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Standing on Our Own Two Feet: Disability Justice as a Frame for Reimagining Our Ableist Immigration System

Nermeen Arastu & Qudsiya Naqui

ABSTRACT

Ableism forms the scaffolding of our immigration laws, policies, and practices, but the operation of this pervasive form of exclusion has been grossly unacknowledged and understudied until now. In 1882, Congress first codified the exclusion of defective bodies by declaring that, "any lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge," was unworthy of admission onto U.S. shores. These ability-based hierarchies remain in today's immigration system which rewards productivity, educational attainment, and high-skilled labor with regularized immigration status, an array of public benefits, work authorization, and other advantages. We argue that immigration legal and policy frameworks must be reimagined in order to decouple the process of migration from this system of body valuation.

This Article is the first to argue that dismantling ableism must be a core imperative of the movement for immigration abolition, and that the principles of disability justice can serve as a tool for identifying the radical changes necessary to achieve this transformation.

We begin by interrogating abolitionist scholarship. We observe the limited acknowledgment of the role that ableism has played in erecting systems of oppression and the consequent absence of anti-ableist strategies to achieve a vision of abolition that eliminates the categorization and stratification of bodies. We then look more closely at the immigration system and the ways in which it creates categories of exclusion based on perceptions of worth and productivity. We also illuminate how ableism has fueled the erection of access barriers for disabled immigrants, and the resulting disempowerment of these individuals as they navigate complex immigration procedures. We contend that decoupling migration from ableism and advancing access as a pathway to power and self-determination for immigrant communities must become a part of the abolitionist vision. This approach encourages the exploration of new solutions drawn from the lessons of the disability rights and disability justice movements.

We then explore three specific ways in which ableism operates in the modern immigration system. We posit 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. We look to the ten principles of disability justice to propose transformative solutions to address these systemic problems. We argue that accounting for ableism as an intrinsic and formative component of the

existing immigration system will augment existing efforts to achieve change. We hope that this reframing is only the beginning for new lines of scholarly and empirical exploration. Our goal is to reimagine migration for disabled people, and, in turn, for all bodies that cross borders.

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INTRODUCTION

> [D]isability and immigration are a part of . . . what have woven this country together. And they're a part of why a lot of families are here that couldn't go elsewhere. Disability is just such a part of the human experience and so is immigration.[1]

Conchita Hernandez Legorreta is one voice among the millions of disabled immigrants in the United States. Conchita's parents brought their five children to the United States in search of a better life and more services for their two low vision children.[2] Conchita's father found work on a horse ranch, where he and Conchita's mother labored for no wages.[3] Conchita's parents lacked access to the language skills necessary to help their two disabled children navigate the education system and receive the services necessary to thrive with their low vision.[4]

These challenges shaped Conchita into a fierce advocate for disabled Spanish-speaking immigrant communities in the United States and Mexico. She founded Mentoring Engaging and Teaching All Students (METAS) International, an organization dedicated to delivering culturally competent blindness training to Spanish-speaking children and their families.[5] She also cofounded the National Coalition of Latinx with Disabilities to raise awareness of the challenges that disabled Latinx people face, including particular barriers in immigration law and policy.[6]

Conchita's acknowledgment that disability and immigration are inextricably linked has rung true from our nation's earliest history. Indeed, ableism fueled by eugenics, racism, and xenophobia forms the soil upon which

1. *Disability Visibility Podcast: Disabled Immigrants*, DISABILITY VISIBILITY PROJECT (Nov. 15, 2020), https://disabilityvisibilityproject.com/2020/11/15/ep-90-disabled-immigrants [https://perma.cc/FQV8-7J2T].
2. Conchita Hernández Legorreta, *I Grew Up Latinx & Disabled—& I'm Creating the Change I Want to See*, REFINERY 29 (Sept. 15, 2020, 6:41 AM), https://www.refinery29.com/en-us/2020/09/9985118/blind-latinx-experience-immigrant-disability-rights-metas#r29-container [https://perma.cc/WSE8-YJS8].
3. *Id.*
4. *Id.*
5. *See* MENTORING ENGAGING & TEACHING ALL STUDENTS, http://metasinternational.org [https://perma.cc/54YZ-DHXY].
6. *See* NAT'L COAL. FOR LATINXS WITH DISABILITIES, http://www.latinxdisabilitycoalition.com [https://perma.cc/9DEW-THPV].

the U.S. immigration system was built. The settler colonial state harnessed Western legal structures of competence, sanity, and wardship to dispossess landowning Native American people and to enable U.S. officials, boarding school superintendents, and reservation agents to incarcerate Native American people.[7] In 1882, the U.S. Congress first codified the exclusion of defective bodies by declaring that, "any . . . lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge," was unworthy of admission onto our shores.[8] The Immigration Act of 1891 replaced the phrase "unable to take care of himself or herself without becoming a public charge," with "likely to become a public charge."[9] This subtle but powerful change allowed immigration officials to construct disability as they sized up each body that passed through ports of entry like Ellis Island.[10]

Later, in 1907, the Commissioner of Immigration, Frank P. Sargent, stated in a letter to Congress that, "the exclusion from this country of the morally,

7. Author Sarah Whitt elaborates:

> Anti-Indian discrimination prevented Indian people from accessing equal protection under U.S. law, and in some cases, U.S. courts appointed legal guardians to act in the interest of the Indian people declared incompetent. Moreover, unequal power dynamics between white Americans and Indian people were paradoxically described in benevolent terms, and regarded as such in everyday conversations. In many instances, Canton records reveal that those confined to the institution were in need of medical care or were perceived, often by the reservation agent, to be a burden upon their communities. But Canton records also document how Western legal structures of sanity, competence, and wardship were used by the powerful to dispossess landowning Indian women and men, and to enable U.S. officials, boarding school superintendents, reservation agents, guardians, and in some instances, family members, to incarcerate Indian people at the facility. These patterns lay bare the settler colonial logic, or "settler grammar," to borrow from Mexican/Tigua scholar Dolores Calderon, that undergirds practices at Canton, as well as Hummer's false promises of offering "care and maintenance" to the Indian people confined there.

Sarah Whitt, *'Care and Maintenance': Indigeneity, Disability and Settler Colonialism at the Canton Asylum for Insane Indians, 1902–1934*, 41 DISABILITY STUD. Q. (2021).

