Intellectual Disability*, MEDICAID.GOV., <https://www.medicaid.gov/medicaid/long-term-services-supports/institutional-long-term-care/intermediate-care-facilities-individuals-intellectual-disability/index.html> (last visited May 18, 2021).

324. See *Thousands Sick from COVID-19 in Homes for the Disabled*, VOICE OF AM. NEWS (June 11, 2020), <https://www.voanews.com/covid-19-pandemic/thousands-sick-covid-19-homes-disabled>.

325. See Michelle Diamant, *COVID-19 Cases at Group Homes, Institutions Going Untracked*, DISABILITY SCOOP, (May 11, 2020), <https://www.disabilityscoop.com/2020/05/11/covid-19-cases-at-group-homes-institutions-going-untracked/28313/2020>.

326. Landes & Turk, *supra* note 322, at 2.

327. See Katie Camero, *Covid-19 Kills Children with Intellectual Disabilities at Higher Rates. Here's Why*, MIAMI HERALD (July 19, 2020), [https://www.miamiherald.com/news/coronavirus/article243470691.html?fbclid=IwAR0Fy4j46MB5nqblnSxT43519lJyfmOCe\\_zkfjXjccapGiU7j2IHAS0Ju8](https://www.miamiherald.com/news/coronavirus/article243470691.html?fbclid=IwAR0Fy4j46MB5nqblnSxT43519lJyfmOCe_zkfjXjccapGiU7j2IHAS0Ju8).

The majority of IDD individuals living in group homes and institutions do not have access to personal protective equipment.<sup>328</sup> The staff in such settings often have little access to PPE as well.<sup>329</sup> In addition, as many facilities have restricted visitors to halt COVID-19 spread, many residents are unable to report abuse and neglect.<sup>330</sup> Finally, these group homes and institutions are no longer being inspected during the pandemic to control virus spread.<sup>331</sup> Little oversight exists to ensure that staff implement proper infection control measures, for both themselves and residents.<sup>332</sup>

IDD residents in group homes and intermediate care facilities have a higher risk of contracting COVID-19.<sup>333</sup> The reasons for this include living in a congregate setting and the difficulty some of these residents have in practicing social distancing.<sup>334</sup> Residents also often rely upon closely proximate support staff.<sup>335</sup> It also can be more difficult to detect early-stage COVID-19 for such residents, since they may have more challenges in communicating their needs and emotions.<sup>336</sup> Finally, many individuals with IDD also have pre-existing conditions and special healthcare issues, which intensifies the threat of contracting and becoming seriously ill from COVID-19.<sup>337</sup>

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328. See *Covid-19 Tracker*, AUTISTIC SELF-ADVOCACY NETWORK (May 8, 2020), <https://autisticadvocacy.org/covid19/>.

329. *Id.*

330. *Id.*

331. See FAQ FOR STATE SURVEY AGENCY AND ACCREDITING ORGANIZATION CORONAVIRUS DISEASE 2019 SURVEY SUSPENSION, CTRS. FOR MEDICAID AND MEDICARE SERV. (Mar. 13, 2020), <https://www.cms.gov/files/document/covid19survey-activity-suspension-faqs.pdf>.

332. *Covid-19 Tracker*, *supra* note 328.

333. See *Disability Rights Louisiana Collects Data on COVID-19 Cases in Group Homes*, DISABILITY RTS. LA. (May 6, 2020), <https://disabilityrightsla.org/disability-rights-louisiana-collects-data-on-covid-19-cases-in-group-homes/>.

334. *Id.*

335. See Caitlin Gibson, *A Time of Unprecedented Fear for Parents of Adults with Intellectual and Developmental Disabilities*, WASH. POST (April 4, 2020), <https://www.washingtonpost.com/lifestyle/on-parenting/a-time-of-unprecedented-fear-for-parents-of-adults-with-intellectual-and-developmental-disabilities/2020/04/02/>.

336. *Disability Rights Louisiana*, *supra* note 333.

337. See generally Scott Landes et al., *Cause of Death in Adults with Intellectual Disability in the United States*, 65 J. INTELL. DISABILITY RSCH. 47 (2020) (higher rates of heart disease, cancer, choking, and diabetes).

In Louisiana, for example, individuals with IDD have contracted COVID-19 at a rate four times higher than the rest of Louisiana.<sup>338</sup> Tragically, this is also true of the death rate.<sup>339</sup> In New York, one home for individuals with severe disabilities saw 36 out of 47 residents stricken with coronavirus by April, with two dead and nine still hospitalized.<sup>340</sup> Over the entire state, 1,100 of the 140,000 people with developmental disabilities had contracted the virus by that same time, with 105 dead – a far higher rate of death than that of nursing homes, although considerably less publicized.<sup>341</sup> Likewise, in Pennsylvania, people with intellectual disabilities and autism who contracted COVID-19 died at twice the rate of others who contracted the virus.<sup>342</sup> In general, the intellectually and developmentally disabled are four times as likely to contract COVID-19 than the general population, and twice as likely to die from the disease once contracted.<sup>343</sup> Congregate living has turned deadly with the advent of COVID.<sup>344</sup>

Despite this high-risk population, many states have failed to provide proper oversight for these congregate care settings, particularly during the beginning of the pandemic. In New York, for example, residents with IDD were still taken on outings as late as mid-March 2020, despite growing spread of coronavirus,<sup>345</sup> nor did all day treatment facilities close.<sup>346</sup> Given the difficulty of finding and retaining staff, many homes and care facilities are having trouble maintaining safe staff to resident ratios, because

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338. *Disability Rights Louisiana Collects Data on COVID-19 Cases in Group Homes*, DISABILITY RTS. LA. (May 6, 2020).

339. *Id.*

340. See Danny Hakim, *'It's Hit Our Front Door': Homes for the Disabled See a Surge of Covid-19*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-disabilities-group-homes.html>.

341. *Id.*

342. See Joseph Shapiro, *COVID-19 Infections and Deaths are Higher Among Those with Intellectual Disabilities*, NPR (June 9, 2020), <https://www.npr.org/2020/06/09/872401607/covid-19-infections-and-deaths-are-higher-among-those-with-intellectual-disabili>.

343. *Id.*

344. See Scott Landes et al., *People with Disabilities in COVID-19: Fixing Our Priorities*, 7 AM. J. BIOETHICS 187, 188 (2000).

345. Hakim, *supra* note 340.

346. See Caitlin McGlade, *"Virtually No Way" To Protect Against Coronavirus Outbreaks at Disability Group Homes*, AZ CENT. (Apr. 2, 2020), <https://www.azcentral.com/story/news/local/arizona-health/2020/03/30/arizonas-disability-group-homes-unprepared-coronavirus-outbreak/2917657001/>.

residents remain at home around the clock.<sup>347</sup> In addition, necessities have been so depleted for some congregate care settings that they have begun to run out of basic cleaning supplies such as bleach wipes, paper towels, gloves, and toilet paper.<sup>348</sup>

Notwithstanding these risks and difficulties, facilities serving disabled individuals have not received enough financial assistance to weather COVID-19. Even though staff are working longer hours to minimize exposure and ensure their clients get proper care during the pandemic, many institutions are unable to get supplemental federal or state funding to help with increased costs.<sup>349</sup>

People with intellectual and developmental disabilities living in care facilities “are marginalized across the spectrum.”<sup>350</sup> Medicare and Medicaid have required nursing homes to publicly report COVID-19 infection rates, but have not extended such requirements to facilities for the disabled.<sup>351</sup> Nor has Medicaid increased reimbursements to intermediate care facilities and group homes to cover the extra costs of more staff and supplies to prevent COVID-19 spread.<sup>352</sup> Many facilities have spent a third of their annual revenue on unexpected pandemic costs, leaving them with only enough cash reserves to cover a month or fewer of operations.<sup>353</sup> Although Medicaid disability facilities have called on Congress for emergency relief, it has not been granted.<sup>354</sup> The Department of Health and Human Services granted a \$15 billion disbursement, but the financial relief must be split between all

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347. See Jane Coaston, “We’re Being Punished Again”: How People with Intellectual Disabilities Are Experiencing the Pandemic, VOX (Apr. 9, 2020), <https://www.vox.com/2020/4/6/21200257/disabilities-coronavirus-group-homes-isolation-policy>.

348. See McGlade, *supra* note 346.

349. See Sarah Mudd, *Center for Developmentally Disabled Responds to COVID-19*, HEALTH FORWARD (July 9, 2020), <https://healthforward.org/your-story-center-for-developmentally-disabled-responds-to-covid-19/>.

350. Hakim, *supra* note 340.

351. Danny Hakim, *It’s Hit Our Front Door’: Homes for the Disabled See a Surge of Covid-19*, N.Y. TIMES (Apr. 17, 2020).

352. See Shapiro, *supra* note 342.

353. See *Congressional Leaders Author Bipartisan Letter Calling on Trump Administration to Commit Emergency Funding*, INS. NEWS NET. (June 4, 2020), <https://insurancenewsnet.com/oarticle/american-network-of-community-options-and-resources-congressional-leaders-author-bipartisan-letter-calling-on-trump-administration-to-commit-emergency-funding#>.

354. *Id.*

Medicaid-eligible facilities as well as Medicaid providers.<sup>355</sup> No specific funding has been earmarked for facilities caring for intellectually and developmentally disabled individuals, even after the passage of the December 2020 COVID relief bill.<sup>356</sup>

Additionally, despite high-risk status, many states have not prioritized IDD adults for the COVID vaccine. Although the CDC has classified disabled residents of long-term-care facilities and their caregivers as “1a priority,” many people with disabilities who receive long-term care outside of these settings are excluded.<sup>357</sup> In some states, such as Maryland and Alabama, and in the District of Columbia, long-term care residents with disabilities are even further down the priority vaccine list. Many states do not give intellectually disabled adults any prioritization at all.<sup>358</sup> Other than noting that individuals with Down syndrome should be prioritized, the CDC does not mention any other disabilities, or mention group care homes at all.<sup>359</sup>

The lack of vaccine prioritization is simply another COVID oversight for intellectually disabled adults, following the failure to provide disability care workers with protective equipment, failure to make testing sites wheelchair accessible, imposing funding cuts to in-home care programs, and failure to increase funding to community-based disability services.<sup>360</sup> Indeed, the federal government has not even tracked the number of COVID deaths of disabled adults living in institutions or group facilities, as they have done in nursing homes.<sup>361</sup>

The nationwide failure to protect people with intellectual and developmental disabilities from COVID or prioritize them in

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355. See Maggie Flynn, *HHS to Release \$15B in COVID-19 Relief Funds to Medicaid Providers*, Skilled Nursing News (June 9, 2020), <https://skillednursingnews.com/2020/06/hhs-to-release-15b-in-covid-19-relief-funds-to-medicaid-providers-nursing-home-impact-unclear/>.

356. See Pam Katz, *Shut Out Again: Covid-19 Relief Package Again Excludes Needs of People With Disabilities, Families, Service Providers*, THE ARC (Dec. 22, 2020), <https://thearc.org/shut-out-again-covid-19-relief-package-again-excludes-needs-of-people-with-disabilities-families-service-providers/>.

357. See Jessica Contrera, *People with Disabilities Desperately Need the Vaccine. But States Disagree on When They'll Get It*, WASH. POST (Jan. 13, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/13/disabled-coronavirus-vaccine-states/>.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

vaccine distribution may sadly mirror how society values these populations.<sup>362</sup> Our neglect of these populations reflects their marginalized status, which often translates to overt discrimination. Such overt discrimination can be directly linked back to eugenic thinking, which sought to control, sequester, and ultimately eradicate the very existence of people with intellectual and developmental disabilities.<sup>363</sup> The handling of the coronavirus pandemic is just another way that this discrimination and neglect appears,<sup>364</sup> tragically this time with deadly consequences. Ironically, July 26, 2020, marked the thirtieth anniversary of the Americans with Disabilities Act (ADA),<sup>365</sup> the civil rights legislation which provides legal protection from discrimination to individuals with disabilities.<sup>366</sup> Although individuals with IDD are three times more likely to die from COVID, little note of this tragedy has been taken.<sup>367</sup> These individuals have once again become forgotten.<sup>368</sup>

## 2. FOSTER CARE GROUP HOMES

Another set of forgotten, vulnerable individuals in the coronavirus pandemic are children living in foster care group homes. Though little discussed, foster group homes across the country have reported multiple coronavirus outbreaks, including in Florida,<sup>369</sup> New York, Pennsylvania, Michigan, Missouri, and Neva-

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362. See Scott Landes et. al., *Less Worthy Lives? We Must Prioritize People with Intellectual and Developmental Disabilities in COVID-19 Vaccine Allocation*, LERNER CTR. PUB. HEALTH PROMOTION (Dec. 10, 2020), <https://lernercenter.syr.edu/2020/12/10/lb-42/>.

