EXCLUSIONARY ABLEISM

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ABSTRACT

The U.S. immigration system reflects society's values and priorities and shapes the makeup of the country. Since the earliest immigration laws and continuing through today, people with disabilities have been targeted for exclusion and expulsion. This Article employs philosopher Louis Althusser's theory on ideology to analyze and explain how U.S. immigration law not only reflects an ableist ideology, but actively reinforces it. We coin a new term, "exclusionary ableism," to describe this phenomenon.

Althusser identified two crucial aspects of how ideology is replicated throughout society. First is the Ideological State Apparatus, which influences people every day through institutions such as family, religion, and schools. Second is the Repressive State Apparatus, which enforces ideology through violent and coercive institutions such as the police, courts, and military. Exclusionary ableism reflects these two components, as this concept both (1) describes the dominant ideology in the United States that rejects and fears people with disabilities and is apparent in our immigration law and policy, and (2) explains how that ideology is actively reproduced through the U.S. immigration system, which functions to exclude and expel noncitizens with disabilities.

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INTRODUCTION

Despite civil rights gains over the past several decades, people with disabilities continue to be seen as unworthy at best,[1] and feared as dangerous at worst. On the basis of various disabilities, people are presumed to be unintelligent,[2] violent,[3] unable to take care of themselves,[4] or otherwise fail to contribute to their communities. The United States' immigration system as a

1. Angélica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 2021 WIS. L. REV. 269, 274 (2021) [hereinafter Guevara, *Disability Rights*] (describing how disability antidiscrimination law focused on "reasonable accommodations" centers non-disabled people as the standard and treats people with disabilities as unworthy, a stereotype that fails to maximize their human potential).

2. *See generally* JAY TIMOTHY DOLMAGE, ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION (2017) (arguing that disability has often been viewed as incompatible with higher education and higher education has viewed disability as a problem to be solved).

3. MARGARET PRICE, MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE 133 (2011) (arguing that the link between mental illness and violence is a false stereotype and misconceived).

4. Jeffrey Ross, Jamia Marcell, Paula Williams & Dawn Carlson, *Postsecondary Education Employment and Independent Living Outcomes of Persons with Autism and Intellectual Disability*, 26(4) J. POSTSECONDARY EDUC. & DISABILITY 337, 337 (2013) (noting that people with disabilities can obtain employment and live independently, thus contributing to their communities, when given proper support).

whole accepts and perpetuates this ableist ideology. This Article breaks down how it does so within the functions of each branch of the immigration system: immigration police, immigration courts, and immigration "gatekeepers."

Immigration law consists of a complex web of statutes, administrative regulations, and jurisprudence that reflects national values and priorities. Immigration law, including laws defining U.S. citizenship, regulates who is permitted to be in the country and thereby shapes the makeup of the populace.[5] There are two primary functions of immigration control: (1) to admit or exclude people seeking entrance, and (2) to expel certain people who are already in the country.[6] Within that legal framework, our immigration laws perpetuate ableism, meaning the belief that people with disabilities are inferior to those without. Recent scholarship highlights the underutilization of disability rights laws to protect noncitizens in removal proceedings,[7] as well as the opportunity that a disability justice framework presents toward eliminating ableism in the immigration system.[8] This Article employs Louis Althusser's theory of ideology to demonstrate how the U.S. immigration legal system functions to reinforce ableism in society, through an ideology and process that we call "exclusionary ableism."

Althusser identified two crucial aspects of how ideology is replicated throughout society. First is the Ideological State Apparatus (ISA), which influences people every day through institutions such as family, religion, and schools.[9] Second is the Repressive State Apparatus (RSA), which enforces ideology through violent and coercive institutions such as the police, courts, and military.[10] Exclusionary ableism reflects these two components, as this concept both (1) describes the dominant ideology in the United States that rejects and fears people with disabilities and is apparent in our immigration law and policy, and (2) explains how that ideology is actively reproduced through the U.S. immigration system, which functions to exclude and expel noncitizens with disabilities.

Despite the prevalence of disability in society, stereotypes and discrimination proliferate. The Center for Disease Control and Prevention has estimated

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5. Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 363 (2012) ("[T]he basic function of citizenship law is to decide that some individuals belong to society as full and formal members, while others are noncitizens and thus outsiders in some meaningful respects.").

6. *See* Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (defining the grounds for excluding a noncitizen from the United States); Immigration and Nationality Act § 237, 8 U.S.C. § 1227 (defining the grounds for deportability).

7. *See* Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, 17 HARV. L. & POL'Y REV. 231, 250–54 (2022) (explaining applicability of Section 504 of Rehabilitation Act and Title II of ADA to people with disabilities who are in immigration detention and/or removal proceedings).

8. Nermeen Arastu & Qudsiya Naqui, *Standing on Our Own Two Feet: Disability Justice as a Frame for Reimagining Our Ableist Immigration System*, 71 UCLA L. Rev. 236 (2024) (arguing that justice for people with disabilities must be included in discussions around immigration abolition).

9. LOUIS ALTHUSSER, ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES 76 (2014) [hereinafter ALTHUSSER ISA].

10. *See id*. at 65–66, 68.

that approximately twenty-eight percent of adults have a disability.[11] And as human beings age, we become more likely to develop a disability. The reality is that anyone can become disabled at any time, as we have seen in the aftermath of the COVID-19 pandemic.[12] Although people with disabilities make up a significant part of society, they are stereotyped as being "unproductive," which has serious implications in a capitalist society where production is associated with profit and worth.[13] This stereotype is why disability antidiscrimination law came about, to intentionally protect people with disabilities. Additionally, having a disability, especially mental illness, has often been associated with being dangerous.[14] Even where society has attempted to accommodate for disability, there is often a paternalistic approach that pities the individual and strips them of their agency and self-determination.[15] Moreover, the labeling of disabilities themselves has been used as a method of social control.[16] As Bernard Harcourt has written specific to psychiatric disabilities, "mental illness was an abstraction designed to rationalize the confinement of individuals who manifested disruptive and aberrant behavior and the asylum's primary function was to confine social deviants and/or unproductive persons."[17] By first labeling people as disabled, and then dismissing people with disabilities as worthless or dangerous, our societal and legal systems justify hiding or otherwise getting rid of that individual. To recognize, name, and combat ableist ideology, Disability Studies and Mad Studies arose.[18]

An important principle of Disability Studies and Mad Studies is the intentional use of terminology to reassign meaning. There are two terms of particular importance in this Article. First, *disability,* as defined by disability

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11. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Disability Impacts All of Us Infographic* (May 15, 2023), https://perma.cc/W8JJ-JEZ7.

12. Angelica Guevara, *To Be, or Not to Be, Will Long-COVID Be Reasonably Accommodated Is the Question*, 23 MINN. J. L. SCI. & TECH. 253, 255 (2022).

13. David Pfeiffer, *The Philosophical Foundations of Disability Studies*, 22(2) DISABILITY STUD. Q. 3, 4 (2002) (highlighting that one of the philosophical foundations in starting disability studies was to eradicate the ideology that people with disabilities are unworthy of investment).

14. Tanja Aho et al., *Mad Futures: Affect/theory/violence*, 69 AM. Q. 291 (2017) (describing how dangerousness is ascribed to "madness" through racialization); Michael L. Perlin & Keri K. Gould, *Rashomon and Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 443–44 (1995).

15. This Article focuses on the ways in which the immigration system operates in an exclusionary capacity. Thus, it does not analyze the ways in which the immigration system sometimes allows people with disabilities to reside in the United States. For a critique of the paternalism permeating immigration cases that *include* people with disabilities, *see* Arastu & Naqui, *supra* note 8, at 280 (describing the "charity model" where noncitizens with disabilities must be presented as "objects of pity" in order to win discretionary relief).

16. Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 HARV. C.R.-C.L. L. REV. 663, 713 (2023).

17. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1759 (2006) (internal quotation marks omitted) (quoting GERALD N. GROB, MENTAL ILLNESS AND AMERICAN SOCIETY, 1875-1940, at ix-x (1983)).

18. SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 8–9 (1998). *See* JAY TIMOTHY DOLMAGE, DISABILITY RHETORIC 21–23 (2014). *See also* MARGARET PRICE, MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE 8–20 (2011).

scholars, is "the disadvantage or restriction of activity caused by a contemporary social organism which takes no or little account of people who have physical [or mental] impairment and thus excludes them from the mainstream of social activities."[19] Second, *mental illness* is defined as "a mental, behavioral, or emotional disorder."[20] These conditions are considered by the medical community as impairments to be fixed or otherwise addressed.[21] Contrasted with illnesses, *disability* reflects how an individual is treated by society.[22] Within the broader category of disability, there are both apparent and non-apparent disabilities. An *apparent disability* is typically immediately recognizable, such as those requiring the use of a wheelchair, while a *non-apparent disability* may not be readily observed.[23] Examples of non-apparent disabilities include mental conditions such as autism, schizophrenia, and developmental disorders, as well as physical conditions such as HIV, deafness, and cancer, of which any can become "intermittently apparent."[24] However, people eventually may gain awareness of another's non-apparent disability. Margaret Price, a renowned disability scholar, offers "stimming" as an example. Stimming is a self-soothing repetitive activity that may be practiced by persons with a variety of disabilities, including autism, obsessive-compulsive disorder, or anxiety.[25] Where a disability such as these may otherwise be non-apparent, stimming is a behavior that is readily observable.[26] Similarly, a

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19. Mike Oliver, *The Politics of Disability*, 4 CRITICAL SOC. POL'Y 21, 22 (1984); Deborah Marks, *Models of Disability*, 19 DISABILITY & REHAB. 85, 85–86 (1997) (discussing the difficulty of defining disability due to the constantly changing nature of qualifying factors); TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED 106 (2nd ed. 2014) (proposing that the social model may cause disabled individuals to define themselves in comparison or contrast with non-disabled individuals); JANE CAMPBELL & MIKE OLIVER, DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE 19–21 (1996) (describing the shift to the social model and subsequent positive change in the political mobility of organizations founded by disabled individuals).

20. *Mental Illness*, NAT'L INST. OF MENTAL HEALTH (Sept. 2024), https://perma.cc/24SA-HDG4.

21. Physicians define *impairment* as "lacking part of or all of a limb, or having a defective limb, organism or mechanism of the body." MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH 11 (1990). The mind is considered part of the body and therefore "impairment" includes conditions of the mind. In short, an "[i]mpairment is, in fact, nothing less than a description of the physical body." MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 35 (1995).

22. LINTON, *supra* note 18, at 11–12 (describing the difference between definitions of "disability," including its medical definition, which has a negative connotation, and its definition as a social/political category, which relates to the identity of "a group bound by common social and political experience"). *See* Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 422–23 (2011). *See also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 50 (2009) (explaining the importance of a pan-disability identity when unifying a group for a political movement).

23. This Article uses the term "non-apparent" instead of "visible" or "invisible" disabilities because it is inherently ableist to base the description of disability on sight-defined perception. *See* PRICE, *supra* note 3, at 18 (explaining that referring to mental disability as "invisible" or "hidden" is a misnomer because it "may become vividly manifest[ed]" and "is not so much invisible as it is apparitional, and its 'disclosure' has everything to do with the environment in which it dis/appears").

24. Margaret Price, *The Bodymind Problem and the Possibilities of Pain*, 30 HYPATIA 268, 272 (2015) (articulating that stimming does not fit into normative social behavior and it is intermittently visible not invisible).

25. Margaret Price, *Defining Mental Disability*, *in* DISABILITY STUDIES READER 298, 306 (Lennard J. Davis ed., 2013).

26. Olivia Ordoñez, *"The Bodymind Problem and the Possibilities of Pain" by Margaret Price*, WORDPRESS BLOG (Apr. 19, 2018), https://perma.cc/N9ED-D7VB.

person who is deaf may appear to be a hearing person until they begin to use sign language to communicate. And a person with HIV or cancer may appear healthy until their disability becomes apparent, with perhaps weight loss, lesions, or possible hair loss.

A second point of terminology in this Article is our use of the word "Mad." Mad Studies rejects a biomedical approach that labels individuals under the umbrella of mental illness/mental health because madness exists as an identity that should not carry pejorative association.[27] The biomedical approach uses terms like normal/abnormal, which are "terms used to distinguish people with and without disabilities,"[28] similar to "sane and Mad . . . creat[ing] hierarchies between individuals."[29] However, for the purposes of this Article, we use "Mad," "mental illness," and "mental disability" interchangeably, in an effort to use terms that most people are familiar with and in recognition that people that fall under this umbrella have differing preferences. Additionally, our legal paradigms have not yet adopted the terminology and concepts of the disability rights movement that do not label people with disabilities as defective.[30] Thus, we use a mixture of terminology, depending on the context, to strive for clarity.

In society as a whole, disregarding or dismissing someone with a disability because they are seen as inferior dehumanizes them.[31] For noncitizens, who already hold a status that is seen as "other" or indicative of not belonging,[32] stigma around disability is especially damaging. Exclusionary ableism—meaning, how ableist ideology exists within, and is exercised through, the immigration system—can lead to physical, mental, or emotional harm, and even death. Thus, this Article exposes the effects of this underlying harmful ideology on noncitizens with disabilities.

Section I of this Article discusses the historic and current exclusion of migrants with disabilities under U.S. immigration law and policy. Section II

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27. Peter Beresford, *'Mad', Mad Studies and Advancing Inclusive Resistance,* 35 DISABILITY & SOC'Y 1337, 1338 (2020).

28. LINTON, *supra* note 18, at 22, 24.

29. *See* Shayda Kafai, *The Mad Border Body: A Political In-Betweeness*, DISABILITY STUDIES Q. (Jan. 1, 2013), https://perma.cc/HWW6-8VSB.

30. Although not a main focus of this Article, we also note that sanity and madness are not binary, because "madness" is not a permanent, stable condition. Shayda Kafai has written about this concept of the "mad border body," which recognizes that people's madness may manifest in different ways at different times and furthermore "challenges . . . the belief that madness diminishes one's ability to access full personhood." *Id.* Madness is not a reason to devalue the contributions of those who are deemed "mad," or to wholly exclude them from taking part in society.

31. Guy A. Boysen et al., *Evidence for Blatant Dehumanization of Mental Illness and its Relation to Stigma*, 3 J. SOC. PSYCH. 346, 353 (2020) (describing how prejudice against people with mental illness leads them to be seen as "fundamentally different" and sometimes even "as less than fully human," exposing them to even worse mistreatment); Robert Bogdan & Steven J. Taylor, *Relationships with Severely Disabled People: The Social Construction of Humanness*, 36 SOC. PROBLEMS 135, 135–46 (1989).

32. Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 435 (2002) (quoting Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889)) (discussing the *Chae Chan Ping* case as evidence of the "immigrants as Other" attitude, where Justice Field's opinion defended the plenary power doctrine by noting the "presence of foreigners of a different race in this country, who will not assimilate with us").

presents foundational concepts, including Michel Foucault's theory of power, in order to explain ableist ideology. It also describes the theory of ideology, as defined by Louis Althusser, that identifies the two aspects of the state apparatus that reinforce ableist ideology. Section III applies Althusser's theory on ideology to the U.S. immigration system in order to unveil the exclusionary ableism deeply ingrained in our laws. Part IV concludes with a call to action.

I. HISTORIC AND CURRENT EXCLUSION OF PEOPLE WITH DISABILITIES THROUGH IMMIGRATION LAW

This section provides a brief description of the historic exclusion of disabled noncitizens within the U.S. immigration system. Aspects of this exclusion still permeate immigration law and policy today.

Early immigration to the United States was favored by many because immigrants were not only a key source of labor, but also consumers. A scholar who studied nativism from the late 19th century to the early 20th century remarked: "Nearly everyone who had something to sell or something to produce hoped to make money out of immigrants."[33] At certain points, immigrants have been seen as necessary cheap labor for the economy to prosper, such as the recruitment of Chinese workers to construct national railroads in the 1800s,[34] as well as the Bracero Program in the 1940s to 1960s that brought 4.5 million Mexican nationals to work in agriculture.[35] Similarly, there were economic underpinnings of the Immigration Reform and Control Act of 1986 (IRCA), which legalized the status of about three million undocumented immigrants.[36]

At other points, immigrants have been seen as "undesirables" who take American jobs. In response to perceptions that impoverished European immigrants were driving wages down, Congress passed the Contract Labor Act of 1885, which prohibited employers from entering into labor contracts with migrants before departing from their countries of origin.[37] As railroad construction slowed and white settlers pushed west, Congress passed anti-Asian laws, including the 1892 Geary Act that required "all Chinese laborers within

33. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, 16 (2d ed. 1963).

34. KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965, 66 (2017).

35. RONALD L. MIZE & ALICIA C.S. SWORDS, CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA 3 (2010); Elizabeth W. Mandeel, *The Bracero Program 1942-1964,* 4 AM. INT'L J. CONTEMP. RSCH. 171, 171 (2014); KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS 218 (2010).

36. *A Latinx Resource Guide: Civil Rights Cases and Events in the United States. 1986: Immigration Reform and Control Act of 1986*, LIBR. OF CONG., https://perma.cc/X3EX-8D7K.