8. An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214 (1882).
9. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084. The 1891 Act added "insane persons" to the health-related grounds of inadmissibility and mandated that arriving immigrants be subjected to a medical examination by a "civil surgeon" of the Marine Hospital Service. *Id.* § 8. *See also* Monika Batra Kashyap, *Toward a Race-Conscious Critique of Mental Health-Related Exclusionary Immigration Laws*, 26 MICH. J. RACE & L. 87, 100 (2021) (footnote omitted) ("In response, Congress passed the Immigration Act of 1891 whose stated purpose was '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.'").
10. *See* JAY TIMOTHY DOLMAGE, DISABLED UPON ARRIVAL: EUGENICS, IMMIGRATION, AND THE CONSTRUCTION OF RACE AND DISABILITY 8–50 (2018).

mentally, and physically deficient is the principal object to be accomplished by the immigration laws."[11] The Acting Director of U.S. Citizenship and Immigration Services in 2019 did not sound very different from Commissioner General Sargent in 1907 when describing the ableist imperatives of American immigration policy: "Give me your tired and your poor who can stand on their own two feet and who will not become a public charge."[12] Public charge remains a ground of inadmissibility to this day.[13]

The concept of abolition has come to define and shape movements for transformative change to dismantle past and enduring systems of oppression including chattel slavery, policing, mass incarceration, and the child welfare system. Abolition has also taken hold in the immigration movement as a rallying cry to end the violent control of our borders. However, this movement has failed to acknowledge the role of ableism. Though much has been written about the operation of racism in our immigration system and the historic ableist foundation of immigration laws, there remains a vacuum of scholarly exploration, especially empirical study, on the present-day manifestations of ableism in immigration policies and practices.[14] We argue that an examination of ableism is essential to achieving the radical reimagining that abolition requires.

Over the course of the last two decades, disabled activists have coined the term "disability justice" to describe a social movement dedicated to the liberation of disabled people that extends beyond protecting civil rights and includes building political power, as well as achieving social and economic freedom. A cross-movement coalition, grounded in the lived experiences of disabled activists like Conchita Hernandez Legorreta and many others, shows us that the principles of disability justice offer the scaffolding upon which we can build a transformative approach to immigration law, policy, and practice.

11. DOUGLAS C. BAYNTON, DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS 19 (2016).
12. Sasha Ingber & Rachel Martin, *Immigration Chief: 'Give Me Your Tired, Your Poor Who Can Stand on Their Own 2 Feet'*, NAT'L PUB. RADIO (Aug. 13, 2019, 10:38 AM), https://www.npr.org/2019/08/13/750726795/immigration-chief-give-me-your-tired-your-poor-who-can-stand-on-their-own-2-feet#mainContent [https://perma.cc/9YM3-KFCL].
13. *See* 8 C.F.R. § 212.22 (2022).
14. *See* Douglas C. Baynton, *Defectives in the Land: Disability and American Immigration Policy, 1882–1924*, J. AM. ETHNIC HIST., Spring 2005, at 31, 4111 ("In immigration historiography, as in so many other areas of historical inquiry, disability has long been present but rendered either invisible or insignificant. A disability analysis is essential, however, to making sense of the depth of anti-immigrant sentiment and the workings of immigration policy at the turn of the twentieth century.").

Immigrant justice cannot exist without disability justice. This Article offers the novel argument that dismantling ableism is an essential component of achieving true change in the immigration system. It further explores how approaching abolition armed with the framing of disability justice can move us closer to policy solutions that will ultimately benefit all immigrants.

In Part I, we define ableism, and highlight its essentiality in abolitionist scholarship and activism. We argue that to integrate the dismantling of ableism as a core abolitionist imperative, scholars and activists must strive to decouple decisions about migration from the processes of body valuation that have undergirded U.S. immigration policies for centuries, and leverage access for disabled immigrants in the immigration process to secure their power and self-determination. We situate disability justice as a fundamental component for crafting transformative policy solutions that align with abolition. In Part II, we explore how ableism operates in the modern immigration system—namely, how it constructs disabled immigrants as unworthy burdens on American society; the ways in which it robs disabled immigrants of agency and self-determination; and how it obscures the experiences of disabled immigrants navigating the system. We apply the principles of disability justice to set forth abolitionist pathways to solve these challenges. We conclude with a call to action for immigration and disability movements alike to recognize disability as part of the immigration experience, and to center disability justice in movements for abolition.

This Article creates the foundation for a new framework to reimagine immigration in the United States. The problems we identify serve as examples of widespread, entrenched ableism, and the solutions we propose as transformative tools for tearing it down. We believe the ideas and concepts we describe in this Article will spur further analysis across all intercepts of the immigration process from admission to deportation, to refugee protection, and beyond.

I. RECOGNIZING DISABILITY JUSTICE AS A PATHWAY FOR TRANSFORMING THE IMMIGRATION SYSTEM

At its core, abolition calls for the dismantling of punitive, carceral systems that have enslaved, imprisoned, and impoverished whole communities based on race for generations. Building upon this tradition of resistance, immigration activists have also begun to call for the abolition of existing hierarchies of immigrant exclusion and detention. Though the movements for

disability rights and disability justice have unfolded alongside movements for police abolition, the end of mass incarceration, the reimagining of the child welfare system, and immigration abolition, abolitionist practice has not fully embraced the dismantling of ableism as one of its ends. We argue that it should.

This Part challenges abolition activists and scholars to incorporate the dismantling of ableism as an abolitionist imperative. It articulates the myriad intercepts of the immigration system that perpetuate ableism, and the potential solutions that emerge when disability justice principles are applied. This theoretical framing guides the discussion in Part II, which examines three specific ways in which ableism operates in the immigration system and the strategies—rooted in disability justice—that might be deployed to combat it. Ultimately, we argue that acknowledging and dismantling ableism will advance the cause of immigration abolition by decoupling notions of body valuation from the process of migration and leverage access as a tool to build power in immigrant communities.

A. The Immigration System

As further described below, abolition movements seek to eliminate reliance on punitive law enforcement tactics like incarceration and family separation in response to perceived social threats. Immigration abolition movements have similarly fought to end deportation and detention practices that have been leveraged to punish and exclude immigrants who are perceived as dangerous or otherwise undesirable. This is exemplified by the "Abolish ICE" movement, which targets the enforcement and imprisonment functions of the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) division. To recognize the insufficiency of current immigration abolitionist theory and practice to address ableism, we must first understand the myriad intercepts of the immigration process where disability status may become an exclusionary factor.