363. Appleman, *supra* note 1, at 446-47.

364. Emily DeCiccio, *Forgotten Population of COVID-19: Developmentally Disabled and Group Home Workers*, FOX NEWS (Apr. 22, 2020), <https://www.foxnews.com/media/forgotten-population-of-covid-19-developmentally-disabled-and-group-home-workers>.

365. See Doron Dorfman, *Thirty Years Later, Still Fighting Over the ADA*, REG. R. (Dec. 7, 2020), <https://www.theregreview.org/2020/12/07/dorfman-burke-thirty-years-fighting-over-ada/>.

366. *An Overview of the Americans with Disabilities Act*, ADA NAT'L NETWORK, <https://adata.org/factsheet/ADA-overview> (last visited Apr. 7, 2021).

367. See Roni Rabin, *Developmental Disabilities Heighten Risk of COVID Death*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/health/covid-developmental-disabilities.html>.

368. DeCiccio, *supra* note 364.

369. See Bianca P. Ocasio, *18 Test Positive for COVID-19 at His House, Florida's Largest Foster Group Home*, MIAMI HERALD (June 19, 2020), <https://www.miamiherald.com/news/local/community/miami-dade/article243455611.html#storylink=cpy>.

da.<sup>370</sup> Although COVID-19 has been far less prevalent in children, this is not true for the youth residing in foster care group homes, who have not been able to socially distance following pandemic rules.<sup>371</sup> Many foster care systems are struggling with COVID-19 spread in group homes and residential facilities, making the resident children's lives even more volatile and unstable.<sup>372</sup>

Like many of the other captive and vulnerable populations discussed above, the callous disregard of foster children living in group homes during COVID-19 can be traced back to eugenic thinking. Eugenicists focused on child dependency, particularly those “poor, ‘feeble-minded,’ and . . . ‘defective’ members of society,” and they theorized that dependent children's behavior potentially threatened the stability of the urban industrial social order.<sup>373</sup> Many eugenicists believed that very little separated dependent children from delinquent children. In other words, they believed that dependency was no accident. Indeed, they thought many children were dependent because the child's entire genetic line was deeply flawed. Consequently, eugenicists rationalized that dependent children must be sequestered away from society, in an institution or in colonies.<sup>374</sup> Dependent children were assumed to be inherently “defective,” and any care given to them need not be at the same level as that given to children from better stock.<sup>375</sup> The public's fear of hereditary defectiveness in dependent children was palpable.<sup>376</sup>

Our current neglect of older foster children in group homes particularly reflects this type of eugenic thinking. In the Progress-

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370. See Lindsay Schnell, *Foster Care Teen's Death Draws Scrutiny to Group Home Outbreaks: Who Is Looking Out For These Children?*, USA TODAY (May 15, 2020), <https://www.usatoday.com/story/news/nation/2020/05/15/coronavirus-foster-care-death-draws-scrutiny-group-home-outbreaks/5196297002/>.

371. See Matt Stout, *Covid-19 Has Largely Spared the State's Youngest. But in Massachusetts Group Homes, Infection Touches Many More*, BOSTON GLOBE (June 29, 2020), <https://www.bostonglobe.com/2020/06/29/nation/covid-19-has-largely-spared-states-youngest-massachusetts-group-homes-infections-touch-many-more/>.

372. See Kate Cray, *How Do You Find a Home for a Foster Child in Times Like This?*, ATLANTIC (Oct. 11, 2020), <https://www.theatlantic.com/family/archive/2020/10/challenge-finding-home-foster-child-pandemic/616673/>.

373. PHYLLIS WENTWORTH, CHILD WELFARE REFORMERS, ACADEMIC PSYCHOLOGISTS, AND THE DEPENDENT CHILD IN PROGRESSIVE ERA AMERICA 125 (2002), <https://core.ac.uk/download/pdf/215514617.pdf>.

374. *Id.* at 132.

375. *Id.* at 131.

376. *Id.* at 136.

sive era, “unfit” female teens of reproductive age were assumed to be as dangerous as dependent adults, and thus needed to be sequestered away from society, in fear of their becoming mothers.<sup>377</sup> Recall that the plaintiff in *Buck v. Bell*, which legalized sterilization of the “feble-minded,” was a 17-year-old foster child who had given birth.<sup>378</sup> It was fear of dependent teenagers like Carrie Buck that unleashed a wave of involuntary sterilizations across the United States.<sup>379</sup>

COVID-19 has spread in foster group homes for a myriad of reasons. First, like many individuals who live in congregate care settings, children in foster care are significantly more likely to have underlying conditions such as asthma, obesity, and other chronic medical conditions, placing them in a higher risk category for catching the coronavirus.<sup>380</sup>

In addition, foster group homes are struggling with staffing levels, an issue only exacerbated by the pandemic.<sup>381</sup> In New York, for example, the Administration for Children’s Services is actively attempting to find space to house foster children.<sup>382</sup> Too many New York group homes are now understaffed, since the caretakers, afraid of contracting the coronavirus, are staying home.<sup>383</sup> Given how easily the virus can spread from children to staff in the group foster homes, maintaining proper staffing levels has been extremely difficult.<sup>384</sup> And like many other congregate care settings, obtaining enough PPE and cleaning supplies has been difficult.<sup>385</sup> Complicating matters, there currently are not

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377. LOMBARDO, *supra* note 7, at 16-17.

378. See *The Supreme Court and the Sterilization of Carrie Buck*, FACING HIST., <https://www.facinghistory.org/resource-library/supreme-court-and-sterilization-carrie-buck> (last visited Apr. 7, 2021).

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

380. See Sofia Rudin, *Covid-19 Spreads in Youth Homes; How Life Inside is Changing*, PUBL. RADIO (May 18, 2020) <https://thepublicradio.org/article/covid-19-spreads-in-youth-group-homes-how-life-inside-is-changing>.

381. See Schnell, *supra* note 370.

382. See Eli Hager, *Coronavirus Leaves Foster Children With No Place to Go*, MARSHALL PROJECT (Mar. 24, 2020), <https://www.themarshallproject.org/2020/03/24/coronavirus-leaves-foster-children-with-nowhere-to-go>.

383. *Id.*

384. See Rudin, *supra* note 380.

385. See Ocasio, *supra* note 369.

enough foster parents to accommodate the numbers of children residing in group homes.<sup>386</sup>

In addition, social services for these children are very minimal due to the pandemic. At-risk youth are not receiving the in-person services to which they are entitled, including counseling, visits with birth parents, physical therapies, and pre-adoption visits.<sup>387</sup> Many child welfare workers will not visit children in person, fearing COVID-19 exposure.<sup>388</sup> The federal government issued guidance to child welfare agencies in March 2020, allowing the government to loosen the rules requiring caseworkers to meet face to face with abused or neglected children.<sup>389</sup>

Finally, several states, including California, have been pushed by labor leaders into allowing caseworkers to stay home during the pandemic.<sup>390</sup> Accordingly, although caseworkers have been deemed essential workers, most of them have been working at home, not interacting in person with their vulnerable clients.<sup>391</sup>

Older children and teenagers are the primary residents of foster care group homes, and reports indicate that they are suffering.<sup>392</sup> Teenagers often have difficulty in following required social distancing rules,<sup>393</sup> sometimes believing social distancing is meant as punishment.<sup>394</sup> For children with behavioral struggles, the rules can be very hard to understand.<sup>395</sup>

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386. Lindsay Schnell, *Foster Care Teen's Death Draws Scrutiny to Group Home Outbreaks: Who Is Looking Out For These Children?*, USA TODAY (May 15, 2020).

387. *Id.*

388. See Garrett Therolf et al., *Children Vulnerable to Abuse Are Imperiled as Caseworkers Stay Home*, N.Y. TIMES ' (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/us/virus-child-abuse.html?action=click&module=Top%20Stories&pgtype=Homepage>.

389. *Id.*

390. *Id.*

391. *Id.*

392. See Kelley Whitener, *Covid-19 and Child Welfare*, GEORGETOWN CENT. FOR FAM. & CHILD. (May 29, 2020), <https://ccf.georgetown.edu/2020/05/29/covid-19-and-child-welfare/>.

393. See Elana Schor, *Pandemic Piles New Pressures on Foster Children, Caretakers*, AP NEWS (May 13, 2020), <https://apnews.com/fee1f76876fe936a1fd1c666550342d7>.

394. Schnell, *supra* note 370.

395. See Nina Shapiro, *Coronavirus Outbreak at Seattle Teen Group Home Raises Questions About Quarantine Plans*, SEATTLE TIMES (June 21, 2020),

As a result of safety precautions, foster children in these homes have been isolated from visitors.<sup>396</sup> The lack of visitors, including friends and family members, has led to an interruption in critical bonding, adversely affecting the children's mental health.<sup>397</sup> The visitations ban also encompasses court-appointed special advocates, meaning that reunification or adoption proceedings often must be put on hold.<sup>398</sup> Complicating matters, the majority of family courts are closed, with indefinitely extended legal deadlines.<sup>399</sup> This judicial shutdown leaves both adoptions and family reunifications for foster children in limbo,<sup>400</sup> causing pain and stress for the children. In addition, although children residing in foster care group homes have a tremendous need to communicate online with family, social workers, and teachers, far too many of them lack proper access to technology.<sup>401</sup> Given that the pandemic has led to severe budget cuts in many states, child protection systems have been pressured to find the lowest-cost solutions possible.<sup>402</sup>

Regular outings have also been curtailed, increasing the children's loneliness and seclusion.<sup>403</sup> Due to feelings of isolation, some foster children living in group homes are more likely to run away, putting them at heightened risk of catching COVID-19.<sup>404</sup>

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<https://www.seattletimes.com/seattle-news/coronavirus-outbreak-at-teen-group-home-raises-questions-about-quarantine-plans/>.

396. See Jeremy Loudonback, *Coronavirus Cases Near 100 for Youth in California Residential Facilities*, CHRON. SOC. CHANGE (July 9, 2020), <https://chronicleofsocialchange.org/child-welfare-2/coronavirus-cases-near-100-for-youth-in-california-residential-facilities/45164>.

397. See Alex Ellerbeck, *COVID-19 Rules Threaten Parents' Bonds with Their Kids in Foster Care*, DENV. POST, (June 7, 2020), <https://www.denverpost.com/2020/06/07/covid-19-rules-threaten-parents-bonds-kids-foster-care/>.

398. *Id.*

399. See Ocasio, *supra* note 369.

400. See Lindsay Schnell, *Foster Care Teen's Death Draws Scrutiny to Group Home Outbreaks: Who Is Looking Out For These Children?*, USA TODAY (May 15, 2020).

401. Lindsay Schnell, *Foster Care Teen's Death Draws Scrutiny to Group Home Outbreaks: Who Is Looking Out For These Children?*, USA TODAY (May 15, 2020).

402. See Angie Schwartz and Cathy Krebs, *The Risk of Hidden Foster Care During COVID-19*, ABA (June 1, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/the-risk-of-hidden-foster-care-during-covid19/>.

403. See Jeremy Loudonback, *Coronavirus Cases Near 100 for Youth in California Residential Facilities*, CHRON. SOC. CHANGE (July 9, 2020).

404. *Id.*

If they return to the same group home, this again increases the possibility of viral spread.<sup>405</sup>

The results of these pressures are troubling. In Washington state, for example, foster children were quarantined in a government office building after their group home closed.<sup>406</sup> Likewise, in Washington, D.C., a group of COVID-positive children spent several evenings sleeping in the Aid to Families with Dependent Children offices, after a failed attempt to place them elsewhere.<sup>407</sup> In addition, many foster parents are trying to relinquish their foster children after they have run away, due to fears of COVID spread.<sup>408</sup> At the same time, in-home foster care placements are becoming more difficult to find for at-risk children as the pandemic stretches on.<sup>409</sup>

Like the other captive, vulnerable groups discussed above, foster children in group homes are at the mercy of the coronavirus, with little state relief on the way. Foster care children are in extreme crisis due to COVID-19 because the pandemic has widened the already-gaping holes in the child welfare net.<sup>410</sup>

The long tail of eugenic fears about dependent children has manifested in our treatment of children in long-term foster care homes, who are often the most troubled and hardest to place. The virtual abandonment of these children during COVID simply highlights the low priority we have given them in our society.