37. Contract Labor Act of 1885, 1885 ch. 164, 23 Stat. 332, 332 (repealed 1952) (stating a potential employer could not "prepay the transportation, or in any way assist or encourage the importation or migration of any alien . . . under contract or agreement . . . made previous to the importation or migration of such alien . . . to perform labor or service of any kind"); Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 802 (2013) (explaining how Representative Martin Foran, who introduced the bill, tied low wages to "debasement, ignorance, degradation, brutality," turning men into "ignorant, degraded, dangerous citizens").

the United States" to provide proof of residence and the presence of "one credible white witness" to testify for them.[38] Even as the Bracero Program continued, deterrence of undocumented immigration led to the offensively named "Operation Wetback," which deported more than one million people in 1954. This "repatriation" to Mexico included many people of apparently Mexican ancestry who were U.S. citizens.[39] Additionally, immigrants are among the first targets when fear of terrorism or economic unrest rises among Americans, evidenced by the modern machinery of immigration enforcement in the United States.[40] A prime example is the increase in enforcement following September 11, 2001, which was fueled by Islamophobia.[41]

People with disabilities have faced barriers to migration due to both the prioritization of labor and the rejection of undesirables. As explained by Professor Mark C. Weber, the exclusion of people with disabilities by the immigration system is rooted in two primary concerns: (1) eugenics-based fears of disability itself and fear that disabilities would be passed genetically into future generations, and (2) the central nature of labor policy, combined with a negative perception that people with disabilities could not contribute sufficiently.[42] A Congressional Report in the late 1800s stated: "[T]he intent of our immigration laws is not to restrict immigration, but to sift it, to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities."[43]

These exclusionary practices are reflected in U.S. law. In the late 19th century, immigration law denied admission to any "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[44] Immigration officials inspected those arriving in the United States for physical and mental conditions.[45] A law was also passed providing that the ship that brought a person who was rejected by immigration officials would bear the cost of the person's return ticket, so ships had an incentive to ensure they were not bringing passengers who might have physical or mental disabilities.[46]

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38. *See* HERNÁNDEZ, *supra* note 34, at 72.

39. Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 127 (1995).

40. DORIS M. MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2 (2013).

41. Steven Salaita, *Beyond Orientalism and Islamophobia: 9/11, Anti-Arab Racism, and the Mythos of National Pride*, 6 NEW CENTENNIAL REV. 245 (2006); DEEPA KUMAR, ISLAMOPHOBIA AND THE POLITICS OF EMPIRE: TWENTY YEARS AFTER 9/11 (2021).

42. Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER RACE & JUST. 153, 155 (2004).

43. H.R. Rep. No. 3807 (1891).

44. IMMIGRATION ACT, ch. 376, 22 Stat. 214 (1882).

45. Weber, *supra* note 42, at 156.

46. ALIEN LABOR IMMIGRATION ACT, ch. 551, 26 Stat. 1084 (1891) (providing that the owner or owners of a ship on which a noncitizen came "unlawfully" would be responsible for the cost of the noncitizen's "maintenance while on land" and their return, or risk criminal conviction and a minimum $300 fine).

Immigration laws also reflected biases of the day, where some people were categorized incorrectly as "disabled" based on misunderstandings or prejudice. For example, in 1952, the INA's exclusion of noncitizens "afflicted with psychopathic personality … or a mental defect" was interpreted to refer to "homosexuals and sex perverts."[47] Thus, homosexuality was conflated with disability in order to justify exclusion of members of an undesirable community. The "psychopathic personality or mental defect" language, and therefore the exclusion based purely on sexual orientation, was not removed from the statute until 1990.[48]

Today, there is still a ground of inadmissibility aimed at explicitly excluding certain people with disabilities. The language includes a conduct-focused component, yet still leaves the door wide open to deny admission on the basis of disability. Section 212(a)(1)(A) of the Immigration and Nationality Act (INA) provides that a noncitizen is inadmissible to the United States:

> (iii) who is determined . . .
>
> (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or
>
> (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . .[49]

As can be seen in the language of the statute, noncitizens are explicitly screened for physical or mental disorders and can be excluded on that basis if an adjudicator determines that the individual *may pose* a danger to anyone, including the noncitizens themselves. The fact that someone has been severely depressed and suicidal, or had a drug use disorder, in the past is grounds for inadmissibility to the U.S.[50] Thus, where an adjudicator has adopted the dominant ideology that rejects and fears disability, the statute provides an explicit means for them to exclude or expel the noncitizen potentially based on ableist bias.[51] This exclusion or expulsion may be based off of

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47. Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 Harv. C.R.-C.L. L. Rev. 439, 446 (1994).

48. *Id*. at 461-62.

49. 8 U.S.C. §1182 (grounds of inadmissibility based on having a mental or physical disorder).

50. For example, a noncitizen was deemed inadmissible because he admitted to burning himself with a cigarette. Ana Clavijo, *The Systemic Discrimination and Misinterpretation of Mental Disorders and Their Continuing Effects on Immigration Status*, J. HEALTH & BIOMEDICAL L., 306, 319 n. 62 (2023) (citing In re 34064420, I. & N. Dec. (1998)). Alcohol-use disorder is also a ground for exclusion. *Id*. (citing In re: 17643817, I. & N. Feb. (2022)). One survivor of domestic violence was deemed inadmissible, denied a U Visa, and put into removal proceedings due to her suicidality resulting from the abuse. Monika Batra Kashyap, *Heartless Immigration Law: Rubbing Salt into the Wounds of Immigrant Survivors of Domestic Violence*, 95 TULANE L. REV. 51, 52-55 (2020).

51. Monika Batra Kashyap, *Toward A Race-Conscious Critique of Mental Health-Related Exclusionary Immigration Laws*, 26 MICH. J. RACE & L. 87, 109 (2021) [hereinafter Kashyap, *Mental*

pure speculation, as an adjudicator can rely on any evidence to make a finding that the noncitizen "may pose" a danger to themselves or others. Due to stigma and stereotypes, especially the association of mental illness with dangerousness, this puts any noncitizen with a disability at risk.

Additionally, as in the 1882 Immigration Act, noncitizens still to this day can be excluded if an adjudicator determines they are likely to be a "public charge."[52] The definition of public charge fluctuates over time and can be changed through administrative rulemaking. For example, Nermeen Arastu and Qudsiya Naqui have analyzed the 2019 proposed rule that expanded the public charge definition.[53] The proposed rule retroactively expanded the list of benefits that could be used to bar admission to noncitizens, such as Supplemental Nutrition Assistance Program (SNAP) benefits or Section 8 housing vouchers—both of which are commonly relied upon by people with disabilities.[54] DHS stated that its purpose was "to better ensure that aliens subject to this rule are self-sufficient."[55] Yet, as Professors Arastu and Naqui note, this rule among others reflects an "ableist construction of disabled immigrants as unworthy burdens."[56]

Moreover, even noncitizens who have gained legal status, such as green card holders, will be found deportable under INA § 237(a)(1)(A) if they are found to have been inadmissible at the time of entry.[57] Thus, even noncitizens who have the illusion of stability, because they have already attained lawful status, stand to have their lawful status stripped from them if it is discovered that they had a mental or physical disorder at the time of admission.[58]

Over time, immigration priorities have shifted slightly to promote family unification and other humanitarian goals, which have led to changes in immigration laws. Thus, IRCA created the possibility of a waiver when a person was deemed excludable due to having a disability.[59] Such waivers still exist today.[60] However, waivers are subject to discretionary adjudication and are not guaranteed to be granted. And they operate from a default presumption of

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Health] (arguing that racist, ableist, and anti-immigrant bias may influence speculation regarding, for example, whether certain behavior is "likely to recur").

52. Medha D. Makhlouf, *Destigmatizing Disability in the Law of Immigration Admission*, DISABILITY, HEALTH, L. & BIOETHICS 177, 193 (2020).

53. Arastu & Naqui, *supra* note 8, at 271-74.

54. *Id.* at 272 (citing Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41295 (Aug. 14, 2019)).

55. *Id.* (citing Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41473 (Aug. 14, 2019)).

56. *Id.* at 274. Arastu & Naqui also note that the Biden Administration rolled back the 2019 rule and explicitly excluded certain benefits relied upon by noncitizens with disabilities from consideration in public charge determinations. However, they argue that the new rule promulgated by the Biden Administration still allows for ableist discrimination because it requires adjudicators to ascertain whether noncitizens are "likely at any time to become primarily dependent on the government for subsistence" based on receiving cash assistance or being institutionalized. *Id.* at 273-74.

57. 8 U.S.C. § 1227(a)(1)(A) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.").

58. It is unclear how often this ground of deportability has been used against people with disabilities. Nonetheless, this provision exists and could be used to deport someone, therefore posing a risk.

59. *See* Weber, *supra* note 42, at 162.

60. 8 C.F.R. § 212.7 (Waiver of certain grounds of inadmissibility).

unfitness to immigrate. As will be explored in the following sections, the ideology that people with disabilities are "not worthy" or are "too dangerous" still play out to an unacceptable degree in all aspects of the immigration system.

II. THEORIES ON CREATION AND PERPETUATION OF ABLEIST IDEOLOGY

This section uses two theoretical frameworks: first, to understand ableist ideology itself, and second, to analyze how such ideology is perpetuated through societal institutions. The work of French philosopher and historian Michel Foucault provides the operative framework in understanding the dominant ideology regarding disability. Then, the work of Louis Althusser explains how ideology operating toward capitalistic goals is reflected in and perpetuated by the U.S. immigration system.