Beyond ICE, the U.S. immigration system is sprawling, governed in part by all three branches of government through statutory and regulatory provisions, executive-made policy, and court decisions that have set the parameters of

border control,[15] noncitizen criminalization,[16] hierarchies of admission,[17] grounds of deportability,[18] and detention authority.[19] Within the executive branch, the system spans six federal agencies, including the Departments of Labor, Health and Human Services, Education, Homeland Security, State, and Justice. Together these agencies create an expansive network involving policing, militarization, detention, and adjudication to oversee all matters concerning noncitizens, ranging from their admission and deportation to the revocation of U.S. citizenship. These agencies also regulate[20] the provision of certain public benefits,[21] including work authorization, education, resettlement support, and other resources offered to noncitizens.

15. In 1951, U.S. Congress created the U.S. Border Patrol, an entity of the U.S. Customs and Border Protection. *See Border Security*, U.S. CUSTOMS & BORDER PROT. (July 28, 2023), https://www.cbp.gov/border-security [https://perma.cc/6NH5-GGAE].
16. 8 U.S.C. § 1325 and § 1326 make it a crime to unlawfully enter or reenter the United States. Both of these laws were passed during the height of the eugenics movement to further the race-based exclusions. *See also* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1053–54 (2022) (providing detailed documentation of the legislative history of criminal reentry statutes whose enactment reflected the racial animus against Latin American immigrants).
17. Some examples of classes of admission are summarized on the Department of Homeland Security's webpage. *See Immigrant Classes of Admission*, DEP'T HOMELAND SEC. (Sept. 23, 2022), https://www.dhs.gov/immigration-statistics/lawful-permanent-residents/ImmigrantCOA [https://perma.cc/U9GW-EUD6]; *see also* 8 U.S.C. § 1182.
18. *See* 8 U.S.C. § 1227.
19. The Department of Homeland Security has broad statutory authority to detain noncitizens identified for removal. Various provisions of the Immigration and Nationality Act scaffold the immigration detention framework. Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226 (providing discretionary detention authority); *id.* § 236(c) (providing for mandatory detention of certain noncitizens due to specified criminal activity or terrorism-related grounds); *id.* § 235(d) (allowing for detention of arriving aliens); *id.* § 241(a) (permitting post-order detention). The scope of detention has been found to be subject to certain constitutional constraints, especially where detention is prolonged. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001); *see also* Megan Davy, Deborah W. Meyers & Jeanne Batalova, *Who Does What in U.S. Immigration*, MIGRATION POL'Y INST. (Dec. 1, 2005), https://www.migrationpolicy.org/article/who-does-what-us-immigration [https://perma.cc/2RMU-ANV4] (depicting which federal agencies are responsible for the implementation and enforcement of immigration-related laws and regulations).
20. For example, Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, §§ 400–51, 110 Stat. 2260–77 (codified at 8 U.S.C. § 1601), established sweeping restrictions on the eligibility of noncitizens for federal public benefits. *Id.*
21. The DHS and Department of Labor oversee the ability of immigrants to work by regulating work authorization of noncitizens and sanctioning employers who hire those noncitizens unauthorized to work. *See, e.g.*, 8 C.F.R. § 274a.12 (2012) (enumerating the classes of aliens authorized to work in the United States without restriction as a condition of admission); 20 C.F.R. § 655.135 (2022) (setting forth the requirements for employers of

To enter the United States through a U.S. border checkpoint, airport, or other port of entry, noncitizens must meet specified criteria and undergo inspection, depending on the status under which they seek to enter.[22] For example, student,[23] employment,[24] humanitarian,[25] and family-based visas[26] all have varying eligibility criteria, many, at least partially, adjudicated at U.S. consulate offices abroad.[27]

Even where these basic eligibility criteria are met, an individual may be excluded from the United States due to inadmissibility grounds.[28] These grounds are statutorily enacted and—among other miscellaneous categories—

temporary agricultural workers); 20 C.F.R. § 655.20 (2015) (setting forth requirements for employers of nonagricultural temporary workers).

22. *See* 8 C.F.R. § 235 (2012).
23. *See Students and Exchange Visitors*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 21, 2023), https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors [https://perma.cc/4HFN-F44D].
24. *See Working in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states [https://perma.cc/482G-9XUQ].
25. *See Humanitarian*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian [https://perma.cc/9RGR-455B].
26. *See Family of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 23, 2018), https://www.uscis.gov/family/family-of-us-citizens [https://perma.cc/AY3C-BRX8].
27. Disabled immigrants may be disadvantaged when seeking lawful pathways to entry due to stringent eligibility requirements which emphasize specific merits or employment-based criteria. Additionally, they could encounter difficulties accessing facilities for adjudication, such as traveling to consulates abroad, and may also lack information about immigration pathways due to inaccessible technologies and information sources. For example, disabled immigrants may be disadvantaged from gaining access to employment and education-based pathways to entering the United States given exclusionary structures in employment and educational frameworks globally. Further, the U.S. constructs "immediate family" eligibility for family-based migration in narrow ways that may exclude caretakers and kinship care providers for disabled immigrants, further preventing their ability to immigrate through family-based pathways. Finally, obstacles to navigating physical consular spaces for interviews or using technology necessary to seek asylum at the Southern border, like the Customs and Border Patrol (CBP) One App, are constructive border walls blocking immigration access for otherwise eligible disabled immigrants. *See, i.e.,* Austin Kocher, *Glitches in the Digitization of Asylum: How CBP One Turns Migrants' Smartphones into Mobile Borders*, 13 Societies 149 (2023).
28. Public charge and health-related inadmissibility have historically targeted disabled immigrants seeking entry to or permanent status in the United States, due to perceived notions of public safety, communicable disease prevention, and misconceptions about the financial costs needed to support them. *See* Immigration and Nationality Act § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

span health,[29] criminal activity,[30] national security,[31] public charge, fraud, misrepresentation, and prior immigration violations.[32] Inadmissibility grounds can prevent certain noncitizens from entering or remaining in the United States or gaining permanent residence status.[33] Finally, inadmissibility grounds may also apply to some permanent residents returning to the United States after travel abroad.