### **PART III: TWO CHEERS FOR LAW: POTENTIAL STATUTORY/LEGAL STOPGAPS**

Given such discriminatory and neglectful conduct, can the law help? Or to put it differently, are private civil lawsuits, new statutes, and new regulation the right response to this crisis? To answer this question, this Article looks at three legal responses to the pandemic treatment of the captive and vulnerable: 1) class lawsuits to halt medical rationing protocols; 2) requesting inmate early release; and 3) the COVID Safer Detention Act. Although these three responses have spurred some minor change, they un-

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405. See Ocasio, *supra* note 369.

406. See Cray, *supra* note 372.

407. *Id.*

408. *Id.*

409. *Id.*

410. See Kristina Garcia, *Care in Crisis*, PENN. TODAY (July 16, 2020), <https://penntoday.upenn.edu/news/foster-care-covid>.

fortunately have not transformed state, local, or federal conduct in any meaningful way, as explained below. Far more must be done to ameliorate the damage done by our society's continued reliance on eugenic beliefs.

### A. HALTING DISCRIMINATORY HEALTHCARE RATIONING PROTOCOLS

COVID-19 rationing protocols, imposed by many states and local hospitals, directly discriminate against elderly and disabled individuals. The hidden eugenic belief system undergirding such protocols has always been present, but the pandemic has laid bare the underlying discrimination for all to see.<sup>411</sup> “[D]isability is an explicit factor used to deny treatment—a factor that will be decisive in many cases.”<sup>412</sup> Using disability as a factor in rationing care and resources is plainly discriminatory,<sup>413</sup> with deep roots in the eugenic thinking that promoted euthanasia to best resolve the costs of custodial care for disabled individuals.<sup>414</sup>

Designating disability as a pivotal disqualifying factor within medical rationing is seemingly blocked by existing discrimination law.<sup>415</sup> Indeed, Congress has barred the use of disability, on its own, to disqualify a person from needed benefits from either the government or medical providers.<sup>416</sup> There are three main ways that advocates for the elderly and disabled can challenge discriminatory healthcare rationing protocols during the pandemic.

#### 1. ADA/OFFICE OF CIVIL RIGHTS (OCR)

Disability-based discrimination is prohibited by the ADA.<sup>417</sup> Healthcare rationing based on disability, age, or potential lifetime left in a disabled patient is also forbidden. More specifically, the ADA bans treatment decisions that are on “judgments about a

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411. See, e.g., Joseph Shapiro, *COVID-19 Infections and Deaths are Higher Among Those with Intellectual Disabilities*, NPR (June 9, 2020).

412. Bagenstos, *supra* note 294, at 6.

413. Harris, *Disability Rights*, *supra* note 288, at 32.

414. Appleman, *supra* note 1, at 442.

415. Harris, *Disability Rights*, *supra* note 288, at 36-37.

416. *Id.* at 10.

417. *Id.* at 5; see also ADA § 302, 42 U.S.C. § 12182 (2018); *Bragdon v. Abbott*, 524 U.S. 624, 629 (1998) (stating that Title III's definition of a covered “public accommodation” includes a private healthcare provider).

person's relative 'worth' based on . . . age."<sup>418</sup> Thus, any age-based decisions resulting in denial of medical devices to those with shorter lifespans likely also violates the Age Discrimination Act.<sup>419</sup>

In order to challenge these sorts of discriminatory protocols in Texas and Arizona, the Center for Public Representation and a raft of partners filed a complaint with the Department of Health and Human Services, Office for Civil Rights (OCR), contending these two states have implemented health protocol plans discriminating against individuals with disabilities, older adults, and people of color.<sup>420</sup> They contend that if these protocols are implemented, such individuals may suffer great harm through withholding of both basic and emergency treatment.<sup>421</sup>

Likewise, in Kansas, a combination of advocacy groups filed a complaint with OCR challenging the state's proposed ventilator rationing plan.<sup>422</sup> The complaint alleges that the Kansas plan violates the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act (Section 504) and Section 1557 of the Affordable Care Act (ACA) by placing the lives of disabled individuals at serious risk.<sup>423</sup>

Such targeted medical rationing is particularly troubling, given that individuals with intellectual and developmental disabilities have both a higher chance of contracting and becoming seriously ill from COVID-19.<sup>424</sup> Accordingly, establishing guidelines that limit the ability to obtain proper care is doubly discriminato-

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418. See *Civil Rights, HIPAA, and COVID 1*, HHS (Mar. 28, 2020), <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>; Bagenstos, *supra* note 294, at 16.

419. See Jessica Silver, *From Baby Doe to Grandpa Doe: The Impact of the Federal Age Discrimination Act on the "Hidden" Rationing of Medical Care*, 37 CATH. U. L. REV. 993, 1049-50 (1988).

420. See *Crisis Standard of Care Plans in COVID-19 Hotspots Arizona and Texas Challenged by CPR and Partners*, CENT. PUB. REP. (July 22, 2020), <https://www.centerforpublicrep.org/news/crisis-standard-of-care-plans-in-covid-19-hotspots-arizona-and-texas-challenged-by-cpr-and-partners/>.

421. *Id.*

422. See Lane Williams & Ami Hyten, *Disability Groups File Discrimination Complaint Challenging Kansas' COVID-19 Treatment Rationing Policy Guidance*, BAZELON CTR. (Mar. 27, 2020), <http://www.bazon.org/wp-content/uploads/2020/03/3-27-20-Kansas-OCR-Press-Release.pdf>.

423. *Id.*

424. *COVID-19 Hotspots*, *supra* note 420.

ry, as these individuals are far more likely to need medical care in the first place.

Individuals with disabilities have long had their lives undervalued, with necessary resources often denied or refused.<sup>425</sup> The ventilator and medical services rationing plans established by many states is simply more of the same treatment. These emergency health protocols are just the latest in a series of decisions bolstered by the hidden blueprint of eugenic thinking.

## 2. § 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973<sup>426</sup> forbids disability discrimination by federal agencies and recipients of federal financial assistance.<sup>427</sup> OCR enforces § 504, assuring that covered entities do not deny a disabled individual the benefits of a program or activity, provide any less effective services to a disabled individual, or provide different or separate services to a disabled individual unless these services are equal to what others are given.<sup>428</sup>

In the context of many state medical rationing protocols, § 504 forbids providing either limited or less effective treatment to an individual with disabilities—including treatment and medical devices for the treatment of COVID-19. OCR has issued specific guidance cautioning HHS-funded programs, such as hospitals and other medical care facilities, that the law prohibits medical rationing policies<sup>429</sup> based on “stereotypes, assessments of quality of life, or judgments about a person’s relative ‘worth’ based on the presence or absence of disabilities or age.”<sup>430</sup>

Some states have supported OCR’s guidance in regards to medical rationing protocol, issuing directives of their own. For

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425. See Laura Guidry-Grimes, et al., *Disability Rights as a Necessary Framework for Crisis Standards of Care and the Future of Health Care*, HASTINGS CTR. REP. (June 29, 2020), <https://onlinelibrary.wiley.com/doi/10.1002/hast.1128>.

426. 29 U.S.C. § 794(a).

427. See Bagenstos, *supra* note 294, at 5.

428. See *Rights and Responsibilities under Section 504 and the ADA*, HHS, <https://www.hhs.gov/civil-rights/for-individuals/disability/index.html> (last visited Apr. 7, 2021).

429. Harris, *Disability Rights*, *supra* note 288, at 34.

430. See *Civil Rights, HiPAA, and the Coronavirus Disease*, HHS OFF. FOR CIV. RTS. IN ACTION (Mar. 28, 2020), <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>.

example, the California Department of Health Care Services issued its own guidance to medical COVID-19 protocols, advising that “rationing care based on a person’s disability status is impermissible and unlawful under both federal and state law.”<sup>431</sup> California also notes that individuals with disabilities may not be “unlawfully denied full and equal access to state-funded programs.”<sup>432</sup> Finally, California’s guidelines refer to the American Medical Association’s Code of Medical Ethics for further instruction.<sup>433</sup> Granted, as noted above, even this kind of cautionary guidance can evaporate under fear of COVID spread.

In contrast, eleven states have all proposed potentially discriminatory medical rationing plans.<sup>434</sup> Lawsuits were subsequently filed against the state of Washington,<sup>435</sup> Tennessee,<sup>436</sup> Kansas,<sup>437</sup> Utah,<sup>438</sup> New York,<sup>439</sup> Oklahoma,<sup>440</sup> Connecticut,<sup>441</sup>

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431. See CAL. DEPT HEALTH CARE SERVS., GUIDANCE RELATING TO NON-DISCRIMINATION IN MEDICAL TREATMENT FOR NOVEL CORONAVIRUS 2019 1 (2020), <https://www.dhcs.ca.gov/Documents/COVID-19/Joint-Bulletin-Medical-Treatment-for-COVID-19-033020.pdf>.

432. *Id.* at 2.

433. *Id.*

434. See Elizabeth Pendo, *COVID-19 and Disability-Based Discrimination in Health Care*, ABA (May 22, 2020), <https://www.americanbar.org/groups/diversity/disabilityrights/resources/covid19-disability-discrimination/>.

435. See Pam Katz, *Disability Discrimination Complaint Filed Over COVID-19 Treatment Rationing Plan in Washington State*, ARC (Mar. 23, 2020), <https://thearc.org/disability-discrimination-complaint-filed-over-covid-19-treatment-rationing-plan-in-washington-state/>.

436. See *Resolution of Federal Civil Rights Complaint Raises the Bar in Prohibiting Medical Discrimination against People with Disabilities during Covid-19 Pandemic*, CPR (June 26, 2020), <https://www.centerforpublicrep.org/wp-content/uploads/TN-press-release-revised-6.26-20.pdf>.

437. See Hyten & Williams, *Disability Groups File Discrimination Complaint*, *supra* note 420.

438. See David Carlson, *Complaint of Disability Law Center and Jodi Hansen on Behalf of Jacob Hansen*, DISABILITY L. CENT. (Apr. 6, 2020), <https://www.centerforpublicrep.org/wp-content/uploads/2020/04/Utah-OCR-Rationing-Final-.pdf>.

439. See Katrin Haldeman, *DRNY Seeks Clear Guidance from DOH to Prevent Discriminatory Rationing of Healthcare*, DISABILITY RTS. N.Y. (Apr. 7, 2020), <https://myemail.constantcontact.com/UPDATED-DRNY-Seeks-Clear-Guidance-from-DOH-to-Prevent-Discriminatory-Rationing-of-Healthcare.html?soid=1128997988588&aid=61IM0GQ2VFU>.

440. See Melissa Sublett, *Complaint of the Oklahoma Disability Law Center*, OK DISABILITY L. CENT. (Apr. 21, 2020), <http://okdlc.org/wp-content/uploads/2020/04/4.21-Oklahoma-OCR-Complaint-Final.pdf>.

441. See *Connecticut Agrees to Assure Equal Access to Medical Care for Individuals with Disabilities Hospitalized During Covid-19*, DISABILITY RTS. CENT. (June 9,

North Carolina,<sup>442</sup> Oregon,<sup>443</sup> Nebraska,<sup>444</sup> Arizona,<sup>445</sup> Texas,<sup>446</sup> Alabama,<sup>447</sup> and Pennsylvania.<sup>448</sup>

Some states did try to comply with OCR, changing their protocols after these complaints were filed. For example, Alabama removed its proposed guidelines for ventilator triage.<sup>449</sup> Similarly, OCR imposed three changes to Pennsylvania's medical rationing protocols: 1) protocols ranking individuals with certain disabilities low-priority were eliminated; 2) individual medical evaluations were required if triage was used; and 3) no individual would be refused care based on any stereotype.<sup>450</sup>

The vast majority of states, however, have not complied with the OCR's guidance, despite outstanding complaints. This failure

2020), <https://static1.squarespace.com/static/5952983059cc68ff83ce3153/t/5edf8da47cfff3d0487cf89/1591709092800/DR+CT+NEWS+RELEASE+6.9.2020.pdf>.

442. See Virginia Marcus, *Complaint of Disability Rights North Carolina*, DISABILITY RTS. N.C. (May 5, 2020), <https://www.centerforpublicrep.org/wp-content/uploads/OCR-Complaint-5.5.20.pdf>.

443. See Jake Cornett, *Complaint Regarding Oregon's Crisis Care Guidance*, DISABILITY RTS. OR. (May 8, 2020), <https://www.centerforpublicrep.org/wp-content/uploads/2020.05.08-Letter-to-HHS-OCR-Regarding-Crisis-Care-Guidance-in-Oregon.pdf>.

444. See Eric Evans, *Illegal Disability Discrimination Concerning Test Nebraska*, DISABILITY RIGHTS NEB., (June 17, 2020), [file:///Users/appleman/Downloads/OCR%20Complaint\\_Nebraska\\_6-17-20-1.pdf](file:///Users/appleman/Downloads/OCR%20Complaint_Nebraska_6-17-20-1.pdf).

