

Open Letter to the Yale Law Journal Denouncing Ableism and Eugenics

To the Yale Law Journal:

We commend your inclusion of scholarship concerning the disability community in your journal. In light of COVID-19 and the erasure of the rights and experiences of people with disabilities throughout legal academia, these discussions are more salient than ever. As a result, the manner in which disabled experiences are brought to the forefront greatly impacts how they are received and interpreted.

The forthcoming article “Why Disability Law Permits Evidence-Based Triage in a Pandemic” by Govind Persad [1] misrepresents the disability rights movement and weaponizes disability law to support a harmful argument rooted in ableism and eugenics. We recognize the importance of “sparking conversation and encouraging reflection among scholars and students” as the Yale Law Journal strives to do. [2]

However, not every contrary opinion furthers the discussion, legally or ethically. As the top law journal in the country, [3] Yale has the utmost control over what it selects for publication and carefully curates the voices it chooses to elevate. These choices are not without consequences -- they carry great weight in the legal community. Viewpoints that advocate for actions rooted in eugenicist ideologies do not further productive discussion about disability law or medical ethics, but rather further ingrain the long-discredited idea that certain lives are not worth preserving.

In evaluating the contribution of Professor Persad’s piece, we must not ignore the many ways that eugenic ideology has been weaponized to justify the sterilization, euthanization, institutionalization, and incarceration of people with disabilities in the United States and throughout the world; these systems have had an especially disastrous effect on people of color. [4] The COVID-19 crisis has highlighted how institutionalized racism and the legacies of eugenics have made Black and brown people virtually expendable in the United States. [5]

In *Buck v. Bell*, Justice Holmes and the Supreme Court infamously condoned the idea of creating a population free of people with disabilities by forcibly sterilizing those with disabilities who “sap the strength of the State . . . in order to prevent [the State] being swamped with incompetence.” [6] These sterilizations targeted people in institutions—people confined for their disabilities and viewed as unable to live a worthy life—so that they could make “sacrifices” for the good of the rest of society. [7] These patterns were also emphatically racialized and extended through the 20th century to sterilize black women, for instance, “without their knowledge or consent.” [8]

Professor Persad picks up where Justice Holmes leaves off. He advocates that people with disabilities who have lower life expectancies or “benefit” less from treatment can make sacrifices to save more lives. [9] The disabled community should not suffer from the shortcomings of society. This logic burdens only people with disabilities, and disproportionately people of color with disabilities, in a way that unthinkable reinforces the idea that not all disabled lives are worth living.

In considering this article, your journal has abandoned its duty as a steward of rigorous legal academia and precedent-setting ideology. Professor Persad’s piece does not add sufficient constructive commentary to outweigh the harm of his words — particularly given the influence they may have during a global pandemic. Notably, Professor Persad’s article is also silent on any racial implications of his proposed ideology.

We ask that the journal revoke publication of Professor Persad’s piece in light of these glaring issues. If the journal must move forward with publication for reasons outside its control, there must be a thorough substantiation of every citation to eradicate the rampant mischaracterizations of fact and law, many of which Professor Samuel R. Bagenstos indicates in his article. [10] Further, any publication of this piece must be couched within a clear context of the current global crisis and juxtaposed with Bagenstos’ work. Regardless of how you resolve the concerns expressed in our letter, we hope that this will be a long-term impetus for training among your staff on issues within the disability community. Disability rights deserve their own voice, not one paternalistically filtered through the lens of medicalization and eugenics. We look forward to your response.

Footnotes:

[1] Govind Persad, *Why Disability Law Permits Evidence-Based Triage in a Pandemic*, 130 *YALE L.J.F.* (forthcoming 2020) (Univ. of Denver Legal Studies Research Paper No. 20-10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3571139.

[2] About the Yale Law Journal, *YALE L.J.*, <https://www.yalelawjournal.org/about-the-yale-law-journal> (last visited Apr. 20, 2020).

[3] 2021 Best Law Schools, *U.S. NEWS & WORLD REP.*, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Apr. 20, 2020).