Some enter the U.S. border outside of a designated port of entry. This manner of entry is referred to as an entry without inspection. Those who enter without inspection are considered undocumented—unless they are able to regularize their status in a few limited ways—and are forced into the fringes of society. While undocumented, they may be unable to gain work authorization or access to certain public benefits and live under the constant threat of deportation.[34]

29. *See* Immigration and Nationality Act § 212(a)(1)(A), 8 U.S.C. § 1182(a)(1)(A). Individuals who have a "communicable disease of public health significance" are inadmissible, as are those persons with a "physical or mental disorder and behavior associated with the disorder that may pose . . . a threat to the property, safety, or welfare of the alien or others." *Id.* Moreover, a person experiencing substance abuse disorders is inadmissible under this section. *Id.* § 212(a)(1)(A)(iv). Individuals seeking admission as immigrants, including those adjusting status in the U.S., are inadmissible unless they can document that they have received certain vaccines. *Id.* § 212(a)(1)(A)(ii).
30. *See id.* § 212(a)(2). Any person is inadmissible who (1) was convicted of or admits to committing a "crime of moral turpitude" or a controlled substance violation; (2) was convicted of two or more offenses of any type and received aggregate sentences of five or more years; (3) trafficked or assisted in the trafficking of controlled substances, or knowingly benefitted from a spouse or parent's trafficking activities; (4) is coming to the U.S. to engage in prostitution or commercialized vice; (5) previously departed the U.S. as a condition of receiving immunity from prosecution for a serious crime committed in the U.S.; (6) engaged in severe violations of religious freedoms as an official in a foreign government; (7) has engaged in trafficking in persons or knowingly benefitted from a spouse or parent's trafficking; or (8) has engaged in money laundering or is coming to the U.S. to launder money. *Id.*
31. *See id.* § 212(a)(3)(B)(i). The current U.S. designated terrorism grounds make inadmissible any person who (1) has in the past, is currently, or is likely in the future to engage in terrorist activities; (2) is an official representative or spokesperson of a terrorist group or a group that endorses terrorism; (3) is a member of a terrorist group; (4) has used a position of prominence to endorse terrorism or persuade others to support terrorism; or (5) is the spouse or child of a noncitizen who is inadmissible on terrorist grounds, unless the spouse or child did not know about the terrorist activity or has renounced it. *Id.*
32. *See id.* § 212(a)(4); *id.* § 212(a)(6).
33. *See id.* § 245.
34. Here, too, disabled immigrants are acutely impacted by the vulnerability of being undocumented. They are forced to navigate physical, social, and institutional discrimination and inaccessibility with the added fear that asking for resources could expose them to deportation.

Finally, those who are admitted to the United States—overcoming multiple levels of eligibility described above—are subject to the threat of deportation until the moment of naturalization. Deportation, referred to in the statutory language governing immigration as removal, is the expulsion of a noncitizen who has already been admitted to the United States.[35] Classified as a civil punishment, deportation allows the United States to expel those it deems undesirable. For those who are at risk of persecution and violence, or who lack essential medications and therapies in their home country, this civil penalty could equal death or long-term family separation.[36]

The process of removal occurs through a series of administrative courts housed within the Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR) and its appellate division, the Board of Immigration Appeals (BIA). It is in this defensive posture that immigrants may prove their eligibility for various forms of relief from deportation, such as asylum, withholding of removal, and cancellation of removal. Certain types of relief can lead to legal permanent residence and eventual naturalization. However, other forms of relief are temporary, resulting in either the provisional removal of the case from the court's docket, known as an "administrative closure," or the dismissal of the case altogether. This leaves immigrants without permanent status in the United States.

35. In theory, immigration law requires more stringent criteria for those who wish to be admitted (under the inadmissibility criteria described above) versus those who have already been admitted. This difference recognizes that individuals already in the United States have ties to this nation. Yet, in practice, some grounds of removal, particularly the grounds calling for deportation of one who has committed an aggravated felony, are more stringent than others. In turn, one can be deported for minor criminal conduct that may have had no impact on one's admission to the United States. Other grounds of removal include inadmissibility at entry and other immigration violations, criminal grounds, and national security grounds. Finally, the Immigration and Nationality Act provides for the removal of individuals for other grounds, including domestic violence, stalking, child abuse, child neglect and protective order violations. Immigration and Nationality Act § 237 (describing crimes that would subject individuals to deportation); *id.* § 212 (describing crimes that would render individuals inadmissible).

36. *See, e.g.*, HUM. RTS. WATCH, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE 1 (2020). Human Rights Watch researchers note:

> In researching this report, we identified or investigated 138 cases of Salvadorans killed since 2013 after deportation from the US . . . . [W]e also identified or investigated over 70 instances in which deportees were subjected to sexual violence, torture, and other harm, usually at the hands of gangs, or who went missing following their return.

Id.

The immigration system also includes a network of legal services providers—advocates, attorneys, and community-based organizations—that provide a range of paid, pro bono, and sliding-scale services to immigrants within the United States and abroad. We include these actors as part of the immigration system because they often make decisions about where to allocate pro bono resources and which immigrant communities to prioritize for advocacy. Such decisions about organizing priorities and the allocation of resources have ripple effects throughout the system. Judges have also used the existence of lawyers and nonlawyer advocates as a perceived measure of due process protections for disabled immigrants, further reiterating the seminal role of lawyers and advocates in the larger immigration system.[37] All of the actors that make up the immigration system have a role to play in the politics of deservedness and work in concert to hinder mobility and stability for some, while facilitating it for others.

B. Abolition, Ableism, and Disability Rights

1. Ableism and Abolitionist Theory

The earliest conceptions of abolition in the United States were born out of Indigenous-led movements and the struggles of enslaved people to achieve liberation.[38] Since that time, abolition has emerged broadly as a concept meant to signify the dismantling of punitive, carceral, harm-inducing systems that have come out of Indigenous erasure, slavery, and settler-colonialism, as well as the dismantling of the capitalistic imperatives that have kept those extractive institutions alive.[39] Modern-day abolitionist movements have fought to end slavery, policing, mass incarceration, and the child welfare system.[40] They have

37. *See, e.g.*, M-A-M-, 25 I. & N. Dec. 474 (B.I.A. 2011) (providing the first ever guidance for immigration judges to identify possible incompetence, evaluate a respondent's competence, and proscribe safeguards, where required to comport with fundamental fairness); Franco-Gonzalez v. Holder, No. CV-10-02211, 2014 WL 5475097, at *2 (C.D. Cal. Oct. 29, 2014).
38. *See, e.g.*, Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686–87 (2019).
39. *See id.*
40. *See id.*; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2020 ed. 2010) (describing the history of mass incarceration and interrogating its racist roots); Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQUIRY 32 (2021) (analyzing criminal reentry praxis through an abolitionist lens); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019)

also served as a blueprint for dismantling the immigration system. Scholars have grappled with the tension between the pursuit of what have been termed reformist reforms, which seek to improve the status quo, and the total shutdown of carceral, punitive institutions and systems.[41] Still others believe that it is indeed possible to take an incremental approach to abolition, while holding total transformation as the ultimate objective.[42] As we describe below, these tensions and debates have borne out in the movements for disability rights and justice, as well as in the movement for immigration abolition. For example, the push to improve conditions of immigrant detention, including access to healthcare and accommodations for detained immigrants with disabilities, is sometimes perceived in the abolition movement as a reformist reform that simply results in more humane confinement spaces, as opposed to completely dismantling detention facilities.[43] In this example, those with disabilities are

(calling for "abolitionist justice" that looks beyond the achievement of justice within legal institutions to replace punishment and retribution with reconciliation and social repair); Jamiles Lartey & Annaliese Griffin, *The Future of Policing*, MARSHALL PROJECT (Oct. 23, 2020), https://www.themarshallproject.org/2020/10/23/the-future-of-policing [https://perma.cc/X73N-LR2J] (exploring modern policing models and the criminalization of communities of color); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/V32Y-7H5U] (calling for the abolition of prisons); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 105 (Greg Ruggiero ed., 2003) (calling for prison abolition in favor of humane and restorative practices); DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022) (exploring the need to apply abolitionist principles to dismantle and transform the child welfare system, which disproportionately harms Black families).