A. *Foucault: Power and Disability*

In general, people with disabilities historically have been labeled as undesirable. Infanticide was a common practice to get rid of unwanted babies who were born with a disability.[61] Justifications were made under the guise that people with disabilities were seen as less than human.[62] As for someone who may or may not have a disability, if they are simply undesired or unwanted, society could label them as having a disability.[63] For instance, the "major antisuffragist point was that women were physically, mentally, and emotionally incapable of duties associated with a vote" and prone to "hysteria," a gendered diagnosis used to oppress women.[64] During slavery, a physician created a new mental health diagnosis called "drapetomania," a purported disease that caused enslaved people to experience symptoms such as "sulkiness" and the desire to escape.[65] As discussed *supra*, homosexuality was treated as a mental defect under immigration law.

A parallel to today's immigration system is seen in the Renaissance era. An individual deemed "mad" would be placed on a ship, often called the "Ship of Fools," and cast away into the waters.[66] Those deemed "mad" were truly out of sight, out of mind. While inhumane practices such as the Ship of

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61. Kathryn L. Moseley, *The History of Infanticide in Western Society*, 1 ISSUES L. & MED. 345 (1985).

62. Laura Ruth Murry Parker, *Less Than Human: Dehumanization Underlies Prejudice Toward People with Developmental Disabilities* (2015) (M.S. thesis, Purdue University) (Purdue Library); Bogdan & Taylor, *supra* note 31, at 135-48. *See also* Danielle D. Fox & Irmo Marini, *History of Treatment Toward Persons with Disabilities in America*, *in* THE PSYCHOLOGICAL AND SOCIAL IMPACT OF ILLNESS AND DISABILITY 3-12 (7th ed., 2012).

63. LENNARD J. DAVIS, THE DISABILITY STUDIES READER 18 (Routledge, 5th ed. 2016).

64. *Id*. at 25.

65. Kashyap, *Mental Health*, *supra* note 51, at 105. Kashyap also discusses the weaponization of schizophrenia diagnoses to diagnose Black civil rights protestors and then commit them to insane asylums during the 1960s. *Id*. at 106.

66. MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 7-9 (1988) [hereinafter FOUCAULT, MADNESS AND CIVILIZATION].

Fools have been discontinued, these parallels exist today in the exclusion and expulsion of people with mental disabilities in the U.S. immigration legal system.

Foucault openly challenged social beliefs regarding madness by questioning the construction of power and knowledge. According to Foucault, power and knowledge are neither separate nor synonymous; instead, power both uses and shapes knowledge.[67] Thus, "the exercise of power itself creates and causes to emerge new objects of knowledge and accumulates new bodies of information . . . [t]he exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power."[68] The courts are an extension of the state,[69] and the penal system "has played a determining role in the divisions of present-day society,"[70] by exerting power over a populous.

Foucault also challenges our ideas of what is natural or normal. His writings provide an exposition of the conceptualization of mental illness in the Western world. He believed that in society, madness equals death—social death, that is.[71] Foucault referenced "madness as the déjá-lá of death,"[72] meaning that mental illness (social death) was assumed to be the precursor to physical death, after comparing the contemporary treatment of mentally ill people to how lepers were treated in earlier centuries. Foucault reflected that "the experience of madness exhibits a rigorous continuity with the experience of leprosy. In those days, the ritual of the leper's exclusion showed that [the leper] was, as a living man, the very presence of death."[73] The exclusion of the leper was the final step to demonstrating his social death.

Immigration law also contains components reflecting the concept of social death. First, migrants are treated as outsiders by the usage of the dehumanizing word "alien" throughout all of immigration law.[74] Second, immigration detention literally separates people from their communities and locks them away. Third, deportation constitutes another social death akin to the banishing of lepers or sending away people with mental disabilities on the Ship of Fools. Immigration detention and deportation constitute social death because

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67. MICHAEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 (Colin Gordon ed., Pantheon 1980) [hereinafter FOUCAULT, POWER].

68. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 52 (1975) [hereinafter FOUCAULT, PRISON].

69. *Id.*

70. *Id.* at 21.

71. "Social death" essentially means that a person is treated as if they were dead, non-existent, or non-human. E. Borgstrom, *Social Death*, 110 QJM: An International Journal of Medicine 2-4 (2016).

72. *See* FOUCAULT, MADNESS AND CIVILIZATION, *supra* note 66, at 16 (social death precedes actual death).

73. *Id.* at 291.

74. *See, e.g.*, INA § 101, 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"). Under the Biden Administration, government agencies were instructed to use the terms "migrants" or "noncitizens" instead. Camilo Montoya-Galvez, *U.S. Immigration Agencies Drop Use of Terms Like "Illegal Alien" and "Assimilation,"* CBS NEWS (Apr. 19, 2021), https://perma.cc/R3WZ-LD9G.

they remove people with disabilities from the presence of the non-disabled, such that society no longer has to tolerate—or even think about—their existence.

In the case of people deemed as Mad, until recently, they were placed in clinics now known as asylums.[75] Instead of seeing individuals as whole, patients were seen as diagnoses or diseases.[76] Suppose an individual was diagnosed with a mental illness. In that case, the clinic might have viewed the individual as dangerous.[77] The birth of the asylum was established for those feared as dangerous—in essence, those individuals whom society did not know how to handle. Sending people off in ships was no longer socially acceptable under this pretense of a more evolved and humane society, and therefore, locking people away in clinics or asylums became viewed as more appropriate. According to a capitalist concept of valuing individuals' worth based on their level of production, which primarily favors bodies that are non-disabled, those with disabilities are viewed as worthless, more easily justifying their institutionalization and separation from society. Thus, social control is exerted by labeling them as Mad and placing them in asylums, or labeling them as criminals and placing them in prisons. This type of social control reinforces the ideology that punishes people with disabilities and promotes the idea that having a disability makes a person worthless, and therefore "bad."

It is also important to acknowledge that official disability diagnoses have also historically played a harmful role as a tool of social control.[78] As discussed at the beginning of this section, certain groups have been labeled as "disabled" simply because they are non-desirable and their behavior deviates from the norm. The norm is created and defined by those with power and knowledge. If those in positions of power do not want to deal with a group or an individual, they can easily marginalize or exile the undesirable by labeling them as Mad. By weaponizing madness, those in power can be as narrow or as inclusive as possible with whom is labeled as such.

Additionally, Foucault points out that someone who does not exhibit any red-flag behavior may go on to commit a heinous crime. He cites cases where individuals with zero degrees of insanity commit serious crimes.[79] In doing

75. Rab A. Houston, *Asylums: The Historical Perspective Before, During, and After*, 7 LANCET PSYCH. 354, 354-362 (2020).

76. Walid Fakhoury & Stefan Priebe, *Deinstitutionalization and Reinstitutionalization: Major Changes in the Provision of Mental Healthcare*, 6 PSYCH. 313, 313-16 (2007).

77. *Id.*

78. Kashyap, *Mental Health, supra* note 51, at 110 (describing how Black men were disproportionately labeled as "schizophrenic," which led to their institutionalization).

79. MICHEL FOUCAULT, POWER, *supra* note 67, at 205.

so, he deconstructs the evolution of the jurisprudence of criminal insanity.[80] Foucault demonstrates that, in reality, no one knows when an individual will harm themselves or another given these random instances of violence. Thus, especially when our systems and their actors lack awareness of ableist ideology, they reflect a conventional logic that attempts to protect the general public by operating on flawed perceptions of dangerousness and worth in order to render decisions.[81] Through diagnoses, people deemed to be Mad are thereby discredited and dehumanized.

B. Althusser's *On Ideology*

Following this theoretical background explaining Foucault's views on disability, we now turn to analyzing how the dominant class perpetuates and enforces its harmful ideology regarding disability.

The Merriam-Webster Dictionary defines "ideology" as "a manner or the content of thinking characteristic of an individual, group, or culture."[82] Although commonly used as a manner of referring to political beliefs, ideology exists and is replicated regarding a variety of subjects and through a variety of ways.

Althusser described the formation and maintenance of a capitalist ideology formed by structures in our society. Specifically, he describes the capitalist ideology in two categories: (1) the ISA, and (2) the RSA. The ISA represents an indirect way of forming and feeding ideology through educational institutions such as private and public schools; communication through media such as the press, radio, and television; and religion through a system of churches and family.[83] If an individual does not adopt or believe the norm perpetuated by these establishments, they are *excluded*.

The RSA is the "enforcement" part of the system that, rather than by passive or non-violent means, achieves its goal through coercion and violence. Thus, the components of the RSA include the police, armed forces, government agencies, and courts,[84] dominating the public domain. These systems force an individual to adopt ideology through *repression or punishment*. Ultimately, the difference between the ISA and the RSA lies in their functions. We might think of private functioning or indoctrination through the ISA (family, church, education, etc.), while the public functioning and maintenance of social order occurs through the RSA (police, courts, military, etc.).[85] In Althusser's own

80. *Id*. at 205-06.