445. See Maya Abela et. al., *Complaint of Donna Jeffrey, et. al, against Arizona Department of Health Services*, ARIZ. CTR. DISABILITY L. (July 17, 2020), <https://www.centerforpublicrep.org/wp-content/uploads/HHS-OCR-Complaint-re-Arizona-CSC-7.17.2020.pdf>.

446. See Richard LaVallo, *Complaint Regarding North Texas Mass Critical Care Guidelines for Adults and Children*, DISABILITY RTS. TEX. (July 22, 2020), <https://www.centerforpublicrep.org/wp-content/uploads/HHS-OCR-Complaint-re-North-Texas-Mass-Critical-Care-Guidelines.pdf>.

447. See David Carlson, *Complaint of Alabama Disabilities Advocacy Program and The Arc of the United States*, ALABAMA DISABILITIES ADVOCACY PROGRAM (Mar. 24, 2020), [https://www.centerforpublicrep.org/wp-content/uploads/2020/03/AL-OCR-Complaint\\_3.24.20.docx.pdf](https://www.centerforpublicrep.org/wp-content/uploads/2020/03/AL-OCR-Complaint_3.24.20.docx.pdf).

448. See Kelly Dar, *Complaint of Disability Rights Pennsylvania concerning Pennsylvania's Interim Crisis Standards of Care for Pandemic Guidelines*, DISABILITY RIGHTS PENNSYLVANIA (Apr. 3, 2020), <https://www.centerforpublicrep.org/wp-content/uploads/2020/04/04.03.2020-DRP-OCR-Complaint-with-Exhibit-A-1.pdf>.

449. Pendo, *supra* note 434.

450. See OCR Resolves Civil Rights Complaint Against Pennsylvania After it Revises its Pandemic Health Care Triaging Policies to Protect Against Disability Discrimination, HHS (Apr. 16, 2020), <https://www.hhs.gov/about/news/2020/04/16/ocr-resolves-civil-rights-complaint-against-pennsylvania-after-it-revises-its-pandemic-health-care.html>.

to act, combined with OCR's failure to impose any reprimands or penalties, shows the limitations of the court and administrative oversight regarding discriminatory state policies concerning medical rationing.

### 3. THE AFFORDABLE CARE ACT, § 1557<sup>451</sup>

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.<sup>452</sup> Specifically, §1557 prohibits disability-based discrimination by any health programs receiving federal financial assistance, as well as those operating under a federal program or activity.<sup>453</sup> This includes nursing homes, institutions for the intellectually and developmentally disabled, mental institutions, and any other facility that receives funding from the Department of Health and Human Services. This also covers discrimination against disabled individuals in prisons, jails, and other state correctional facilities.<sup>454</sup>

In addition, disability discrimination laws are broadly applicable to medical treatment decisions. In *Alexander v. Choate*,<sup>455</sup> the Court held that disabled beneficiaries cannot be denied "meaningful access" to health care benefits.<sup>456</sup> Likewise, both *Pennsylvania Department of Corrections v. Yeskey*<sup>457</sup> and *Olmstead v. L.C.*<sup>458</sup> held that states must "adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide."<sup>459</sup> *Olmstead* also concluded, however, that in some circumstances, reduced supplies can limit resources which maximally accommodate people with specific disabilities, if such accommodation deprives other patients.<sup>460</sup>

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451. 42 U.S.C. § 18116(a).

452. See *Section 1557 of the Patient Protection and Affordable Care Act*, HHS, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

453. Bagenstos, *supra* note 294, at 5.

454. *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 207 (1998).

455. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

456. *Id.* at 301, 309.

457. *Yeskey*, 524 U.S. at 207 (applying Title II of ADA, Court held that prison inmate could not be denied access to prison program due to medical history of hypertension).

458. *Olmstead v. L.C.*, 527 U.S. 581, 603 (1999) (holding that ADA imposes significant obligations on states regarding provision of mental health treatment).

459. *Id.* at 603, n.14.

460. *Id.* at 604 (allowing state to show that "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the

Overall, § 1557 prohibits medical rationing protocols that deny necessary care based on disability.<sup>461</sup> There is no stated exception to this prohibition for any public health emergency, pandemic or otherwise.<sup>462</sup> Even allocation of scarce resources in a pandemic must still follow the dictates of federal law.<sup>463</sup>

Despite these rules and regulations, however, complaints raised about COVID-19 health rationing have not been overwhelmingly successful. Only a few states have changed their medical rationing protocols after suit was filed, leaving the vast majority with discriminatory procedures if medical care needs to be triaged. Even the best attempts of disability law advocates have not been able to overcome the eugenic thinking undergirding state responses to a public health emergency.

## B. EARLY RELEASE OF INMATES

Another legal approach to resolving COVID-19 issues for captive populations is the battle to release prisoners from correctional facilities, whether before trial or serving their sentence. These attempts have also had limited success.

### 1. BAIL REFORM

One way to mitigate COVID-19 risks for arrested defendants is through COVID-19-based bail reform. Reforming existing bail rules, either to allow arrestees to be released on their own recognizance or to post a token bail, would shrink the number of pre-trial detainees and alleviate jail overcrowding. As of December 2020, approximately 631,000 people were currently in jail,<sup>464</sup> 74% of whom had not been convicted of a crime.<sup>465</sup> Indeed many pre-trial detainees are incarcerated precisely because they cannot af-

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State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.”).

461. See Disability Rights Education and Defense Fund, *Preventing Discrimination in the Treatment of COVID-19 Patients: The Illegality of Medical Rationing on the Basis of Disability*, CENT. HIV L. & POV., at 1 (Mar. 25, 2020) <https://www.hivlawandpolicy.org/resources/preventing-discrimination-treatment-covid-19-patients-illegality-medical-rationing-basis>.

462. *Id.* at 3.

463. See Wendy Hensel & Leslie Wolf, *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 FLA. L. REV. 719, 739 (2011).

464. See JACOB KANG-BROWN ET AL., PEOPLE IN JAIL AND PRISON IN 2020 1 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>.

465. See Sawyer & Wagner, *supra* note 178.

ford their bail.<sup>466</sup> Given the dangers of COVID-19 infection and death in crowded jail facilities, reducing or eliminating money bail for most pretrial detainees seems like an obvious course of action.<sup>467</sup>

For individuals detained due to lack of access to bail money, it is virtually impossible to socially distance, wear masks, obtain proper cleaning supplies, and avoid infection while jailed.<sup>468</sup> Those legally innocent individuals could be released on their own recognizance, or, if necessary, be provided with electronic tracking devices. Given both their lack of funds and current COVID travel restrictions, the risk of flight is lower.<sup>469</sup>

As an initial response to the pandemic, some states set \$0 bail for certain crimes. In California, for example, a temporary measure was passed to set bail amounts at zero for individuals accused of misdemeanors and lower-level, non-violent felonies.<sup>470</sup> This was passed in an attempt to reduce the spread of coronavirus in the state's overcrowded jails.<sup>471</sup> For two months, this emergency bail measure kept over 20,000 defendants out of jail while they awaited trial or pretrial hearings,<sup>472</sup> or approximately one-third of California's daily jail population.<sup>473</sup> Although the bail

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466. See Sully Barrett, *How the Coronavirus Could Kill the \$2 Billion U.S. Bail Bond Industry*, CNBC (May 9, 2020), <https://www.cnbc.com/2020/05/09/how-coronavirus-could-kill-the-us-bail-bond-business.html>.

467. See Ronal Serkas & Taryn Merkl, *Law Enforcement Leaders Agree: Money Bail Has to End, Especially in A Pandemic*, THE APPEAL (Apr. 21, 2020), <https://theappeal.org/law-enforcement-leaders-agree-money-bail-has-to-end-especially-in-a-pandemic/>.

468. See Seann Riley, *As Coronavirus Spreads, Cash Bail Is A Virtual Death Sentence*, USA TODAY (Apr. 15, 2020), <https://www.usatoday.com/story/opinion/policing/2020/04/14/coronavirus-cash-bail-virtual-death-sentence/5125312002/>.

469. *Id.*

470. See Merrill Balassonne, *California Counties Keeping Emergency Bail Order*, CAL. CTS. NEWSROOM (July 10, 2020), <https://newsroom.courts.ca.gov/news/california-counties-keeping-covid-19-emergency-bail-schedules>.

471. See Aja Goare, *COVID-19 No Bail Order Ending but CA Voters Could Adopt Permanent Bail Reform*, KSBY NEWS (June 19, 2020), <https://www.ksby.com/news/local-news/covid-19-no-bail-order-ending-but-ca-voters-could-adopt-permanent-bail-reform>.

472. See Bob Egelko, *Coronavirus Era Ban on Bail for Non-Violent Cases Will End on June 20*, S.F. CHRON. (June 10, 2020), <https://www.sfchronicle.com/news/article/Coronavirus-era-ban-on-bail-for-nonviolent-cases-15331687.php>.

473. See Rosalia Ahumada, *No More \$0 Bail: Rule to Slow Coronavirus in California Jails and Courts Is Rescinded*, SACRAMENTO BEE (June 10, 2020), <https://www.sacbee.com/news/california/article243446216.html#storylink=cpy>.

measure expired on June 20, 2020,<sup>474</sup> thirty California counties (home to 78% of the state's citizens), continued the zero bail measure in some form.<sup>475</sup>

Similarly, Philadelphia, Seattle, New Orleans, and Tulsa have embraced bail reform as an appropriate way to reduce virus spread in jails. Both Seattle's and Philadelphia's DA asked his office to limit bail requests to serious cases that pose a threat to public safety.<sup>476</sup> In New Orleans, public defenders have requested lower bail amounts for many crimes, allowing the accused to obtain pre-trial release more readily.<sup>477</sup> In Tulsa, any arrested individual not judged to be a safety threat is released on personal recognizance, sometimes with ankle monitors, or at reduced bail.<sup>478</sup> As a result, the Tulsa county jail quickly reached new lows in residence, decreasing fifteen percent in a ten-day period.<sup>479</sup>

Conversely, New York's response to COVID-19 made pre-trial release more difficult. In 2019, New York instituted bail reform, eliminating cash bail for nonviolent crimes and requiring prosecutors to produce evidence within fifteen days of arrest.<sup>480</sup> After only three months, however, law enforcement backlash to

474. See Goare, *supra* note 471.

475. See Balassonne, *supra* note 470.

476. See Jane Roh, *District Attorney Krasner Announces Acceleration of DAO Reforms in Response to COVID-19 Emergency*, MEDIUM (Mar. 16, 2020), <https://medium.com/philadelphia-justice/district-attorney-krasner-announces-acceleration-of-dao-reforms-in-response-to-covid-19-emergency-e2340f587f25>.

477. See Mike Perlstein, *Coronavirus Threat, Low Bail Brings New Orleans Jail Population to Post-Katrina Low*, WWLTV (Mar. 19, 2020), <https://www.wwtv.com/article/news/health/coronavirus/coronavirus-threat-low-bail-brings-new-orleans-jail-population-to-post-katrina-low/289-648f659e-3d32-4cfa-8a46-1eab5715c66a>.

However, this should be contrasted against earlier New Orleans measures which actually increased arrests in the early months of the pandemic, including unconstitutional checkpoints. The end result was that more Black and Brown individuals were detained in COVID-19-unsafe jails. Finally, the Macarthur Center was able to convince New Orleans lawmakers to reduce the number of arrests during COVID-19. *Our Response to Covid-19*, MACARTHUR JUST., <https://www.macarthurjustice.org/home/our-response-to-covid-19/> (last visited Apr. 7, 2021).

478. See Samantha Vicent, *Tulsa County Jail Occupancy Hits Record Low as Judges, Attorneys, Police Adjust To COVID-19 Pandemic*, TULSA WORLD (Mar. 28, 2020), [https://tulsaworld.com/news/local/crime-and-courts/tulsa-county-jail-occupancy-hits-record-low-as-judges-attorneys-police-adjust-to-covid-19/article\\_9ba4c86d-0fdc-5223-983b-89fa572ad54f.html](https://tulsaworld.com/news/local/crime-and-courts/tulsa-county-jail-occupancy-hits-record-low-as-judges-attorneys-police-adjust-to-covid-19/article_9ba4c86d-0fdc-5223-983b-89fa572ad54f.html).