41. *Compare* Liat Ben-Moshe, *The Tension Between Abolition and Reform*, *in* THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT 83 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013) (arguing that the movement to deinstitutionalize disabled people and efforts to improve the conditions of disabled people within carceral institutions must form part of abolitionist history and narratives), *with* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (Earl Lewis et al. eds., 2007) (describing nonreformist reforms as "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization").

42. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (calling for an aspirational abolitionist ethic grounded in gradual decarceration of prisons coupled with a replacement of criminal regulation with more positive regulatory frameworks); René Reyes, *Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention*, 53 CONN. L. REV. 667, 674 (2021) (arguing that the constitutional elimination of pretrial detention marks an incremental step towards the larger project of abolition).

43. *See e.g.*, Setareh Ghandehari, *Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022.pdf [https://perma.cc/XK2N-MPUW].

disproportionately impacted by detention conditions which may exacerbate, or even create, disability, yet ableism is often left out of the abolition conversation.

To understand ableism's role in creating systems of oppression, we must first examine disability history, the definition of ableism, and the role disabled communities have played in the fight to achieve liberation.

According to the Centers for Disease Control and Prevention, approximately one in four U.S. adults has a disability.[44] It is the only minority group that anyone can become a part of at any time. The Americans with Disabilities Act (ADA) defines disability as, "a physical or mental impairment that substantially limits one or more major life activities of such . . . ; [a person who has] a record of such an impairment; [or a person who is perceived by others] as having such an impairment."[45] According to this definition, an individual's physical or mental condition is defined by the medical establishment or by others in the community. It does not account for an individual's self-perception or identification, nor does it acknowledge the social and structural harms that create impairment. Though the ADA's definition of disability establishes a useful and flexible legal category for the purpose of enforcing civil rights protections, it assumes a nondisabled norm and is thus a construct of the abled gaze.[46] Despite its imperfections, we rely on the ADA's definition of disability for our analysis because it is the definition upon which the modern immigration system relies.

Ableism is intertwined with the concept of disability. While most definitions of ableism focus primarily on disability as the root cause of ableism,[47] disability activist Talila Lewis takes a more expansive view, defining ableism as:

44. *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2023), https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html [https://perma.cc/UB9E-TYHN].

45. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1); Rehabilitation Act of 1973, 29 U.S.C. § 791.

46. *See, e.g.*, DOLMAGE, *supra* note 10. Dolmage describes how early restrictive immigration laws of the late nineteenth and early twentieth centuries deployed words like "imbecile" and "feeble-minded" to empower immigration officers deputized by the federal government to cast their gaze on entering migrants, determining whose bodies were acceptable for admission. *Id.* at 31. He further explores how the immigrant sorting process at Ellis Island allowed immigration officials to shape the meaning of disability through their power to admit and exclude based on their own diagnosis. *Id.* at 11–12. Likewise, we argue that the ADA's disability definition confers this power on institutions to provide or withhold accommodations based on their own perceptions of disability.

47. *See, e.g.*, Ashley Eisenmenger, *Ableism 101*, ACCESS LIVING (Dec. 12, 2019), https://www.accessliving.org/newsroom/blog/ableism-101/#main [https://perma.cc/

> A system of assigning value to people's bodies and minds based on societally constructed ideas of normalcy, productivity, desirability, intelligence, excellence, and fitness. These constructed ideas are deeply rooted in eugenics, anti-Blackness, misogyny, colonialism, imperialism, and capitalism. This systemic oppression leads to people and society determining people's value based on their culture, age, language, appearance, religion, birth or living place, "health/wellness", and/or their ability to satisfactorily re/produce, "excel" and "behave."[48]

Lewis's definition encompasses the origins of ableism as rooted in racism, colonialism, and capitalism. It also incorporates other characteristics, aside from disability itself, that factor into the valuing of bodies. For example, ableism also encompasses value being granted or withheld on account of place of birth or residence, a characteristic that is foundational to the present-day immigration system. Importantly, this definition displays how one may be impacted by ableism even if they are not disabled, as individuals are devalued where they stray from perceived ideas of normality and productivity.[49]

Even though ableism plays a foundational role in the prison, policing, and surveillance systems that abolitionists seek to dismantle, it is frequently overlooked in abolition scholarship, organizing, and advocacy.[50] Yet the early efforts of the disability rights movement that led to the passage of the ADA and its enforcement involved combined tactics of deinstitutionalization and the building of strong communities. A brief examination of disability rights history clearly demonstrates this abolitionist ethos.

The ADA was groundbreaking legislation that strove to break down ableism. It achieved this by extending civil rights protections for disabled people, which had previously been limited to federally funded programs under Section 504 of the Rehabilitation Act of 1973. The ADA extended these protections to encompass all state and local governments as well as places of

DBD5-52J6] ("Ableism is the discrimination of and social prejudice against people with disabilities based on the belief that typical abilities are superior.").

48. Talila A. Lewis, *Working Definition of Ableism - January 2022 Update*, TALILA A. LEWIS (Jan. 1, 2022), https://www.talilalewis.com/blog [https://perma.cc/XRM6-8YT2].

49. Talila "TL" Lewis, *Disability Justice Is an Essential Part of Abolishing Police and Prisons*, MEDIUM (Oct. 6, 2020), https://level.medium.com/disability-justice-is-an-essential-part-of-abolishing-police-and-prisons-2b4a019b5730 [https://perma.cc/42KC-S24B].