81. John W. Parry, *The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 667, 668 (2005) (noting inability of mental health professionals to accurately predict future dangerousness, which has led to greater and likely unnecessary infliction of the death penalty).

82. *Ideology*, MERRIAM-WEBSTER.COM DICTIONARY, https://perma.cc/7PCV-KSF9.

83. ALTHUSSER ISA, *supra* note 9, at 76.

84. *Id*. at 70, 168, 203.

85. *Id*. at 75.

words, the "Repressive State Apparatus functions 'by violence,' whereas the Ideological State Apparatus function 'by ideology.'"[86]

1. *ISA: Perpetuating Ableist Ideology*

Due to the importance of the ISA to Althusser's theory, we've included a more in-depth discussion of the concept here. The ISA consists of several aspects of society that function together to teach and reinforce ideas that serve the dominant class' interests. As Althusser explains, the ideological apparatus consists of several components: family, religion, culture, education, communications, legal, political, and trade unions.[87] Each of these aspects of society is responsible for perpetuating ableist ideology. Here, the relevant interest is in excluding people with disabilities from society, based on the ideology that people with disabilities are unproductive, worthless, or dangerous.

As an example of how the ISA operates, ideology becomes perpetuated and reinforced through education in schools. In *Schooling in Capitalist America*, economists Bowles and Gintis explain how schools prepare workers in a capitalist system.[88] Schools feed into the workforce, separating workers by educational level and abilities. Ableism leads to low expectations of students with disabilities, which in turns often leads to students performing poorly, which then means they are not prepared for the workforce.[89] Thus, ableism is embedded in our educational systems, as are capitalist views. Similarly, the ideology embedded in educational systems also appears in the immigration process, especially when considering the preferential treatment given to highly skilled individuals, especially those of extraordinary ability or who have attained higher than a college degree.[90] The naturalization process also reflects educational and ideological expectations, as applicants are required to speak and write in the English language and pass a civics exam regarding American history and values.[91] Thus, the educational aspects of the immigration system function as an ISA that shapes America's workforce and the composition of the citizenry.

In addition to educational institutions, communications through media sources such as the press, radio, and television also perpetuate an ideology that sees people with disabilities, especially those with non-apparent disabilities such as mental illness, as mad or dangerous.[92] The media perpetuates the

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86. LOUIS ALTHUSSER, ON IDEOLOGY 19 (2020) [hereinafter ALTHUSSER IDEOLOGY].

87. *See generally id.*

88. Samuel Bowles & Herbert Gintis, *Schooling in Capitalist America Revisited*, 75 SOCIO. OF EDUC. 1, 1 (2002).

89. *See generally* LEX FRIEDEN, IMPROVING EDUCATIONAL OUTCOMES FOR STUDENTS WITH DISABILITIES, National Council on Disability (2004).

90. *Employment-Based Immigrant Visas,* U.S. DEP'T OF STATE, https://perma.cc/S5W3-BR3S.

91. *See infra*, Section III.C.

92. Patrick W. Corrigan & Amy C. Watson, *Mental Illness and Dangerousness: Fact or Misperception, and Implications for Stigma*, *in* ON THE STIGMA OF MENTAL ILLNESS: PRACTICAL STRATEGIES FOR RESEARCH AND SOCIAL CHANGE 165 (Patrick W. Corrigan, ed. 2005). *See also* Alastair Benbow, *Mental Illness, Stigma, and the Media*, 68 J. CLINICAL PSYCH. 31 (2007).

idea of the need for protection from people with mental illnesses because they are presumed to be dangerous.[93] The media creates a narrative of normalcy and acceptability, and anyone that falls out of these expectations is not understood and, worse yet, feared.[94] New ideas and ideologies become normalized and seen as truth the more they appear in the media.[95] Thus, how immigrants are viewed in the media also becomes normalized and taken as truth, bringing forth fears like xenophobia[96] and Islamophobia.[97]

Lastly, Althusser mentions the legal, political, and trade union aspects of the ISA. The legal and political components are relevant here. The "'law' belongs both to the (Repressive) State Apparatus and to the system of the ISAs."[98] While the ISAs can exist in the private *and* public domain, the RSA is entirely in the public domain.[99] The law is a "formal, systemized, non-contradictory, comprehensive system that cannot exist all by itself."[100] Social proximity also perpetuates ideology, and those who do not believe accordingly are excluded. Those who think differently about people with disabilities are not automatically accepted because they challenge a deep-rooted belief about people with disabilities that stems from stereotypes and stigma. This level of resistance to change prevents those in positions of power from deviating from the socially constructed norm.

2. *RSA: Enforcement of Ableist Ideology through Immigration Law*

The previous section discussed the ISA that sees people with disabilities as being unworthy or "less than," beliefs rooted in negative perceptions that people with disabilities are either not productive in ways that matter to our capitalist systems, or that they are dangerous. The ISA, which includes our educational institutions, such as law schools, perpetuates that thinking. This section shifts to discussing the RSA that enforces the ideology, including the immigration system as a whole.

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93. OTTO F. WAHL, MEDIA MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS, 93 (1995).

94. *See* Ginny Chan & Philip T. Yanos, *Media Depictions and the Priming of Mental Illness Stigma*, 3 STIGMA AND HEALTH 253, 253–264 (2018) (bias reporting perpetuates the normalcy of dangerousness of mental illness).

95. *See* John Corner, *'Ideology' and Media Research,* 38 MEDIA, CULTURE & SOC'Y 265 (2016); David L. Altheide, *Media Hegemony: A Failure of Perspective*, 48 PUB. OP. Q. 476 (1984); Kimberly N. Kline, *A Decade of Research on Health Content in the Media: The Focus on Health Challenges and Sociocultural Context and Attendant Informational and Ideological Problems*, 11 J. HEALTH COMMC'N 43 (2006).

96. *See generally* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2019) (discussing that immigration regulations are often based on xenophobia).

97. *See generally* Christine Ogan, Lars Willnat, Rosemary Pennington, & Manaf Bashir, *The Rise of Anti-Muslim Prejudice: Media and Islamophobia in Europe and the United States*, 76 INT'L COMMC'N GAZETTE 27 (2014) (factors that influenced Islamophobia included anti-Muslim attitudes from those politically conservative, being older, and paying close attention to news coverage of the Park 51 Islamic Community Center in the United States near ground zero in New York).

98. *See* ALTHUSSER IDEOLOGY, *supra* note 86, at 17 n.9.

99. *Id*. at 18.

100. *See* ALTHUSSER ISA, *supra* note 9, at 68 (emphasis omitted).

Althusser defines law as "necessarily repressive," citing Immanuel Kant's conception of law as a system that "entails constraint."[101] Althusser lists the following as some components of the RSA: "courts, fines, prisons, and the various detachments [*corps*] of the police."[102] The U.S. immigration system includes immigration police, prisons, courts, and other adjudicators of affirmative benefits, all situated within a complex web of laws. Thus, the U.S. immigration system—whether we are talking about affirmative benefits or immigration police, prisons, and deportation proceedings—is part and parcel of the RSA that upholds society's rejection of people with disabilities.

There are different ways of classifying the policies underlying the U.S. immigration system. Recent narratives have signaled that "merit-based" immigration—the idea that current immigration policy is geared toward encouraging immigrants who have the potential to contribute economically to society—is one of the current prevailing ideologies.[103] However, the merit-based immigration system is heavily influenced by capitalism and the idea of a person's worth being tied to productivity. This de-values people with disabilities, as people who are perceived as being less "productive." As Professor Katherine Pérez posits, "Undergirding both DACA and the DREAM Act is the continual push toward a capitalist system favoring non-disabled individuals for the purpose of production. Within a capitalist system, people with disabilities are not valued as they are considered insufficient laborers."[104] The RSA applies forcefully to noncitizens with disabilities because of this idea of unworthiness, which stems from societal apprehension around both "immigrants" and "people with disabilities" being drains on the system.[105] Moreover, the RSA is particularly damaging for people with mental illnesses because of the added perception that mentally ill people are "dangerous." Such perceptions lead to a higher likelihood of imprisonment and deportation.[106] The following section explores in-depth how the ISA and RSA exist in each segment of the U.S. immigration system.

III. UNVEILING EXCLUSIONARY ABLEISM

Consistent with the two components of Althusser's theory of ideology (the ISA and RSA), we define the concept of "exclusionary ableism" as consisting of: (1) how the dominant ideology in the United States that rejects and fears

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101. *Id*. at 65.

102. *Id*. at 66.

103. For example, much of the discourse surrounding the push for Deferred Action for Childhood Arrivals (DACA) recipients to move to permanent legal statuses is based on the possibility of contributing to the economy. *See* Katherine Pérez, *A Critical Race and Disability Legal Studies Approach to Immigration Law and Policy*, UCLA L. REV. LAW MEETS WORLD (Feb. 2, 2019) https://perma.cc/AL3V-9JTX.