[4] See, e.g., *Racial Eugenics*, EQUAL JUSTICE INITIATIVE (Oct. 1, 2013), <https://eji.org/news/history-racial-injustice-racial-eugenics> (“American sterilization laws were also used as a tool of racialized population control. From the 1920s to 1970s, thousands of poor, Southern black women were sterilized without their knowledge or consent.”); Gregory W. Rutecki, *Forced Sterilization of Native Americans: Late Twentieth Century Physician Cooperation with National Eugenic Policies*, *CTR. FOR BIOETHICS & HUM. DIGNITY* (Oct. 8, 2010), <https://cbhd.org/content/forced-sterilization-native-americans-late-twentieth-century-physician-cooperation-national> (discussing forced sterilizations of Native women); LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 21-22 (2017) (documenting sterilization and genocide of Native populations in the U.S.); Criminal Justice Fact Sheet,

NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Apr. 22, 2020) (noting that African Americans are incarcerated at more than five times the rate of whites); Lucius Couloute, New Poll Shows Mass Incarceration is a Latinx Issue, PRISON POLICY INITIATIVE (Jan. 24, 2018), <https://www.prisonpolicy.org/blog/2018/01/24/new-poll-shows-mass-incarceration-is-a-latinx-issue> (“Latinx people make up about 20% of the U.S. incarcerated population.”); Kali Holloway, Modern-Day Eugenics? Prisoners Sterilized for Shorter Sentences, SALON (July 28, 2017), https://www.salon.com/2017/07/28/modern-day-eugenics-prisoners-sterilized-for-shorter-sentences_partner.

[5] See, e.g., Jeffery C. Mays & Andy Newman, Virus is Twice as Deadly for Black and Latino People Than Whites in N.Y.C., N.Y. TIMES (updated Apr. 14, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html> (“In New York City, Latinos represent 34 percent of the people who have died of the coronavirus but make up 29 percent of the city’s population, according to preliminary data from the city’s Health Department. Black people represent 28 percent of deaths but make up 22 percent of the population.”); see also Fabiola Cineas, Covid-19 is Disproportionately Taking Black Lives, VOX (Apr. 8, 2020), <https://www.vox.com/identities/2020/4/7/21211849/coronavirus-black-americans> (listing disproportionate impact in cities across the U.S. and noting that “[h]undreds of years of slavery, racism, and discrimination have compounded to deliver poor health and economic outcomes for black people — heart disease, diabetes, and poverty, for starters — that are only being magnified under the unforgiving lens of the coronavirus pandemic”). Due to higher rates of poverty, Black and brown people have been forced to work frontline jobs at minimum wage just to meet their basic needs. See Elise Gould & Heidi Shierholz, Not Everybody Can Work from Home, WORKING ECON. BLOG (Mar. 19, 2020), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home>. Similarly, our racist criminal justice system has refused community pleas to release people of color from jails and prisons across the country, despite astronomically high rates of COVID-19 infections. See Ed Pilkington, Mass Incarceration Could Add 100,000 Deaths to US Coronavirus Toll, Study Finds, GUARDIAN (Apr. 22, 2020), <https://www.theguardian.com/us-news/2020/apr/22/coronavirus-us-jails-incarceration-death-toll-study>. Our government’s actions and inactions in this crisis reveal, yet again, how they cast aside the lives of Black, brown, and disabled people.

[6] 274 U.S. 200, 207 (1927).

[7] *Id.*

[8] Racial Eugenics, *supra* note 4.

[9] See, e.g., Persad, *supra* note 1, at 4 (“For instance, securing ventilators for patients with severe chronic lung disease who are unlikely to benefit sacrifices the lives of patients with other disabilities . . . who could benefit.” (emphasis added)); *id.* at 5 (“In absolute scarcity, recognizing that some patients would require more of a scarce treatment to survive . . . presents a choice between saving more lives and saving fewer.”). While Persad attempts to disaggregate “quality of life” choices about patients from those he finds acceptable, his argument ends up in the same place: devaluing disabled lives.

[10] Samuel R. Bagenstos, May Hospitals Withhold Ventilators from COVID-19 Patients with Pre-Existing Disabilities? Notes on the Law and Ethics of Disability-Based Medical Rationing, 130 YALE L.J.F. (forthcoming 2020) (manuscript at 15-16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559926.

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