50. *Id.*

public accommodation.[51] The passage of the ADA and the decades of advocacy that preceded it also resulted in what Liat Ben-Moshe describes as the "largest decarceration movement in U.S. history," namely, the movement for deinstitutionalization of disabled people.[52] This effort ultimately culminated in the U.S. Supreme Court's decision in *Olmstead v. L.C.*, which held that unwarranted segregation of disabled people inside institutions violated Title II of the ADA.[53] Deinstitutionalization forced a reimagining of how people with mental and physical disabilities can exist in the world. It demonstrated the value of community integration over punitive segregation. Ben-Moshe argues that although deinstitutionalization offers the liberatory pathway that abolitionists seek, it does not form part of the abolitionist history.[54] In fact, activists, advocates, and scholars often blame deinstitutionalization as an exacerbating factor in the rise of mass incarceration.[55]

Like deinstitutionalization, the disability rights movement's demand for access and inclusion also reflects the spirit of abolitionist objectives in its insistence that disabled people should have the tools they need to thrive in their communities. Disabled activists fought for and achieved protections that ensured equal treatment in fundamental areas of life such as employment, education, healthcare, places of public accommodation, and digital access. Without accessibility and accommodations in these arenas, disabled people are relegated to the total care of others, either in their homes or inside segregated institutions. Consequently, we argue that abolition in the immigration system and other contexts requires us to fight for access and inclusion for disabled people. Without these foundations, ableism reigns, and segregation, exclusion, and incarceration are inevitable consequences.[56]

51. *See ADA: The Next 30 Years of Disability Rights*, FORD FOUND. (Mar. 4, 2020), https://www.fordfoundation.org/news-and-stories/ford-forum/ada-the-next-30-years-of-disability-rights [https://perma.cc/2U3G-8KTH].
52. LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 2 (2020).
53. Olmstead v. L.C., 527 U.S. 581 (1999).
54. *See* BEN-MOSHE, *supra* note 52.
55. *See id.*
56. *See infra* Part II.C for a detailed discussion of disability justice, its origins, and its ten key principles.

2. Immigration Abolition

As seen in other movements such as family policing,[57] prison abolition,[58] and environmental justice, disability justice has not been adequately considered in efforts to advocate for the abolition of the immigration system. Though calls for abolition and reform in the immigration system have evolved alongside the immigration policies of the early twenty-first century in response to increased enforcement and militarization of the border, the operation of ableism in the modern immigration system has played a limited role in shaping immigration abolition movements. Understanding this limitation in our conception of and advocacy towards immigration abolition is essential to the development of the critical solutions we describe in Part II.

Calls to "abolish ICE" have existed since the genesis of DHS, an agency created in the shadow of September 11, 2001 to enhance national security.[59] DHS was created by combining twenty-two federal agencies under one umbrella, giving the federal government unmatched financial and personnel capacity to enforce already exclusionary immigration laws.[60] ICE is a subagency of DHS, and functions as its largest investigative and enforcement arm.[61] Before consolidation under DHS, immigration admissions were adjudicated through the Department of Commerce and the Department of Labor. Critics of ICE's formation argued that the transfer of the agency under the guise of national security led to a mindset shift, characterizing immigrants as criminals and terrorists, rather than foreign nationals seeking to live and work in the United States.[62]

57. *See, e.g.*, Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37 (2022).
58. *See, e.g.*, Lewis, *supra* note 49.
59. Andrea González-Ramírez, *Here's How the #AbolishICE Movement* Really *Got Started*, REFINERY 29 (July 30, 2018, 1:45 PM), https://www.refinery29.com/en-us/2018/07/205854/abolish-ice-origins-twitter-undocumented-immigrants [https://perma.cc/5VTB-XV5Y].
60. *See Who Joined DHS*, DEP'T OF HOMELAND SEC. (Feb. 27, 2023), https://www.dhs.gov/who-joined-dhs [https://perma.cc/65UZ-6TP2].
61. *Fact Sheet: Immigration and Customs Enforcement (ICE)*, NAT'L IMMIGR. F. (July 10, 2018), https://immigrationforum.org/article/fact-sheet-immigration-and-customs-enforcement-ice [https://perma.cc/3NDY-5JKJ].
62. *See, e.g.*, USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code); Press Release, White House, Homeland Security Presidential Directive-2 (Oct. 30, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011030-2.html [https://perma.cc/HD6E-AB3M]; U.S. IMMIGR. & CUSTOMS ENF'T, ICE FISCAL YEAR 2007 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 1 (2007), https://corpora.tika.

Advocates called for the dismantling of this bureaucratic structure as the Bush and Obama Administrations used it to engage in mass raids and deportations, enhance border militarization, and create vast prison-to-deportation pipelines.[63] The use of deportation and removal, particularly for recent border crossers and those charged with criminal activity, escalated across the Bush and Obama administrations as a result of expanded federal partnerships deputizing state and local law enforcement to engage in immigration enforcement through programs like Secured Communities, which further expanded ICE's reach.[64] In 2014, the Obama Administration announced a new immigration enforcement prioritization schema, informally called "felons, not families" that purported to prioritize violent felons for deportation while avoiding separating families.[65] At the same time, the Obama administration responded to advocates' cries for pathways for young undocumented immigrants and their parents through the creation of the Deferred Action for Childhood Arrivals (DACA) program. The deportations of some classified as dangerous criminals coupled with relief for others who had completed requisite educational and employment requirements further entrenched narratives about deservedness and merit.[66]

Later, the Trump administration's draconian immigration policies led to a more concentrated focus on the dismantling of ICE as an agency, with congressional representatives joining the call for abolition in the aftermath of

apache.org/base/docs/govdocs1/700/700477.pdf [https://perma.cc/NRT4-762M] [hereinafter ANNUAL REPORT] (explaining that ICE was formed "as a 21st century law enforcement agency" for the post-9/11 era).

63. *See* González-Ramírez, *supra* note 59.

64. *See* Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST.: MIGRATION INFO. SOURCE (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not#main-content [https://perma.cc/CWN5-YAMC].

65. Leighton Akio Woodhouse, *Obama's Deportation Policy Was Even Worse Than We Thought*, INTERCEPT (May 15, 2017, 11:23 AM), https://theintercept.com/2017/05/15/obamas-deportation-policy-was-even-worse-than-we-thought [https://perma.cc/D37D-UW66].

66. *See, e.g.*, Joel Sati, *How DACA Pits 'Good Immigrants' Against Millions of Others*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/09/07/how-daca-pits-good-immigrants-against-millions-of-others [https://perma.cc/E287-Y4BE] ("Though well intentioned, lauding the Dreamers has the unintended effect of juxtaposing these 'good,' 'deserving' immigrants with the 'bad' ones—those with, say, a drug charge from years back—who deserve nothing but deportation and marginalization."); Anne Schneider & Helen Ingraham, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 2 (1993) (analyzing how some groups are discursively positioned to be more deserving than others of policy benefits).