104. *Id*.

105. Weber, *supra* note 42, at 174-75 (describing societal concerns in the 1990s around "whether immigrants place a burden on the social and economic system" and similar fears about people with disabilities).

106. Tania N. Valdez, *Disability, Race, and Immigration: The Intersectional Impact of Policing*, 65 B.C. L. REV. 1981, 2009-10 (2024) (describing the mental health crisis-to-deportation funnel).

people with disabilities is reflected in our immigration law and policy; and (2) the reproduction of ableist ideology through the U.S. immigration system, which functions to exclude and expel noncitizens with disabilities. Said another way, through exclusionary ableism, the immigration system both reflects and actively perpetuates ableist ideology through laws that exclude and expel noncitizens with disabilities. The following section illuminates how exclusionary ableism operates within the various components of the immigration system.

Certain aspects of the immigration system are obviously geared toward exclusion and expulsion. For example, the immigration enforcement branch (U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE)) serves policing functions and is thereby clearly a component of the RSA. Also clear is that the immigration courts, which are tasked with determining the removability of noncitizens, are part of the RSA. Perhaps less obvious to people unfamiliar with the immigration system is that the components viewed as "benefits-granting" are equally a part of the RSA.

This section discusses the application of Althusser's theory to all three aspects of the immigration system: immigration police and prisons; immigration courts; and the benefits-granting agencies—what we call the "immigration gatekeepers."[107] The RSA enforces the dominant class' ableist ideology by excluding or expelling disabled people, operating to traumatize noncitizens during immigration processes, and sometimes even physically hurting or killing people, as in the instances of police violence and immigration detention.

A. *Immigration Police & Prisons*

According to Althusser, the entrenched nature of the ISA means that oftentimes people will behave in accordance with the status quo without the need for state intervention. However, sometimes intervention from the RSA—which relies on coercion and violence to function—is required. Althusser points out that armed police, as a sort of regulated violence, play an important part in the legal system.[108] In addition to police that patrol and detain, prisons are an important piece of the RSA, as they confine and restrict the movement of people who are alleged or deemed to have violated the law.

Mirroring the criminal legal system, the enforcement aspects of the immigration system include the police and prisons. The U.S. Department of Homeland Security (DHS) is the largest federal law enforcement agency,[109] and includes CBP and ICE. Between CBP and ICE, there are more than

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107. Guevara, *Disability Rights*, *supra* note 1, at 279 (defining the concept of "gatekeepers" as those who open or close doors to people with disabilities in deciding whether to provide accommodations).

108. *See* ALTHUSSER ISA, *supra* note 9, at 69 (stating that "legal practice functions 'on the violence' (the regulated violence) of the state apparatus").

109. *DHS Law Enforcement*, U.S. DEP'T HOMELAND SEC., https://perma.cc/9E74-G5R3 (last visited July 15, 2024).

50,000 law enforcement officers working at U.S. borders and in the interior.[110] ICE's Enforcement and Removal Operations branch, which handles detention and deportation, employs more than 8,200 officers alone.[111]

People with disabilities are at least equally at risk, if not more at risk, as other noncitizens of becoming victims of police violence, coercion, racial profiling, and other civil rights violations during the course of arrest and detention. One study found that people with disabilities have a higher probability of arrest (43%) than non-disabled people (30%).[112] Because of the intertwined nature of the criminal and immigration enforcement systems, such that the Supreme Court of the United States has recognized that "recent changes in our immigration law have made removal *nearly an automatic result* for a broad class of noncitizen offenders,"[113] there is a strong possibility that noncitizens with disabilities will become entangled in the immigration removal system as well.

Additionally, disabled noncitizens face a multitude of challenges in immigration detention. Noncitizens are detained in facilities managed by the federal government, for-profit facilities run by private corporations, and regular jails and prisons where states and localities have contracted out part of their space to ICE.[114] Just as noncitizens with physical injuries and illnesses are entitled to medical treatment pursuant to the U.S. Constitution,[115] so are noncitizens requiring treatment for mental disabilities, including mental illness.[116]

Noncitizens with intellectual, developmental, and psychiatric disabilities have historically faced many challenges in detention, including the increased possibility of prolonged detention. For example, in the *Franco-Gonzalez v. Holder* litigation, a seminal case upholding the rights of disabled noncitizens via a settlement agreement, two of the plaintiffs were detained longer than five years—with no access to counsel—after an immigration judge (IJ) deemed them incompetent to proceed.[117] The *Franco-Gonzalez* settlement agreement

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110. AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 1 (2021), https://perma.cc/5J3K-N24G.

111. *Id*. at 3-4.

112. Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 AM. J. PUB. HEALTH 1977, 1988 (2017).

113. Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010) (describing the "enmeshment" of criminal convictions and deportation).

114. Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L. J. 145, 160-61 (2020).

115. *See id*. at 166-68 (describing constitutional tort remedies available to plaintiffs in government-run prisons). However, noncitizens' rights are severely limited if they happen to be held in privately-run facilities. *See id*. at 168-73.

116. *See* Estelle v. Gamble, 429 U.S. 97, 102-04 (1976) ("[E]lementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."). *See also* Desirae Hutchison, *Inadequate Mental Health Services for Mentally Ill Inmates*, 38 WHITTIER L. REV. 161, 163 (2017) ("Most federal circuits have extended this right of medical health care to mental illness treatment, noting that the two are not distinguishable for purposes of a prisoner's right to care.").

117. ACLU, *Immigrants with Mental Disabilities Lost in Detention for Years*, (2010), https://perma.cc/KR23-XE7C. Case filings are also available at this site.

spurred the creation of a nationwide program that mandates the appointment of counsel for noncitizens who are deemed incompetent to represent themselves. However, as explained in the next subsection, there are a host of problems with the operation of the program.

The dangers of detention, including prolonged detention, have been widely discussed in legal scholarship. Scholars and advocates have illuminated at length the failure of immigration detention centers to provide adequate mental health care.[118] Risks include the inability to effectively prepare one's case, particularly if counsel is not appointed, and decompensation of mental health that can lead to suicide.[119] Professor Stacey Tovino has illuminated that "[s]uicide is the leading cause of death in detention."[120] Suicidality is the result of the sheer punitive nature of detention, the lack of oversight of noncitizens in their cells (even when they are on suicide watch), failure to respond appropriately to requests for help, untreated physical medical needs that increase suffering, and overuse of solitary confinement for people with mental illness.[121] The failure of the immigration system to recognize the depth of harm caused by detention, including exacerbation or even creation of mental health problems, reflects the same "out of sight, out of mind" attitude as casting mentally ill people out into the waters on the so-called Ships of Fools.[122]

Immigration policing and prisons, a key component of the RSA, serve to confine, inflict suffering on, and facilitate the removal of noncitizens with disabilities. The next section addresses another aspect of the removal process.

B. *Immigration Courts*

The immigration courts also comprise part of the RSA, as they perform the function of determining whether noncitizens are permitted to stay in the United States, or must leave or be deported. Thus, IJs play a direct role in determining whether noncitizens with disabilities deserve to stay in the United States. The INA is the governing statute that provides definitions and rules around who is permitted to stay or forced to leave the United States.[123] Among the considerations that IJs make are whether a person is deportable or inadmissible due to criminal history or other unsavory characteristics, whether they are likely to become a "public charge," and whether a person warrants relief in the exercise of discretion.

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118. *See, e.g.*, Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787 (2017); Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167 (2016).

119. Sherman-Stokes, *supra* note 118, at 788 (describing noncitizen's trouble understanding his immigration proceedings); Tovino, *supra* note 118, at 181-89 (discussing numerous suicides of people in ICE custody).

120. *See* Tovino, *supra* note 118, at 181.

121. Nick Schwellenbach et al., Project on Gov't Oversight, *Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, POGO (Aug. 14, 2019), https://perma.cc/CKD3-VQ8J (citing New York University's medical school 2015 study).

122. *See* FOUCAULT, MADNESS AND CIVILIZATION, *supra* note 66, at 15.

123. 8 U.S.C. § 1101.

People with disabilities are deported every year. The scope of the problem is not clear, as the government either does not collect information, or has not made information publicly available, regarding the number of people with disabilities who are deported each year.[124] However, the ACLU estimates the number to be in the tens of thousands.[125]

Disability potentially plays into every aspect of an immigration case. An overarching problem is the lack of access to counsel, since people in removal proceedings are not entitled to counsel at government expense. A 2016 study by Ingrid Eagly and Steven Shafer found that about two-thirds of non-detained noncitizens are represented by lawyers in their court proceedings, while only about fourteen percent of detained noncitizens are represented.[126] These problems may be exacerbated for noncitizens with disabilities, as being able to navigate the process of finding and paying for a lawyer is difficult.