479. *Id.*

480. See Karen DeWitt, *New York Bail Reform Rollback Takes Effect*, WAMC N.E. PUB. RADIO (July 2, 2020), <https://www.wamc.org/post/ny-bail-reform-rollback-takes-effect>.

the bail reform resulted in limitations of the reforms during the April 2020 budget process.<sup>481</sup> The changes included reinstating bail for certain crimes and giving prosecutors up to 35 days to provide evidence.<sup>482</sup> Revisions to bail reform went into effect July 1, 2020,<sup>483</sup> despite the continuing COVID-19 threat in state jails.<sup>484</sup>

Setting bail to zero and releasing arrested individuals on their own recognizance offers a simple and effective way to reduce jail population, preventing COVID-19 spread in correctional facilities and surrounding communities. The safest way to ensure that jails do not continue to serve as vectors for the coronavirus is to reduce the number of people incarcerated.<sup>485</sup> At minimum, eliminating money bail and low-level felony arrests, along with mandated petty and gross misdemeanors citations, would go a long way toward preventing jail overcrowding.<sup>486</sup> Those charged with crimes should not face increased COVID-19 infection risk simply because they are poor.<sup>487</sup>

## 2. ACLU JAIL AND PRISON RELEASE LAWSUITS

Another way to potentially speed inmate release is to bring civil rights lawsuits. State and federal correctional facilities across the country have been hit with multiple lawsuits, arising from both the poor management of COVID and the resulting infection and death.<sup>488</sup>

At the beginning of the pandemic, Congress designated \$100 million to the federal Bureau of Prisons (BOP) for prison staff overtime, testing kits and personal protective equipment, along with the authority to determine which low-risk offenders could be

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481. See Taryn Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

482. DeWitt, *supra* note 479.

483. Merkl, *supra* note 480.

484. DeWitt, *supra* note 479.

485. See *Coronavirus Spread*, THE BAIL PROJECT, <https://bailproject.org/covid-19/> (last visited Apr. 7, 2021).

486. *Id.*

487. *Id.*

488. See Carolyn Casey, *Dozens of Prisons Now Face COVID-19-Related Civil Rights Lawsuits*, EXPERT INST. (June 25, 2020), <https://www.expertinstitute.com/resources/insights/dozens-of-prisons-now-face-covid-19-related-civil-rights-lawsuits/>.

released to home confinement.<sup>489</sup> By mid-March, however, when the pandemic was in full flower, the BOP had failed to release many eligible prisoners early, including those most in need of release.<sup>490</sup>

The ACLU brought multiple lawsuits against numerous state jails and prisons in order to obtain early inmate release.<sup>491</sup> The ACLU initiated or supported such lawsuits in Arizona,<sup>492</sup> Arkansas,<sup>493</sup> Connecticut,<sup>494</sup> D.C.,<sup>495</sup> Georgia,<sup>496</sup> Kansas,<sup>497</sup> Kentucky,<sup>498</sup> Louisiana,<sup>499</sup> North Carolina,<sup>500</sup> Ohio,<sup>501</sup> Pennsylva-

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489. *Id.*

490. *Id.*

491. See *Settlement Reached in Federal Lawsuit Seeking to Protect Incarcerated People from COVID-19*, ACLU (June 8, 2020), <https://www.aclu.org/press-releases/settlement-reached-federal-lawsuit-seeking-protect-incarcerated-people-covid-19>.

492. See *Lawsuit Seeks Class-Action Relief for People Detained in Federal Custody in Arizona*, ACLU (May 8, 2020), <https://www.aclu.org/press-releases/aclu-sues-protect-people-incarcerated-private-prison-covid-19>.

493. See Andrew DeMillo, *Lawsuit Filed Over Coronavirus Outbreak at Arkansas Prison*, AP NEWS (Apr. 21, 2020), <https://apnews.com/a4c42840e6e742ae72011a8684cc4798>.

494. See *Settlement Reached*, *supra* note 491.

495. See *Banks v. Booth - Challenging Life-Threatening Lack of COVID-19 Precautions at the D.C. Jail*, ACLU (July 2020), <https://www.acludc.org/en/cases/banks-v-booth-challenging-life-threatening-lack-covid-19-precautions-dc-jail>.

496. See *Southern Center for Human Rights File Motion for Preliminary Injunction to Require Clayton County Sheriff to Protect People in Jail from Escalating COVID-19 Outbreak*, ACLU (July 27, 2020), <https://www.aclu.org/press-releases/aclu-southern-center-human-rights-file-motion-preliminary-injunction-require-clayton>.

497. See Nomin Uyediin, *Kansas Prisons Are Fighting A Lawsuit to Release Prisoners to Reduce COVID-19 Spread*, KCUR (Apr. 30, 2020), <https://www.kcur.org/news/2020-04-30/kansas-prisons-are-fighting-a-lawsuit-to-release-prisoners-to-reduce-covid-19-spread>.

498. See *ACLU-KY Files Federal Lawsuit to Free Seven Medically Vulnerable People from Kentucky Correctional Institution for Women*, ACLU (June 15, 2020), <https://www.aclu.org/press-releases/aclu-ky-files-federal-lawsuit-free-seven-medically-vulnerable-people-kentucky>.

499. See *ACLU of Louisiana Demands Immediate Release of Asylum-Seekers and People Awaiting Trial, Expedited Parole Hearings for Elderly Prisoners During Coronavirus Pandemic*, ACLU (March 12, 2020), <https://www.aclu.org/press-releases/aclu-louisiana-demands-immediate-release-asylum-seekers-and-people-awaiting-trial>.

500. See *ACLU Sues to Protect People at Butner Federal Prison From COVID-19*, ACLU (May 8, 2020), <https://www.aclu.org/press-releases/aclu-sues-protect-people-butner-federal-prison-covid-19-0>.

501. See *Appeals Court Strikes Down Ruling Requiring Bureau of Prisons to Release Medically Vulnerable People at Elkton Prison*, ACLU (June 9, 2020), <https://www.aclu.org/press-releases/appeals-court-strikes-down-ruling-requiring-bureau-prisons-release-medically>.

nia,<sup>502</sup> Tennessee,<sup>503</sup> Texas,<sup>504</sup> and Virginia.<sup>505</sup> These lawsuits included demands for officials to effectuate the rapid downsizing of those facilities and highlighted their failure to review candidates for early release, to inform individuals of their eligibility for early release, and to expedite consideration of conditional pardons.<sup>506</sup>

These efforts have been insufficient in preventing mass prisoner infection, however.<sup>507</sup> Although some prisoners have been released, the incarcerated population numbers have generally remained stable.<sup>508</sup> Moreover, the Supreme Court has halted orders requiring prisons and jails to use better safety and health procedures or release inmates early.<sup>509</sup> In *Barnes v. Ahlman*, for example, the Court upheld a stay of a preliminary injunction requiring the Orange County Jail to implement particular safety measures to protect inmates from the coronavirus.<sup>510</sup> This is despite the fact that over 300 jail detainees had contracted COVID-19 in less than a month's time, with little attempt at social distancing, provision of cleaning materials, PPE, or proper testing supplies.<sup>511</sup> Although the Orange County Jail released 53% of its residents, it still holds approximately 3,000 detainees, 488 of them medically fragile.<sup>512</sup>

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502. See Matthew Santoni, *Inmates Say Pittsburgh Jail Not Following COVID-19 Guidance*, LAW360 (April 9, 2020), <https://www.law360.com/articles/1261781/inmates-say-pittsburgh-jail-not-following-covid-19-guidance>.

503. See *Federal Court Certifies Class, Orders Sheriff to Release List of People in Shelby County Jail Most Vulnerable to COVID-19*, ACLU (June 11, 2020), <https://www.aclu.org/press-releases/federal-court-certifies-class-orders-sheriff-release-list-people-shelby-county-jail>.

504. See *Civil Rights Groups File Lawsuit to Stop Spread of COVID-19 in Dallas Jails*, ACLU (May 21, 2020), <https://www.aclu.org/press-releases/civil-rights-groups-file-lawsuit-stop-spread-covid-19-dallas-jails-0>.

505. See *ACLU of Virginia Sends Notice of Noncompliance in COVID-19 Lawsuit Against VDOC for Failure to Follow Court-Approved Settlement*, ACLU (June 25, 2020), <https://www.aclu.org/press-releases/aclu-virginia-sends-notice-noncompliance-covid-19-lawsuit-against-vdoc-failure-follow>.

506. *Id.*

507. See Kovarsky, *supra* note 80, at 2.

508. See Sandra Garcia, *U.S. Prison Population Remained Stable as Pandemic Grew*, N.Y. TIMES (May 14, 2020), <https://nyti.ms/3cu58Xc>.

509. See, e.g., *Barnes v. Ahlman*, 240 S. Ct. 2620, 2622 (2020) (Sotomayor, J., dissenting).

510. *Id.* at 2620.

511. *Id.* at 2621 (Sotomayor, J., dissenting).

512. *Id.* at 2624 (Sotomayor, J., dissenting).

In short, although lawsuits have fostered some movement in forcing correctional facilities to increase some early release and improve COVID-19 precautions, they have been an insufficient tool to solve the continuing crisis. This failure to release prisoners directly relates back to the eugenic belief system underlying so much of mass incarceration: that detained and convicted individuals are unfit and unworthy of protection, due to their criminogenic genetics and inferior bloodlines. Refusing to acknowledge the effect of a world-wide pandemic and the danger it poses to captive, vulnerable individuals is ultimately another version of the eugenic thinking that rationalizes injury and death of those whose lives are adjudicated less valuable. We need better, more comprehensive solutions to the mistreatment of captive individuals, ones that recognize eugenics-based prejudices and seek to address them at their core.

### 3. ALTERNATIVE CORRECTIONS RELEASE

Many states have ordered their probation and parole officers to temporarily suspend the return of parole or probation violators to jail.<sup>513</sup> Many of these arrests are for minor violations breaking the rules of correctional control supervision—drinking alcohol, traveling without permission, or missing appointments.<sup>514</sup> Thus, relaxing standards for violations for parolees and probationers helps keep jail and prison populations down.

Approximately two-thirds of state probation and parole departments have halted mandatory office visits and no longer issue arrest warrants for technical violations.<sup>515</sup> In addition, many states only drug test the highest-risk probationers and parolees.<sup>516</sup> California, for example, has relaxed its rules of probation, and no longer requires individuals under supervision to take drug tests, attend mandated therapy, or meet weekly with their super-

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513. See Beth Schwartzapfel, *Probation and Parole Officers Are Rethinking Their Rules as Coronavirus Spreads*, MARSHALL PROJECT (Apr. 3, 2020), <https://www.themarshallproject.org/2020/04/03/probation-and-parole-officers-are-rethinking-their-rules-as-coronavirus-spreads>.

514. *Id.*

515. See Caroline Harting, *Parole and Probation Reform in the COVID-19 Era*, COLUM. NEWS (July 31, 2020), <https://news.columbia.edu/news/parole-probation-vincent-schiraldi-hrw-aclu>.

516. *Id.*

vision officer while social distancing rules are still in effect.<sup>517</sup> Likewise, Idaho suspended its parole and probation sentencing matrix, allowing the officers to tailor a non-jail sentence instead.<sup>518</sup> Massachusetts shrunk the number of offenders sentenced to electronic monitoring and limited the non-serious violations resulting from the tracking.<sup>519</sup>

For those sentenced to halfway houses, work farms, or other forms of alternative correction, however, there has been little relief. In New Jersey, no high-risk individuals have been released early from halfway houses.<sup>520</sup> Florida has not only detained probationers in work camps, but also continues to use their labor. Work camp residents live in tight confines and travel to and from work sites on crowded buses, both powerful vectors for coronavirus spread.<sup>521</sup> Similarly, in Minnesota's Challenge Incarceration Program, a minimum-security boot camp for non-violent offenders, there have been few releases to alleviate the overcrowding.<sup>522</sup> Those under alternative correctional control have been largely overlooked throughout the pandemic.<sup>523</sup>

The spread of COVID-19 in alternative corrections is little discussed, with minimal information about those sentenced to community control. For the most part, the push for early release

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517. See Lauren White, *Probation Conditions Relaxed During the Pandemic. Some Say They Should Stay That Way*, THE APPEAL (June 8, 2020), <https://theappeal.org/coronavirus-probation-parole-technical-violations/>.

518. See Tommy Simmons, 'A little more creative': How the Coronavirus Has Changed Probation, Parole in Idaho, KTVB (May 3, 2020), <https://www.ktvb.com/article/news/crime/a-little-more-creative-how-covid-19-has-changed-probation-parole-in-idaho/277-ad46e588-d77a-4da9-aba2-1ee3b86a06fa>.

519. See *Community Supervision Response to COVID-19*, MARSHALL PROJECT (Apr. 2, 2020), <https://www.themarshallproject.org/documents/6823500-Community-Supervision-Response-to-COVID-19#document/p22/a558866>.

520. See Colleen O'Dea, *New Jersey's COVID-19 Release Program for Prisoners Is Slammed for Major Failings*, N.J. SPOTLIGHT (May 26, 2020), <https://www.njspotlight.com/2020/05/njs-covid-19-release-program-for-prisoners-is-slammed-for-major-failings/>.