President Trump's zero-tolerance policies that led to the well-publicized images of children locked in cages and separated from their families.[67] Congressman Marc Pocan proposed legislation to abolish the agency, calling for the dissolution of ICE and a commission to "implement a humane immigration enforcement system that upholds the dignity of all individuals."[68] Several other federal, state, and local officials joined the rallying cry that advocates had begun decades before.[69] Therefore, calls to abolish immigration enforcement largely focused on the most severe instances of restricting liberty—specifically the forced movement and containment of humans through deportation and incarceration. Thus, abolition included calls to defund, dismantle, and delegitimize immigration enforcement.[70]

Immigration scholars, activists and practitioners have offered a variety of abolitionist goals and ideas for reform and reimagination. Some of these suggestions call for the reduction of the sheer size and scale of the government's ability to deport,[71] others have advocated for access to counsel[72] and other constitutional protections for those in removal,[73] while others have called for

67. *See, e.g.*, Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html#site-content [ttps://perma.cc/L2YP-9WUU].

68. Press Release, U.S. Representative Mark Pocan, Following Trip to Southern Border, Pocan to Introduce Legislation That Would Abolish ICE (June 25, 2018), https://pocan.house.gov/media-center/press-releases/following-trip-to-southern-border-pocan-to-introduce-legislation-that [https://perma.cc/KHV6-D3HR].

69. *See* Olivia B. Waxman, *The 'Abolish ICE' Movement Is Growing. Here's Why the U.S. Immigration and Customs Enforcement Agency Was Created*, TIME (June 29, 2018, 3:12 PM), https://time.com/5325492/abolish-ice-history [https://perma.cc/DV6M-JLFG].

70. *See* Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1042–47 (2021).

71. *See* Jennifer Lee Koh, *Downsizing the Deportation State,* 16 HARV. L. & POL'Y REV. 85, 89 (2021).

72. *See, e.g.*, *Who We Are,* VERA: ADVANCING UNIVERSAL REPRESENTATION INITIATIVE, https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative [https://perma.cc/5FM9-JDKN];*see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

73. *See, i.e.*, Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 U.C. DAVIS L. REV. 1283, 1284 (2022) (arguing that "constitutional traditions demand that all categories of noncitizens—including legal permanent residents, temporary lawful visitors, unauthorized individuals, and applicants for initial entry—be entitled to freedom from arbitrary detention, notice of the grounds that will render them deportable or inadmissible, a reasoned explanation for governmental action, and a meaningful opportunity to be heard").

expanded pathways to lawful status for those most vulnerable, such as those who have survived persecution.[74]

A range of scholars have posited various affirmative visions of just and humane immigration-enforcement system in a post-ICE world.[75] Markowitz posits that any new immigration enforcement scheme must achieve two distinct goals: to cure the inhumanity that characterizes ICE and to assure compliance with immigration laws.[76] To advance these goals, he offers a system that reduces enforcement and creates cooperative compliance assistance.[77] Markowitz imagines scalable penalties such as fines as an alternative to deportation, with the aim of minimizing the use of coercive state power.[78]

Despite the expansive shifts that Markowitz proposes, the assumption that the ability to deport and exclude remains unimpeachable political common sense.[79] This concept is what Angélica Cházaro coins as a problematic "common

74. *See* AM. IMMIGR. COUNCIL, BEYOND A BORDER SOLUTION: HOW TO BUILD A HUMANITARIAN SOLUTION THAT WON'T BREAK 40 (2023), https://www.americanimmigrationcouncil.org/research/beyond-border-solutions [https://perma.cc/EZX6-G4XR] ("Targeted parole programs and alternate pathways can reduce the need for irregular migration and benefit individuals who are seeking safety or a better life in the United States but do not have any method of accessing the country other than the asylum system at the southern border.")

75. Peter L. Markowitz, *Abolish ICE . . . and Then What*?, 129 YALE L.J. F. 130 (2019) (suggesting an alternative enforcement scheme divorced from detention, mass deportation or dedicated immigration police); *see also* Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 9–13 (2017) (suggesting a cooperative enforcement approach where immigration officials would help regularize status of immigrants who are low priorities for removal); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011) (suggesting an increase in the ability for the Department of Labor to monitor immigration enforcement decisions to, among other benefits, lessen ICE's law enforcement culture); David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411 (2015) (suggesting an expansive one-time statutory legalization program followed by enforcement for newer violators); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622 (2015) (analyzing legal noncompliance from the perspective of current and prospective unauthorized immigrants to inform a more self-regulatory approach to governance); Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. AM. PROGRESS (July 22, 2019), https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system [https://perma.cc/PH6X-5T5X] (putting forth a framework aligned with supply and demand rather than artificial caps, fair and efficient asylum adjudication, proportionality and due process in enforcement and a path to citizenship for long-term residents).

76. Markowitz, *supra* note 75, at 137.

77. *Id.* at 138–46.

78. *Id.* at 143–44.

79. Cházaro, *supra* note 70, at 1043.

sense of deportation."[80] Likewise, there remains a belief in the unquestionable right of a sovereign nation to engage in an ableist sorting of noncitizens, regulating who can enter a nation's borders and what form of temporary or permanent status they are granted. That a sovereign nation would prioritize able-bodied individuals who would contribute to a capitalistic society is rarely questioned, except in instances where there is a plea for restricted exemptions to admit individuals based on specific humanitarian reasons related to persecution or extreme hardship.[81]

Laila Hlass puts forth a "deportation abolition ethic" that builds upon and operationalizes Chazaro's carceral abolition theory, creating a roadmap for practitioners.[82] She suggests three categories of inquiry as attorneys develop this ethic: (1) an antiracist orientation, (2) practices to build power within immigrant communities, and (3) structural changes that avoid re-entrenching and expanding state violence.[83]

Cházaro provides a framework for deportation abolition described as "ending the practice of expulsions on the basis of national origin" by abolishing both the process of deportation and very idea of deportability.[84] By questioning the legitimacy and effectiveness of deportation as a means of social control and border regulation, Cházaro proposes an ethic that challenges the fundamental idea of immigrant exclusion and integration as necessary to domestic sovereignty and security.[85] Cházaro asks us the question: why is deportation necessary? Cházaro recenters immigration as a paradigm of exclusion and deportation, which stands in direct contrast to its portrayal as a process of inclusion. This new perspective defines immigration through the lens of violence, both at the moment of deportation itself and also in living under the constant threat of deportation. At its heart, deportation is illegitimate state violence.[86]