One limited way that noncitizens with certain disabilities may get assistance is through the National Qualified Representative Program (NQRP), which provides counsel to detained noncitizens who are deemed incompetent by an IJ.[127] From the initiation of the program in 2013 through January 2020, the Vera Institute of Justice reports that 2,000 detained immigrants with serious mental illnesses have been provided NQRP representatives.[128] However, significant deficiencies in the existing system have been discussed extensively in the literature. Most importantly, the NQRP only provides counsel to people who are deemed mentally incompetent and does not provide counsel to people with other disabilities. And for people with the "right" types of disability to qualify for the NQRP, IJs are not adequately trained to make competency determinations. They often do not solicit the opinions of mental health professionals. IJs *may*, but are not required, to order full competency evaluations that are conducted by mental health professionals.[129] Thus, advocates have noted numerous instances where noncitizens obviously were incompetent to represent themselves and were denied counsel nonetheless by IJs.[130] IJs' decisions are affected not just by the constraints built into the legal

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124. The authors could not locate government data regarding the number of noncitizens with mental disabilities in detention or removal proceedings. *See also* HUMAN RIGHTS WATCH, ACLU, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 18 (July 2010), https://perma.cc/EF5F-TUXN.

125. *Id.*

126. Ingrid Eagly & Steven Shafer, AM. IMMIGR. COUNCIL, *Access to Counsel in Immigration Court*, (Sept. 2016), https://perma.cc/ASW2-WHSU.

127. The NQRP came about as a result of the *Franco-Gonzalez* litigation. Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants*, 97 WASH. L. REV. ONLINE 21, 23 (2022).

128. Mike Corradini, VERA INSTITUTE OF JUSTICE, *National Qualified Representative Program,* https://perma.cc/V7RP-JQCE (last visited July 11, 2022).

129. Matter of M-A-M, 25 I&N Dec. 474, 479 (B.I.A. 2011) ("Another measure available to Immigration Judges is a mental competency evaluation.") (citing Matter of J-F-F, 23 I&N Dec. 912, 915 (AG 2006)); Matter of J-F-F, 23 I&N Dec. 912, 915 (A.G. 2006) (explaining that the immigration judge had requested that DHS produce a psychiatric evaluation).

130. One of the authors has litigated two such cases.

system, but also by the ideology they have absorbed throughout their lives through their own conditioning by the ISAs and RSA.

The harmful ideology devaluing noncitizens with disabilities proliferates and goes unchecked in part because IJs have large amounts of discretion in case adjudication.[131] In various immigration cases (including bond, adjustment to lawful permanent resident status, or cancellation of removal), IJs have broad discretion regarding whether to grant or deny relief. For example, even if a green card holder has met all of the statutory requirements for cancellation of removal (seven years' presence in the United States, no crimes committed within five years of entering the United States, has not been convicted of a disqualifying crime), a judge may still deny relief as a matter of discretion.[132] This leads to untenable situations where an IJ weighs the value or worth of a person's contributions to society. In one case, an IJ denied relief as a matter of discretion to a noncitizen who had been homeless for several years due to having an untreated mental illness—he was denied in essence because the positive equities did not outweigh the negative, largely because he could not hold a job or maintain community connections due to his disability. Such a denial is directly *because of* symptoms of the noncitizen's disability, yet legal protections were not enough to prevent his deportation.

A significant part of the problem with discretionary denials is that there is extremely limited oversight. Under the INA, no judicial review is available for denials of discretionary relief.[133] This means that, once the agency (the IJ and the Board of Immigration Appeals) has denied relief as a matter of discretion, a federal court of appeals cannot review that decision. Thus, there is a perverse incentive for immigration adjudicators to deny relief as a matter of discretion specifically to avoid judicial oversight.[134]

Another limitation of the standards in removal proceedings is that appointment of counsel is the only mandated "safeguard" for people with mental disabilities. However, there is no requirement, for example, that a person be competent enough to work effectively with their lawyer.[135] Thus, a person may be completely unable to participate in the defense of their case due to a disability and may be ordered deported nonetheless as long as they were appointed a lawyer. There is a severe need for the immigration agencies to create guidelines regarding actual safeguards that may meaningfully provide access to justice for disabled noncitizens.

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131. For one example of the immense adjudicatory discretion that immigration judges have, *see* Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 374-75 (2020) (criticizing the broad discretion of immigration judges to deny a noncitizen's case even where the noncitizen satisfies the statutory eligibility criteria set by Congress).

132. INA § 240A(a), 8 U.S.C. § 1229b(a).

133. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).

134. *See* Wadhia, *supra* note 131, at 408.

135. *See* Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L. J. 929, 968 (2014) (arguing for a substantive due process right to competence as "the only way to ensure that incompetent individuals are not deported in error").

As discussed here, the immigration courts play a large role in making value judgments that result in disabled noncitizens either being permitted to remain or being deported from the United States. This is a crucial piece of the RSA that carries out exclusionary ableism.

C. *Immigration Gatekeepers*

Another piece of the immigration RSA involves the benefits-granting branches. Although these aspects of the immigration apparatus are not as *facially* coercive or punitive as detention and deportation, those constructing the systems through our laws are "gatekeepers [who] manufacture disability, using the discretion afforded to them[.]"[136] Thus, we call these branches the "gatekeepers" because they function to exclude—and also can function as part of the process to expel—people with disabilities. These gatekeepers are equally central to exclusionary ableism as the policing and court functions of the RSA.

There are two components to this aspect of the immigration system. U.S. Citizenship and Immigration Services (USCIS) is a branch of the DHS that adjudicates applications for naturalization, visa petitions, lawful permanent resident status, work permits, and more.[137] The Bureau of Consular Affairs, within the Department of State, adjudicates applications of noncitizens who are residing outside of the United States.[138] There is a myth that these aspects of the immigration system are non-adversarial and less coercive than the policing, detention, and court functions.[139] While it is true that these agencies grant benefits and are not directly charged with detaining or deporting people, USCIS and the U.S. Consulates nonetheless serve a gatekeeping function by virtue of their power to: (1) bar someone from entering the United States; (2) not allow someone who is already here to obtain lawful status; (3) halt progress toward citizenship; (4) block some other benefit such as deferred action, Temporary Protected Status, or authorization to work; and (5) directly refer applicants to removal proceedings under certain circumstances.[140]

In the adjudication of immigration benefits, including the ability to even enter the United States, officers assess whether a person is subject to any grounds of inadmissibility. As discussed above, there is a ground of inadmissibility that explicitly excludes noncitizens with a physical or mental disorder,[141] and another ground called the "public charge rule," which is also used

136. Guevara, *Disability Rights*, *supra* note 1, at 279.

137. *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 27, 2020), https://perma.cc/UYR6-NCHZ.

138. *See Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 7, 2023), https://perma.cc/JZC7-8GVT.

139. For a thorough critique of this myth, *see generally* Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707 (2020).

140. *See generally Policy Memorandum: Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removal Aliens*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Nov. 7, 2011), https://perma.cc/FDS2-8ADH.

141. *See supra* Section II.

to deny admission to people with disabilities based on a finding that the individual is likely to become a burden to the United States by relying on public benefits or other such needs.[142] Thus, an immigration official is entitled to use information from medical examination results, including symptoms of a disability, in order to deny relief under this ground.[143] When a noncitizen is subject to a ground of inadmissibility, they can apply for a waiver.[144] However, such waivers are also subject to the discretion of the adjudicator. In the case of biased adjudicators, the availability of a waiver will not protect a noncitizen with disabilities.[145]

Just as IJs have immense discretion during the course of removal proceedings, USCIS and U.S. consular officers have a large amount of discretion when deciding whether to grant or deny relief. Just as there is a lack of oversight for IJ denials of relief on the basis of discretion, there is similarly a lack of oversight of consular or USCIS discretionary denials.[146] The officers adjudicating immigration petitions and applications make value judgments throughout the adjudication process, based on materials submitted by the applicant, criminal history, and the interview process. In some applications, officers are directed to determine whether the person is of "good moral character."[147] Thus, officers frequently engage in worthiness and dangerousness judgments in their adjudication of petitions and applications, rendering any preconceived notions about disabilities potentially harmful.[148]

Returning to Althusser's theory, particular aspects of USCIS demand that noncitizens show that they have adopted certain beliefs and practices in order to show that they belong in U.S. society. These aspects therefore function as an ISA. Naturalization is a quintessential example. In order to successfully naturalize, the INA provides that a noncitizen must demonstrate they are "attached to the principles of the Constitution of the United States, and well disposed to

142. Makhlouf, *supra* note 52, at 193-94.

143. Monika Batra Kashyap has argued that the original purpose of the medical examinations, which infects their use today, had eugenicist aims of keeping out people of color who would disrupt the "purity and homogeneity of the white Anglo-Saxon race against the threat of racially inferior, undesirable, and unassimilable races." Kashyap, *Mental Health, supra* note 51, at 89.

144. *See id*. at 110.

145. *Id*. at 111 (noting how there is broad discretion afforded to immigration adjudicators who may be biased or prejudiced).