521. See Kevin Bliss, *Florida Continues to Use Slave Labor During Coronavirus Outbreak*, PRISON LEGAL NEWS (June 1, 2020), <https://www.prisonlegalnews.org/news/2020/jun/1/florida-continues-use-slave-labor-during-coronavirus-outbreak/>.

522. See Dan Kraker, *Coronavirus Spread Puts Minnesota's Willow River Boot Camp on Edge*, MPR NEWS (Apr. 20, 2020), <https://www.mprnews.org/story/2020/04/20/coronavirus-spread-puts-minnesotas-willow-river-boot-camp-on-edge>.

523. See Laura I Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, & Criminal Justice Debt*, 55 HARV. C.R. – C.L. L. REV. 1, 5-6 (2020).

has not ameliorated any restrictive conditions in alternative corrections. This failure can largely be attributed to the dehumanization process we impose on those who have gone through the criminal justice system. The core elements of the eugenics blueprint for criminal justice<sup>524</sup>—that criminals are unfit and should be removed from society—still resonate for those under correctional control. Our strong belief in such Progressive era innovations such as parole, probation, and work camps have remained deeply popular in American criminal justice.<sup>525</sup>

### C. THE COVID-19 SAFER DETENTION ACT

Despite significant COVID spread in correctional facilities, various procedural hurdles and rigorous legal standards continue to prevent prisoners from appealing to federal court for pandemic relief.<sup>526</sup> A prisoners' ability to apply for release can vary tremendously, depending on the type of incarceration—prison or jail—and whether their sentence is state or federal.<sup>527</sup> In addition, federal prisoners must first apply to the Bureau of Prisons for release.<sup>528</sup> The Bureau's response to the pandemic and the question of early release, however, has been chaotic and dysfunctional.<sup>529</sup>

In response, Senators Richard Durbin and Chuck Grassley introduced the COVID-19 Safer Detention Act (SDA).<sup>530</sup> The SDA reforms the existing Elderly Home Detention Pilot Program

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524. Simon, *supra* note 4, at 792.

525. *Id.* at 815.

526. See Taryn Merkl & Brooks Weinberger, *What's Keeping Thousands in Prison During Covid-19*, BRENNAN CTR. (July 22, 2020), <https://www.brennancenter.org/our-work/research-reports/whats-keeping-thousands-prison-during-covid-19>.

527. *Id.*

528. *Id.*

529. See *Coronavirus Crisis in Prisons Won't Stay Behind Bars*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/coronavirus-prisons-compassionate-release.html>.

530. See Durbin, *Grassley Introduce New, Bipartisan Legislation to Reform Elderly Home Detention and Compassionate Release Amid COVID-19 Pandemic*, DICK DURBIN, <https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-introduce-new-bipartisan-legislation-to-reform-elderly-home-detention-and-compassionate-release-amid-covid-19-pandemic> (last visited Apr. 7, 2021). The SDA was re-introduced to Congress by Durbin and Grassley on February 10, 2021. Durbin, *Grassley Introduce Bipartisan Legislation to Reform Elderly Home Detention and Compassionate Release Amid COVID-19 Pandemic*, DICK DURBIN, <https://www.durbin.senate.gov/newsroom/press-releases/durbin-grasslet-introduce-bipartisan-legislation-to-reform-elderly-home-detention-and-compassionate-release-amid-covid-19-pandemic> (last visited Apr. 7, 2021).

(EHDPP) and expands compassionate release of federal inmates.<sup>531</sup> The bill seeks to release elderly offenders, a growing percentage of the federal prison population, who have much lower rates of recidivism and higher costs due to health issues.<sup>532</sup> The SRA clarifies the amount of time an inmate must serve before release, expands eligibility to allow non-violent offenders to apply to the EHDPP, requires judicial review for elderly prisoner release decisions, and specifies that COVID-19 vulnerability can be used as a release basis.<sup>533</sup>

The SDA is certainly a step in the right direction. It is a fundamentally modest proposal, however, that attempts to patch existing laws affecting compassionate release and home confinement.<sup>534</sup> The SDA fails to address the chaos and disorganization involved with federal prisoner release programs.<sup>535</sup> It also ignores the continuing issues with state prisoner release.<sup>536</sup> Far more will be needed to address the continuing spread of COVID in correctional facilities across the nation.

#### PART IV: DRAFTING A BLUEPRINT FOR THE FUTURE

Our continued reliance on eugenic thinking has resulted in the discriminatory, inadequate treatment of captive and vulnerable populations during the COVID-19 pandemic. The effects of this treatment will ripple through communities long after the pandemic is over, because our standard legal remedies provide few solutions, primarily reifying the underlying eugenics-based policies. Thus, although eventually this particular pandemic will recede, the subliminal eugenic blueprint will still remain if we do not take action to counter it.

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531. *Id.*

532. *Id.*

533. *Id.*

534. See *Coronavirus Crisis in Prisons*, *supra* note 529.

535. See Zoe Tillman, "I Had Hit the Lottery": Inmates Desperate to Get Out of Prisons Hit Hard by the Coronavirus Are Racing to Court, BUZZFEED (Aug. 6, 2020), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-prison-release-rules-inconsistency>.

536. See, e.g., Anat Rubin et al., *Inside the U.S.'s Largest Maximum-Security Prison, COVID-19 Raged. Outside, Officials Called Their Fight a Success*, PROPUBLICA (June 24, 2020), [https://www.propublica.org/article/inside-the-uss-largest-maximum-security-prison-covid-19-aged?utm\\_source=pardot&utm\\_medium=email&utm\\_campaign=majorinvestigations&utm\\_content=feature](https://www.propublica.org/article/inside-the-uss-largest-maximum-security-prison-covid-19-aged?utm_source=pardot&utm_medium=email&utm_campaign=majorinvestigations&utm_content=feature).

Accordingly, we need to take steps to start eradicating the hidden pattern of eugenic thinking, particularly when it comes to our behavior towards captive and vulnerable populations. The best approach is two-fold. First, we must teach the complicated history of eugenics throughout all levels of education, in order to expose eugenic thinking at its root, making it a standard part of educational curriculums. This would include not only the true history of American eugenics, both past and present, but also contextualizing many scientific and medical discoveries stemming from victimizing individuals with disabilities, impoverished and elderly citizens, and people of color.

Second, the critical second step would create a permanent Commission on Ethics and Eugenics. This Commission would review all medical treatment of certain groups, including those incarcerated and under correction control, care home residents, foster care children, individuals with developmental and mental disabilities, and any other individuals in congregate living who have been historically discriminated against or neglected. The Commission would also oversee and regulate any kind of proposed human medical experiments, including drug trials. The general aim of the Commission would be to both inform and educate the public about current eugenic practices, as well as protect vulnerable and captive communities from risks and damages, in the public health and research arenas.

The general ignorance about the long history of American eugenics partially explains why the eugenics blueprint is so frequently used. Even among historians, academics, and medical professionals, the reality of our shameful past and present is rarely discussed, let alone specifically acknowledged and delineated. Accordingly, one way to spotlight our continued reliance on eugenic philosophy is to prominently teach its history in all levels of schooling.

It is well past time to teach our eugenic history and eradicate what is left of eugenic thinking in our present. Education and permanent ethical oversight will help make this a possibility.

#### **A. HIGHLIGHT THE HISTORY OF EUGENICS IN SECONDARY, COLLEGE, LAW & MEDICAL SCHOOLS**

Eugenic history would ideally be taught in middle or high school as a basic teaching module, and then become more complex and potentially more specialized in post-secondary education,

whether college, law school, medical school, or nursing/parahealth training. The standard middle and high school history curriculum largely ignores American eugenics and its influence on public policy.<sup>537</sup> At best, it is mentioned incidentally.

For children in secondary education, there are a few programs that can be used in social studies, humanities, or science classes.<sup>538</sup> For example, *Facing History and Ourselves*, which teaches about historical genocide, has a training course for teachers focusing on American eugenics.<sup>539</sup> Based on the text *Race and Membership in American History*, the course explains how “the eugenics movement represents a moral fault line in our history,” and helps students trace the path.<sup>540</sup> This module underlines that “the eugenics movement was not a footnote in history.”<sup>541</sup>

Once at the post-secondary education level, the teaching can become more specialized and complex. The inclusion of eugenics history into college pedagogy is particularly important given that so many institutions of higher learning have been loci of eugenic thinking.<sup>542</sup> But even at colleges and universities without those specific histories, it is crucial to explore and share our past decisions, in part because it is “a hidden part of American scientific history — people didn’t like to talk about it.”<sup>543</sup> Too many educational institutions are still reluctant to discuss this painful history and present practices, which makes such teaching all the more important.

Critically, American eugenic thinking should be taught not just in History or American Studies classes, but also in science and genetics classes, whether undergraduate or graduate level. The history of American Eugenics has long been “conspicuously

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537. See THOMAS CARGILL, EUGENICS IN HIGH SCHOOL HISTORY 6 (2020), <https://www.independent.org/publications/tir/article.asp?id=1489>.

538. See Christopher Rearden, *American Gothic*, TOLERANCE MAG. (2003), <https://www.tolerance.org/magazine/spring-2003/american-gothic>.

539. *Id.*

540. See generally FACING OURSELVES AND HIST., <https://www.facinghistory.org/resource-library?search=eugenics> (last visited Apr. 7, 2021).

541. See Rearden, *supra* note 538.

542. See Jonathan Chernoguz, *Why We Should Teach the History of Eugenics*, BIOPOLITICAL TIMES (October 28, 2014), <https://www.geneticsandsociety.org/biopolitical-times/why-we-should-teach-history-eugenics?id=8164>.

543. *Id.*

absent” from most modern science and genetics textbooks.<sup>544</sup> In contrast, Harvard now offers a graduate microbiology class entitled “Social Issues in Biology,” which specifically addresses the issues of eugenics, sterilization, reproducibility, and sexism in science.<sup>545</sup> As the Genetics Society of America has pointed out, teaching eugenics in science classes makes future scientists “less likely to repeat the racist mistakes of our past.”<sup>546</sup> Likewise, eugenics should be prominently taught in history and American studies classes, helping contextualize why such decisions were and still are being made.

It is equally important to teach about our history of eugenic thinking in law and medical schools. Law school currently gives very short shrift to eugenics past and present, at most discussing *Skinner* and *Buck v. Bell*. As Jonathan Simon has pointed out, however, influential judges such as Benjamin Cardozo relied heavily on eugenic thinking in their decision-making about crime control and incarceration, helping shape the modern criminal justice system, with its focus on public safety and punishments of probation, parole, and habitual offender laws.<sup>547</sup> Yet criminal law and procedure are rarely taught with any reference to eugenics.<sup>548</sup>

Likewise, medical schools give little time to eugenic philosophy, despite the medical world’s deep involvement throughout the twentieth century. One shining counterexample is Harvard Medical School, which began a Personal Genetics Education Program (with a few other medical schools) to offer genetics education programs nationwide.<sup>549</sup> The program offers workshops for all disciplines, including biology, social studies, law, government, health,

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544. See Michelle Markstein et al., *Want to Teach Eugenics History in Your Genetics Class? Advice and Resources to Take the Leap!*, GENETICS SOC. AM. (June 29, 2020), <http://genestogenomes.org/resources-and-tips-for-including-eugenics-history-in-your-genetics-class/>.

545. See M.R.F. Buckley, *When Science Can Harm*, HARV. MED. SCH. (March 2, 2020) <https://hms.harvard.edu/news/when-science-can-harm>.

546. *Id.*

547. See Simon, *supra* note 4, at 807-08.

548. See Jonathan Simon, *The Criminal Is to Go Free: The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 807-08 (2020).

549. See Amy Marcus, *Scientists Confront the Ghosts of Eugenics*, WALL ST. J. (Aug. 17, 2018), <https://www.wsj.com/articles/scientists-confront-the-ghost-of-eugenics-1534523929>.

humanities and bioethics.<sup>550</sup> Aside from this program, however, medical education about eugenics is quite minimal.

This was recently exemplified in 2018, when faculty at UC Berkeley's School of Public Health realized that the university was dispersing monies from the Genealogical Eugenic Institute Fund, which supports research and education in eugenics.<sup>551</sup> The fund offered approximately \$70,000 yearly to support research and education on policies, practices and technologies that could "affect the distribution of traits in the human race," citing a "modern definition of eugenics."<sup>552</sup> Although UC Berkeley ultimately froze the fund, it had benefited from it since 1975.<sup>553</sup> Equally important, the fund's continuing operation illustrates how "[e]ugenic thinking did not disappear after the horrors of the Holocaust were revealed . . . it remains embedded in medicine and public health today."<sup>554</sup>

In general, colleges and universities have only recently realized the major role of eugenics in their past. In October 2020, for example, USC removed the name of former president Rufus von KleinSmid from campus after recognizing its own role in helping California advance in the eugenics movement.<sup>555</sup> In the same month, Stanford University resolved to rename all buildings named after David Starr Jordan, a founding president of the university who was a driving force of the eugenics movement.<sup>556</sup> Commendably, Stanford is not simply renaming buildings, but also attempting to "better explain the full range of Jordan's legacy and contributions."<sup>557</sup> Given how many academics and scientists

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550. See *Professional Development*, PERSONAL GENETICS EDUC. PROJECT, <https://pged.org/teacher-development/> (last visited Apr. 7, 2021).

551. See Teresa Watanabe, *UC Berkeley Is Disavowing Its Eugenic Research Fund After Bioethicist and Other Faculty Call It Out*, L.A. TIMES (Oct. 26, 2020), <https://www.latimes.com/california/story/2020-10-26/uc-berkeley-disavows-eugenics-research-fund>.

552. *Id.*

553. *Id.*

554. Watanabe, *supra* note 551.

555. Theresa Watanabe, *USC Removes Name of Rufus von KleinSmid, A Eugenics Leader, From Prominent Building*, L.A. TIMES (June 11, 2020), <https://www.latimes.com/california/story/2020-06-11/usc-removes-name-of-former-president-rufus-von-kleinsmid-a-supporter-of-eugenics-from-prominent-building>.

556. See Chris Peacock, *Stanford Will Rename Campus Spaces Named for David Starr Jordan and Relocate Statue Depicting Louis Agassiz*, STAN. NEWS (Oct. 11, 2020), <https://news.stanford.edu/2020/10/07/jordan-agassiz/>.

557. *Id.*

were involved in eugenics in the early twentieth century, this type of reckoning is extremely important.

Similarly, Pomona College and CalTech have also protested honoring Robert Millikan, a major CalTech scientist but also the leader of the Human Betterment Foundation, a group infamous for influencing Nazi eugenic policies.<sup>558</sup> Pomona College is renaming its Millikan Laboratories, while CalTech has collected hundreds of signatures to remove Millikan's name from its buildings.<sup>559</sup> The University of Virginia has also taken steps to remove eugenicists' names from their buildings, changing the name of a medical school wing honoring Paul Barringer, a eugenicist who believed slavery benefited Black people.<sup>560</sup>

It has taken over 100 years for colleges and universities to even realize that some of their founders and most celebrated professors were eugenicists, as was common in the early parts of the twentieth century. It is time that the long tail of eugenics was exposed, taught, and discussed in all institutions of higher learning.

#### **B. CONTEXTUALIZE SCIENTIFIC AND MEDICAL “DISCOVERIES” OF PAST**

Most histories of medical and scientific discoveries are taught with minimal information about those who were human research subjects or unwitting victims of the investigators. In part, this is due to our very recent reckoning with our history of research and experiments on the captive and vulnerable.<sup>561</sup> Because Americans are generally ignorant of the origins of most scientific and medical discoveries, there is little awareness of how the captive and vulnerable have been misused for centuries in the name of science and medicine.

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558. Michael Hiltsik, *CalTech Faces Reckoning Over Its Links to Eugenics and Sterilization Movement*, L.A. TIMES (July 7, 2020), <https://www.latimes.com/business/story/2020-07-07/caltech-robert-millikan-eugenics-sterilization>.

559. Watanabe, *supra* note 551.

560. See Ruth Smith, *Another UVA Building Named After a Eugenicist Could Be Renamed*, ROANOKE TIMES (Aug. 1, 2019), [https://roanoke.com/news/education/another-uva-building-named-after-a-eugenicist-could-be-renamed/article\\_aee096af-aef6-5968-b60e-015932e99285.html](https://roanoke.com/news/education/another-uva-building-named-after-a-eugenicist-could-be-renamed/article_aee096af-aef6-5968-b60e-015932e99285.html).

561. See Esther Choo, *The James Marion Sims Problem: How Doctors Can Avoid Whitewashing Medicine's Racist History*, NBC NEWS (June 7, 2018), <https://www.nbcnews.com/think/opinion/james-marion-sims-problem-how-doctors-can-avoid-whitewashing-medicine-ncna880816>.

One recent example is our rediscovery of the history of Dr. Marion Sims, the celebrated “father” of gynecology. Sims did pioneer many gynecological techniques, including inventing the speculum and creating the current procedure to repair vesicovaginal fistulas.<sup>562</sup> These techniques, however, were infamously tested on female slaves without either their consent or any anesthesia, a fact widely known but only recently acknowledged.<sup>563</sup> NYC removed Sims’ Central Park statute in 2018,<sup>564</sup> and there is a growing movement to rename the Sims speculum the “Lucy” speculum, honoring the slave used most frequently in surgeries.<sup>565</sup>

Sims operated numerous times on female slaves to perfect his gynecological surgical techniques, always without anesthesia, which he justified on the racist, eugenicist basis that Black women did not feel pain.<sup>566</sup> This type of fallacy has persisted to this day, promoting false beliefs about biological differences between Black and white people which has been reflected in, among other things, differential pain treatment between races—specifically, undertreatment of pain in Black people.<sup>567</sup> These types of erroneous views have contributed to the continuing subconscious beliefs in eugenic thinking, resulting in untold suffering for many. And yet until very recently, Sims’ beliefs and practices were celebrated, without his shadow story being told.

Similarly, in the 1970’s, Dr. Eugene Saenger, a pioneering radiologist, experimented with high-dose total body irradiation (TBI), using approximately ninety cancer patients with localized, radio-resistant cancers, despite knowing that TBI was unlikely to work.<sup>568</sup> Saenger and his partner specifically chose poor or working-class patients—sixty percent of whom were Black—because

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562. See Maura Hohman, *How This Black Doctor is Exposing the Racist History of Gynecology*, USA TODAY (June 29, 2020), <https://www.today.com/health/racism-gynecology-dr-james-marion-sims-t185269>.

563. *Id.*

564. See Choo, *supra* note 561.

565. See Hohman, *supra* note 562.

566. *Id.*

567. See generally Kelly Hoffman et al., *Racial Bias in Pain Recommendation and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. USA 4296 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4843483/>.

568. William Dicke, *Eugene Saenger, Controversial Doctor, Dies at 90*, N.Y. TIMES (Oct. 11, 2007), <https://www.nytimes.com/2007/10/11/us/11saenger.html>.

“these persons don’t have any money and they’re black and they’re poorly washed.”<sup>569</sup> A full quarter of these patients died.<sup>570</sup>

Despite this, Saenger taught at the University of Cincinnati Medical School until his death, receiving a Gold Medal from the Radiological Society of North America.<sup>571</sup> He never suffered any serious repercussions from the experiments.<sup>572</sup> Although the experiment was mentioned in his obituary, little is taught about it in the history of radiology or medicine. We erase such history at our peril.

### C. COMMISSION ON ETHICS AND EUGENICS

In addition to increasing the level of education and general knowledge about eugenics, there also must be a more comprehensive oversight of current eugenic practices and philosophies. The best option would be a nationwide commission to investigate, oversee, and review the treatment of all vulnerable and captive populations. This Commission on Ethics and Eugenics (CEE) should be a permanent commission, charged with general oversight and the eventual eradication of eugenic thinking.

There have been two U.S. federal commissions focused on eugenics, both following major scandals, but neither lasted very long. After the Tuskegee Syphilis Study ended in 1972, Congress created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, spanning from 1974 to 1978.<sup>573</sup> Similarly, in 1994 Congress formed the Advisory Committee on Human Radiation Experiments (ACHRE), to review federally-funded radiation research on human subjects for experimental purposes.<sup>574</sup> ACHRE only lasted ten months before it was disbanded.<sup>575</sup> There have also been a few commissions and councils on bioethics over the past twenty years, largely focused on new biotechnologies, cloning, and stem cell research.<sup>576</sup>

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569. Appleman, *supra* note 9, at 15.

570. *Id.*

571. *Id.*

572. *Id.*

573. See *Former Bioethics Commissions*, BIOETHICS ARCHIVE, GEO. UNIV., [https://bioethicsarchive.georgetown.edu/pcbe/reports/past\\_commissions/](https://bioethicsarchive.georgetown.edu/pcbe/reports/past_commissions/) (last visited Apr. 7, 2021).

574. See *Advisory Committee on Human Radiation Experiments*, NSA, <https://nsarchive2.gwu.edu/radiation/> (last visited Apr. 7, 2021).

575. *Id.*

576. See *Former Bioethics Commissions*, *supra* note 572.

In the United States, the 1947 Nuremberg Code,<sup>577</sup> regulating medical experimentation on the detained, and the 1964 Declaration of Helsinki, regulating medical research involving human subjects,<sup>578</sup> formed the historical basis for regulating federally funded research.<sup>579</sup> These international policies, however, only loosely oversee medical, research, and health care performed in this country. Therefore, other than the periodic U.S. commission formations, there is little attention paid on a national level to the overarching issues of eugenics, human medical experimentation, or research ethics.

Following the Tuskegee syphilis study and a few additional research scandals in the 1960s and 1970s, political pressure arose to regulate medical research.<sup>580</sup> A pushback from researchers, however, resulted in our current system of Institutional Review Boards (IRB), which became the primary means of protecting research subjects.<sup>581</sup>

The IRB system, which is the major regulator of U.S. human subject research, is made up of the IRBs and two federal departments, the Office for Human Research Protections (OHRP) and the Food and Drug Administration (FDA).<sup>582</sup> OHRP regulates human subject research, and the FDA oversees drug and medical device development.<sup>583</sup> IRBs review research plans to check for informed consent and subject exposure to unreasonable risks, and assesses continuing research to oversee human subject protections.<sup>584</sup>

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577. *Nuremberg Code* (1949), NIH, <https://history.nih.gov/display/history/Nuremberg+Code> (last visited Apr. 7, 2021).

578. See Brandon Peters, *What Is the Declaration of Helsinki*, VERYWELL HEALTH (Oct. 27, 2020), <https://www.verywellhealth.com/declaration-of-helsinki-4846525>.

579. 45 C.F.R. § 46(1); see also *45 C.F.R. 46 FAQs*, HHS, <https://www.hhs.gov/ohrp/regulations-and-policy/guidance/faq/45-cfr-46/index.html> (last visited Apr. 7, 2021).

580. See Dan Turello, *Carl Elliott Answers Five Questions About COVID-19 and the Ethics of Medical Research*, INSIGHTS, LIBR. OF CONG. (June 4, 2020), <https://blogs.loc.gov/kluge/2020/06/carl-elliott-answers-five-questions-about-covid-19-and-the-ethics-of-medical-research/>.

581. See Carl Elliott, *Poor Reviews*, MOTHER JONES (Sept. 2010), <https://www.motherjones.com/environment/2010/09/institutional-review-boards/>.

582. See Simon Whitney, *Institutional Review Boards: A Flawed System of Risk Management*, 12 RES. ETHICS 182, 183 (2016), <https://journals.sagepub.com/doi/pdf/10.1177/1747016116649993>.

583. *Id.* at 183.

584. See JUNE BROWN, HHS, INSTITUTIONAL REVIEW BOARDS: A TIME FOR REFORM i (1998), <https://oig.hhs.gov/oei/reports/oei-01-97-00193.pdf>.

The IRB system has myriad problems, especially in its role as the primary bulwark against unethical research and treatment of the vulnerable and captive. First, IRBs often review “too much, too quickly, with too little expertise,” particularly in the bigger universities and organizations.<sup>585</sup> The combination of large workloads, minimal resources, and growing federal requirements all create a setting where it is difficult to fully review all projects.<sup>586</sup>

In addition, although IRBs are supposed to oversee human subject research, the boards were primarily designed with the intent to “review trial design, risk-benefit ratios, and informed-consent document” compliance, not to safeguard vulnerable populations’ safety and autonomy.<sup>587</sup> In other words, the IRB plan was never a formal regulatory system, but instead “essentially an honor code.”<sup>588</sup> Under the IRB system, medical research studies are evaluated by a panel of academic volunteers who review the research on paper, with little other oversight.<sup>589</sup> There is no consistent measure of IRB effectivity in meeting their goal of protecting human subjects.<sup>590</sup>

The OHRP usually does not oversee non-federally funded trials, largely deferring to the FDA.<sup>591</sup> Accordingly, the agency’s public response to allegations of research abuse has largely evaporated.<sup>592</sup> Put another way, “the federal watchdog for human subject protections is ineffective in its role in investigating complaints,” as well as in preventing violations.<sup>593</sup>

Where does this leave us? A world where insufficient regulatory bodies oversee the health and safety of captive and vulnerable populations. Indeed, concerns have been raised about the IRB system’s ability to protect research participants from unnecessary

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585. *Id.* at ii.