146. *See, e.g*., James A.R. Nafziger, *Review of Visa Denial by Consular Officers*, 66 WASH. L. REV. 1, 16-17 (1991) (noting limited administrative or judicial review of consular visa denials); Zilberman, *supra* note 139, at 740 (describing process of appealing to the Administrative Appeals Office and possibly the Board of Immigration Appeals, and the limited judicial oversight for discretionary determinations in 8 U.S.C. § 1252(a)(2)(B)). The strength of the doctrine of consular nonreviewability was recently reaffirmed by the Supreme Court. Dep't of State v. Munoz, 144 S. Ct. 1812, 1812-13 (2024) (holding that a U.S. citizen does not have a fundamental liberty interest in her spouse's visa petition).

147. 8 C.F.R. § 316.10(a)(1) ("An applicant for naturalization bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character.").

148. Arastu & Naqui, *supra* note 8, at 279 (discussing how people with disabilities, who may be "seen as less productive or more burdensome on U.S. social welfare systems," are more likely to be denied discretionary relief).

the good order and happiness of the United States."[149] Noncitizens are also barred from naturalization if they have been associated with Communism "or any other totalitarian party of the United States,"[150] or if they refuse "to bear arms on behalf of the United States when required by law."[151] Thus, noncitizens must demonstrate they have adopted the ideology encapsulated in the Constitution, have not been involved with disfavored political parties, and that they will put their commitment to the U.S. first.

Moreover, as discussed in Section II.B.1, the general educational system is a key part of the ISA because it is through education that children in particular are trained how to think. Similarly, people applying for U.S. citizenship must study civics and become proficient in verbal and written English, as the official language of the United States.[152] They must take an examination in order to succeed in their application.[153] As one scholar has said in the broader context of nationalism: "The experts working at the ISAs develop a definition of the national subject and prescribe what concrete individuals must do in order to become an integral part of a national community, to have a national identity and thus—to be real subjects with real national experiences."[154] In implementing the statutory requirements for naturalization, USCIS acts as the ISA in assessing whether noncitizens are fit to become national subjects.[155]

The immigration benefits interview process can feel like an interrogation or cross-examination, including during asylum interviews and adjudication of spousal petitions. As Beth K. Zilberman has explained, "The classification of field office interviews as non-adversarial is particularly problematic as USCIS is a politically-charged policy-making executive branch agency that is increasingly taking enforcement action against applicants."[156] Zilberman also quotes testimony provided to the House Judiciary Committee by the Executive Director of the Immigrant Legal Resource Center, who reported survey results from immigration practitioners regarding their experiences with USCIS. The attorneys' survey responses noted "an increase in suspicion among adjudicators towards their clients, a 'fraud first' mentality, longer

149. INA § 316(a)(3), 8 U.S.C. § 1427(a)(3).

150. INA § 313, 8 U.S.C. § 1424. Note that there are some exceptions to this naturalization bar. *See, e.g.*, INA § 313(d) (exempting people whose involvement was involuntary, occurred prior to age 16, "or was for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes").

151. INA § 337(a)(5)(A), 8 U.S.C. § 1448(a)(5)(A) (titled "Oath of renunciation and allegiance"). There is an oath waiver available if the Attorney General determines a "person is unable to understand, or to communicate an understanding of, its meaning because of a physical or developmental disability or mental impairment."

152. INA § 312, 8 U.S.C. § 1423. There are also waivers of these requirements available based on advanced age or "physical or development disability or mental impairment."

153. 8 C.F.R. § 312.1(c) ("Literacy examination"), § 312.2(c) ("History and government examination").

154. Ieva Zake, *The Construction of National(ist) Subject: Applying the Ideas of Louis Althusser and Michel Foucault to Nationalism*, 25 SOC. THOUGHT & RSCH. 217, 226 (2002).

155. *See id*. at 236 ("Through language and its regulated use subjects become both products and tools of nationalism.").

156. Zilberman, *supra* note 139, at 748-49.

interviews, and changes in the types of questions asked," as well as less willingness to exercise discretion favorably to the noncitizen.[157] For people with disabilities, the "fraud first" mentality is especially dangerous. It could mean that noncitizens seeking waivers of various requirements based on disability will be aggressively interrogated and that the adjudicators are predisposed to disbelief. Longer interviews can be straining for people with certain disabilities, such as mental disabilities affecting focus or physical disabilities affecting stamina. Fewer favorable exercises of discretion may mean the denial of discretionary waivers and findings of good moral character, particularly when the adjudicator has bought into ableist ideology.

Finally, the affirmative benefits process can be a way of "policing" behavior because people can not only be denied but can be referred to immigration court for the commencement of removal proceedings. A USCIS Policy Memorandum states that people can be directed to immigration court for removal proceedings in the following instances: after someone is denied asylum, after petitions relating to certain types of permanent resident statuses are denied, and when a person's asylum or refugee status is terminated.[158] Additionally, certain denials of naturalization applications where a noncitizen is found to pose a risk due to criminal offenses may lead to immigration removal proceedings.[159] Denials of applications and petitions during the affirmative immigration process due to ableism within the immigration gatekeeping agencies therefore may lead to more aggressive enforcement actions.

In short, the gatekeeping function of USCIS and the Consulates reinforces ableist ideology and utilizes some of the same repressive methods of other parts of the U.S. immigration system, ultimately in furtherance of exclusionary ableism.

IV. A CALL TO ACTION

The primary goal of this Article is to expose ableism in the immigration system, because identifying harmful ideology and illuminating the way the ideology currently operates is a crucial first step toward creating a more inclusive system that recognizes the worth of every human being. This is what we have attempted to do by dedicating this Article to naming the concept of exclusionary ableism. Nonetheless, it is important to begin a call to action to discuss ways on how to move forward toward a more inclusive society.

There are several concrete changes that could be made to the immigration laws that would have an immediate impact. First, we could eliminate the grounds of exclusion based on having physical or mental disorders. Second, the public charge rule could also be eliminated. Or, if the rule

157. *Id.* at 750 (quoting *Hearing on Policy Changes and Processing Delays at USCIS Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 9 (2019) (testimony of Eric Cohen, Executive Director of the Immigrant Legal Resource Center)).

158. *See generally Policy Memorandum*, *supra* note 140.

159. *Id.*

remains, considerations of disability could be excluded from the public charge determination.[160] Third, there could be limits imposed on what can be considered in discretionary determinations across immigration cases. For example, there could be explicit policies barring adjudicators from taking disability into account as a negative factor when determining whether a person warrants relief in the exercise of discretion. These changes would all have an impact on ensuring a more inclusive society and eliminating the ability to discriminate based on ability.

However, these changes will not come about if ableism continues to run as a current throughout society. Thus, we assert that education is also an important tool in the toolbox for rooting out and eliminating exclusionary ableism.[161] Using Althusser's ISA theory of ideology, combined with a disability justice approach,[162] it is apparent that people—most urgently those in positions of power like politicians, lawyers on both sides, judges, and other adjudicators—must be educated about ableism. Such education would ideally lead to the creation of a new framework to understand and adequately account for disability in the immigration system.

CONCLUSION

Ultimately, the purpose of this Article was to define what we call "exclusionary ableism," a term that encapsulates how the immigration system reflects and perpetuates ableist ideology through laws that function to exclude and expel noncitizens with disabilities. This system explicitly and implicitly de-values people with disabilities by operating on stereotypes. Rooting out ableism, as with other "isms" such as racism and sexism, begins with identifying the problem and the places where ableism is reflected in the system. We see substantive changes to immigration law and policy, as well as education of all actors involved in the immigration system, as the next steps. Our hope is that scholars, advocates, and changemakers will continue to offer solutions and implement changes that reflect a different ideology moving forward—one that values and prioritizes inclusion, openness, and recognition of the unique contributions of people with disabilities.

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160. This idea was proposed by the Autistic Self Advocacy Network. *ASAN Comments on Public Charge ANPRM*, AUTISTIC SELF ADVOCACY NETWORK (Oct. 26, 2021), https://perma.cc/3P33-2L8Y.

161. *See* Arastu & Naqui, *supra* note 8, at 263 (acknowledging the disability justice framers' belief "that absent a widespread change in the public perception of disability, disability rights laws can only achieve the bare minimum").

162. For a more fulsome discussion of the disability justice approach, see generally Arastu & Naqui, *supra* note 8 (positing that ableism "(1) undergirds the construction of disabled immigrants as unworthy burdens; (2) robs disabled immigrants of agency and self-determination; and (3) invisibilizes the experiences of disabled immigrants navigating immigration processes and the advocacy ecosystem"); Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 716 (2021) ("Disability Justice moves beyond law and policy: It seeks to radically transform social conditions and norms in order to affirm and support all people's inherent right to live and thrive.") (quoting Talila "TL" Lewis, *Disability Justice Is an Essential Part of Abolishing Police and Prisons*, LEVEL (Oct. 7, 2020), https://perma.cc/E9UJ-EHXJ).