586. *Id.*

587. See Carl Elliott & Roberto Abadie, *Exploiting a Research Underclass in Phase 1 Clinical Trials*, 358 N. ENG. J. MED. 2316, 2317 (2008).

588. Carl Elliott, *The University of Minnesota’s Medical Research Mess*, N.Y. TIMES (May 26, 2015), [https://www.nytimes.com/2015/05/26/opinion/the-university-of-minnesotas-medical-research-mess.html?ref=opinion&\\_r=0](https://www.nytimes.com/2015/05/26/opinion/the-university-of-minnesotas-medical-research-mess.html?ref=opinion&_r=0).

589. *Id.*

590. *Id.*

591. See Marisa Taylor, *Unregulated Herpes Experiments Expose A Black Hole of Accountability*, KHN (Dec. 17, 2017), <https://khn.org/news/unregulated-herpes-experiments-expose-black-hole-of-accountability/>.

592. *Id.*

593. *Id.*

risk of harm.<sup>594</sup> In part, this is because oversight agencies—university IRBs, the OHRP, the FDA, or other regulatory agencies—often fail to act, even in the face of shocking abuse.<sup>595</sup> The OHRP, the federal watchdog for human subject protections, does very little to oversee compliance activities, and is largely ineffective in investigating complaints and preventing violations.<sup>596</sup> Only federally funded experiments receive OHRP oversight—privately funded research is largely unregulated.<sup>597</sup>

These many lapses in regulatory oversight beg for a more permanent form of regulation. A permanent commission could be tasked with a broad mandate to review all medical treatment of certain groups, including those incarcerated and under correctional control, long-term care home residents, foster-care children, individuals with developmental and mental disabilities, the mentally ill, and any other individuals in congregate living who have been historically ignored or discriminated against in medical treatment.

These type of ethical oversight commissions already exist in Europe. The Council of Europe, for example, has a bioethical subgroup, the Committee on Bioethics, which focuses on establishing frameworks to prevent abuse with any biological or medical research or technology.<sup>598</sup> The Committee on Bioethics scrutinizes ethical issues affecting the individual and their rights and dignity, in genetics, transplantation, biobanks, and other kinds of emerging technologies.<sup>599</sup> The group is comprised of various experts from different fields, including human rights, biology and medicine.<sup>600</sup> The Committee is also part of the larger Steering Committee for Human Rights.<sup>601</sup>

What are some of the areas upon which the U.S. CEE could focus? We can draw once again from the Committee on Bioethics,

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594. See *NIH Official Sees Need to Evaluate Effectiveness of IRBs In Protecting Study Volunteers*, CENT. WATCH (Oct. 18, 2020), <https://www.centerwatch.com/articles/23406>.

595. See Taylor, *supra* note 590.

596. Marisa Taylor, *supra* note 591.

597. *Id.*

598. See *Bioethics*, COUNCIL OF EUR., <https://www.coe.int/en/web/bioethics/at-a-glance> (last visited Apr. 7, 2021).

599. *Id.*

600. *Id.*

601. See INFORMATION DOCUMENT, COMM. ON BIOETHICS 1 (2019), <https://rm.coe.int/inf-2019-7-info-doc-dh-bio-e/16809c82bf>.

which, among other tasks: created a protocol to protect human rights and dignity of persons with mental illness regarding involuntary placement and involuntary treatment;<sup>602</sup> developed a training course for legal and health professionals on protecting human rights in the biomedical field;<sup>603</sup> continually assesses ethical and legal challenges raised by biomedical developments;<sup>604</sup> and promotes public debate on any human rights issues raised by recent developments in science, medicine, and technology.<sup>605</sup> The Committee on Bioethics also holds hearings with international organizations, NGOs, research and academic institutions, and specialists to further inform their oversight.<sup>606</sup>

Likewise, the European Commission (EU) also has a special Ethics Review procedure, noting that “ethical compliance is pivotal to achieve real research excellence.”<sup>607</sup> Following the structure of European research regulations, the EU’s vision of research ethics is based on the unequivocal European focus on human rights.<sup>608</sup> These include specific rights for the integrity of the person, stating plainly that “everyone has the right to respect for his or her physical and mental integrity.”<sup>609</sup> These rights include “the free and informed consent of the person concerned,” and “the prohibition of eugenic practices, in particular those aiming at the selection of persons.”<sup>610</sup> Nowhere in any U.S. law or regulations are there any such parallel rights.

Finally, the EU requires ethical review of all funded research, to ensure that research activities are conducted in compliance with fundamental ethical principles.<sup>611</sup> This means that proposals are evaluated both on scientific merit as well as on ethical and social impact.<sup>612</sup> There is no such overarching ethical evaluation on federally funded research in the U.S.

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602. See INFORMATION DOCUMENT, COMM. ON BIOETHICS 2 (2019).

603. *Id.*

604. *Id.*

605. *Id.* at 6.

606. *Id.* at 18.

607. See ETHICS FOR RESEARCHERS, EUR. COMM’N, DIRECTORATE-GENERAL FOR RESEARCH AND INNOVATION 2 (2013), [https://ec.europa.eu/research/participants/data/ref/fp7/89888/ethics-for-researchers\\_en.pdf](https://ec.europa.eu/research/participants/data/ref/fp7/89888/ethics-for-researchers_en.pdf).

608. *Id.* at 4.

609. EUR. CHARTER OF FUNDAMENTAL RTS., ART. 3.

610. *Id.*

611. ETHICS FOR RESEARCHERS, *supra* note 607, at 7.

612. *Id.* at 8.

The U.S. should create an analogous commission, with the power to oversee all federally funded research, impose ethical guidelines on medical and scientific treatment done on captive and vulnerable communities, and scrutinize any practices smacking of eugenics. Similar to the EU Commission, the CEE would oversee all medical and pharmacological treatment of any captive or vulnerable populations, as well as any proposed federally funded research or medical experimentation. At minimum, these populations would include: all individuals who are incarcerated in prisons or jails; those who are under correctional control, including people sentenced to alternative corrections; people living in nursing homes and long-term care; individuals with intellectual or developmental disabilities who are residing in institutions or congregate care; and children in foster care, particularly those living in group residential homes.

The general aim of the CEE should be to inform, educate, and protect vulnerable and captive communities from risks and damage, in both public health and medical research. The European Parliament's resolution on the protection of vulnerable adults is a useful model to follow.<sup>613</sup> The Parliament's resolution includes a helpful framework regarding how to oversee the welfare of the vulnerable, specifically focusing on paying "particular attention to the needs of the most disadvantaged vulnerable adults and to put measures in place aiming to ensure that they do not suffer discrimination as a result of their condition."<sup>614</sup> Likewise, the World Health Organization (WHO) has promulgated a Code of Ethics and Professional Conduct,<sup>615</sup> grounding its research and health practices upon "a robust ethical framework," with a commitment to "developing and promoting ethical, evidence- and human-rights-based guidance for the development of evidence-based health policies, and guidelines."<sup>616</sup> Notably, the two WHO Codes of Conduct apply to everyone providing health care or performing research, since "responsibility for ethical behaviour in research

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613. *Resolution on the Protection of Vulnerable Adults*, EUR. PARLIAMENT (June 1, 2017), [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0235\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0235_EN.html).

614. *Id.* at AA.7.

615. *Code of Ethics and Professional Conduct*, WHO (April 2017), [https://www.who.int/about/ethics/code\\_of\\_ethics\\_full\\_version.pdf?ua=1](https://www.who.int/about/ethics/code_of_ethics_full_version.pdf?ua=1).

616. WHO, CODE OF CONDUCT FOR RESPONSIBLE RESEARCH 6 (2017), <https://www.who.int/about/ethics/code-of-conduct-responsible-research.pdf?>.

lies with all staff members at all levels, and forms the basis of WHO's reputation."<sup>617</sup>

The WHO's ethical principles on research are an excellent framework for the Commission on Ethics and Eugenics. Here are the most relevant:

- Staff members are required to demonstrate intellectual and moral honesty in proposing, conducting, and reporting research.
- Staff members must ensure that personal views, convictions, previous experiences or future ambitions do not compromise the objective scientific process, the performance of their official duties or the interests of WHO.
- Alongside the health needs of individuals and communities, [] staff must consider all factors that affect quality of life when designing, conducting, and reporting research. These factors include the social, economic, and psychological needs and expectations of individuals and communities. . . .
- Staff are required to build their professional competence on a foundation of integrity, scientific knowledge, and personal commitment to advancing health for all.<sup>618</sup>

Applied to all doctors, policy makers, correction officials, foster care administrators, and group home/congregate living staff, these principles could make a tremendous difference in how vulnerable and captive populations are treated.

The CEE could be given some regulatory teeth by having punitive sanctions for violators, whether research scientists, correction officials, hospital or institutional doctors, long-term care home workers, or foster care administrators. For proven cases of misconduct in either research or health services provision, sanctions could include: a written letter of reprimand, placed in the file; enforced resignation; dismissal with prejudice from the job; issuing an order to stay away from the institution for a period of time; imposition of financial penalties for other costs associated with any related healthcare or remediation to victims; expulsion

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617. *Id.* at 10.

618. *Id.* at 11.

from professional licensure; or exclusion from membership of academic and/or professional bodies.<sup>619</sup>

Creating a Commission to oversee the work of medical practice and human research studies on the captive and vulnerable would be new for the medical/research world. Such commissions have been envisioned in the world of criminal justice, however. New York's Senate Bill S2412D, establishing the Commission on Prosecutorial Conduct (CPC), creates a watchdog commission on prosecutorial conduct, regulating "unprofessional, unethical, and unlawful" conduct by the state's sixty-two DA's offices.<sup>620</sup> The CPC has the power to issue subpoenas, compel witnesses to testify, conduct hearings, and request any relevant materials that are relevant to the ongoing investigation.<sup>621</sup> The Commission on Ethics and Eugenics would need similar powers to increase and enforce accountability.

Currently, there are limited sanctions for violation of research ethics, even for human medical experimentation on the captive and vulnerable. In contrast, medical codes of ethics often have teeth. State and local medical societies can sanction physicians who have committed ethical violations, causing serious professional repercussions.<sup>622</sup> For example, after serious medical wrongdoing is found, medical disciplinary actions can span from relatively minor (like attending some continuing education programs) to severe (such as permanent loss of licensure or imprisonment).<sup>623</sup> Accordingly, we should apply some medical ethics sanctions to the largely unregulated areas of health treatment and research ethics, particularly in regards to captive and vulnerable populations. Our ongoing failure to oversee the treatment of our most at-risk populations, as well as our continued reliance

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619. See ESTONIAN RSCH. COUNCIL, OVERVIEW OF THE EUROPEAN RESEARCH INTEGRITY PRINCIPLES AND GUIDELINES 16 (2017), [https://www.etag.ee/wp-content/uploads/2017/10/Overview-of-the-Research-Integrity-Principles-and-Guidelines\\_ETAg\\_ENG.docx.pdf](https://www.etag.ee/wp-content/uploads/2017/10/Overview-of-the-Research-Integrity-Principles-and-Guidelines_ETAg_ENG.docx.pdf).

620. See Jesse McKinley, *A New Panel Can Investigate Prosecutors They Plan to Sue to Block It*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/nyregion/cuomo-prosecutors-oversight-commission.html>.

621. *Id.*

622. See Maxwell Mehlman, *Can Law Save Medicine*, 36 J. LEG. MED. 121, 137-38 (2015).

623. See James DuBois et. al., *Serious Ethical Violations in Medicine: A Statistical and Ethical Analysis of 280 Cases in the United States from 2008-2016*, 19 AM. J. BIOETH. 16, 30 (2019).

on a blueprint of eugenics, highlights the necessity of a permanent Commission on Ethics and Eugenics.

### CONCLUSION

The legacy of eugenic thinking still drives our actions today. Our subliminal reliance on eugenic philosophy has created a system of consistent neglect and discrimination against those individuals who are incarcerated, detained, institutionalized, disabled, living in long-term care homes, or under correctional control. The COVID-19 pandemic has highlighted the urgent need to redraft this flawed blueprint of discriminatory practices in medicine, health care, and research. We must educate Americans about our continuing practice of eugenics, and how to identify its hidden influence. Additionally, we must protect our captive and vulnerable communities by creating more oversight and regulation of their treatment, with the help of a permanent Commission on Ethics and Eugenics. Only then can we finally begin to discard our eugenic past and present, and chart a less discriminatory future.