Scholars of immigration history and abolition rightly cite to race-based exclusions, disproportionate impacts of criminal immigration schemes, and state violence against communities of color, especially Black

80. *Id.* at 1042–43.
81. *See* Liav Orgad, *When Is Immigration Selection Discriminatory?*, 115 AM. J. INT'L L. UNBOUND 345 (2021).
82. *See* Laila L. Hlass, *Lawyering From a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597 (2022).
83. *See id.* at 1623–36.
84. Cházaro, *supra* note 70, at 1048.
85. *Id.* at 1050.
86. *Id.* at 1070–83.

people, as evidence that policing and deportation are tools of social control and aim to preserve existing power hierarchies.[87] Yet, like race, class, and poverty, disability also makes one disproportionately more likely to face the violence of exclusion and deportation. Omitting ableism from discussions of immigration abolition limits abolitionist tactics to focus on detention and removal alone, rather than the myriad other immigration processes that also constitute state violence. Eisha Jain acknowledges that a deportation-centric approach conceptually narrows the full range of enforcement practices and instead calls for an expansive polity-centric approach.[88]

For those with disabilities, carcerality exists long before ICE steps in. It exists in the sorting and valuing of people for admission to the United States, the mechanics of border crossings, and the ability to access information and services throughout the process. Violence inherent in the execution of manufactured hierarchies of admission which govern who is allowed to enter the United States, who is given status after entry, what type of status is given, how long it takes to achieve such status, and the difficulties in applying for that status all contribute to violence against disabled immigrants.[89] As we explain in Part II, this hierarchy

87. *See* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018) (describing how racial animus was at the root of laws which rendered those with criminal convictions as deportable); *see also* Yolanda Vázquez, *Enforcing the Politics of Race and Identity in Migration and Crime Control Policies, in* RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL 142, 151 (Mary Bosworth et al. eds., 2017); Cházaro, *supra* note 70, at 1090 ("Contending with safety, particularly when discussing safety through deportation of criminals, means contending with the idea that in the United States criminality has historically been defined through proximity to Blackness. Blackness became tethered to criminality in part through non-Black immigrants' claims to whiteness; successive waves of immigrants sought to distance themselves from African Americans and fought to be recognized as white, with successful integration predicated on proximity to whiteness."); Hlass, *supra* note 82, at 1611 (footnote omitted) ("Deportation abolitionists, like carceral abolitionists, center those communities most impacted by carceral systems. In the immigration context, this means drawing out histories of Native Americans and Black migrants, which are often neglected in accounts of immigration history. It also means understanding how White supremacy ideology animates historic and modern immigration law and policies targeting immigrants of color.").

88. Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794 (2022).

89. *See* Omar Martinez et al., *Evaluating the Impact of Immigration Policies on Health Status Among Undocumented Immigrants: A Systematic Review*, 17 J. IMMIGRANT MINORITY HEALTH 947 (2015) (finding a direct relationship between anti-immigration policies and depression, anxiety, and posttraumatic stress disorder in undocumented immigrants); Heide Castañeda, Seth M. Holmes, Daniel S. Madrigal, Maria-Elena DeTrinidad Young, Naomi Beyeler & James Quesada, *Immigration as a Social Determinant of Health*, 36 ANN. REV. PUB. HEALTH 375 (2015) (discussing the correlation between punitive immigration policies and negative impacts on health and wellbeing); Karen Hacker, Jocelyn Chu, Lisa

has pervaded the U.S. immigration system through both explicit and facially neutral policies.

Applying disability justice in the movement for immigration abolition requires the dismantling of systems that prioritize some humans over others based on perceived hierarchies of body value premised upon health and productivity. We propose that any reimagination of immigration policy should begin by resisting the ableist value system that underlies current schemes of admission, enforcement, and deportation.[90]

3. Disability Justice and Its Liberatory Pathways

Disability justice establishes a framework to address the limitations of existing abolitionist theory. It creates a praxis for organizing and community building that centers the experiences of those whom the disability rights movement did not account, including immigrants. We argue that the principles of disability justice lead to new pathways that will advance abolition in the immigration system.

In 2005, activists Patty Berne, Mia Mingus, Leroy Moore, Stacey Milbern, Eli Claire, Sebastian Margaret, and others began the first conversations about the need for a second-wave movement that would build upon the advances of the disability civil rights movement.[91] These queer and disabled activists of color coined the term "disability justice" as the framework for this nascent form of organizing. They define disability justice using the following basic tenets:

- "All bodies are unique and essential[;]

Arsenault & Robert P. Marlin, *Provider's Perspectives on the Impact of Immigration and Customs Enforcement (ICE) Activity on Immigrant Health*, 23 J. HEALTH CARE FOR POOR & UNDERSERVED 651, 651 (2012) (reporting findings that 48 percent of surveyed health providers "observed negative effects of ICE enforcement on the health or health access of immigrant patients"); Laura C N Wood, *Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children*, BMJ PAEDIATRICS OPEN, Aug. 2018, at 1 (reporting how family separation immigration policies may result in "damaged attachment relationships, traumati[z]ation, and toxic stress" in children and immigrant communities).

90. *See* Medha D. Makhlouf, *Destigmatizing Disability in the Law of Immigration Admissions*, *in* DISABILITY, HEALTH, LAW, AND BIOETHICS 187 (I. Glenn Cohen et al. eds., 2020). Medha Makhlouf observes these politics of deservedness and comments, "[s]ome might argue that it is common sense to prefer a healthy or able-bodied citizenry to one that is ill or disabled. That 'common sense,' however, reveals a blanket judgment about the inferiority of noncitizens with disabilities relative to noncitizens without disabilities." *Id.* at 188.

91. *See* SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 16–17 (2d ed. 2019).

- All bodies have strengths and needs that must be met[;]
- We are powerful, not despite the complexities of our bodies, but because of them[; and]
- All bodies are confined by ability, race, gender, sexuality, class, nation state, religion, and more, and we cannot separate them."[92]

The framers identify ten principles of disability justice: intersectionality,[93] leadership of those most impacted,[94] anticapitalist politic,[95] commitment to cross-movement organizing,[96] recognizing wholeness,[97]

92. *Id.* at 19.
93. *See* SINS INVALID, 10 PRINCIPLES OF DISABILITY JUSTICE 1 (2015), https://static1.squarespace.com/static/5bed3674f8370ad8c02efd9a/t/5f1f0783916d8a179c46126d/1595869064521/10_Principles_of_DJ-2ndEd.pdf [https://perma.cc/DXG7-EHWN] ("[T]his principle says that we are many things, and they all impact us. We are not only disabled, we are also each coming from a specific experience of race, class, sexuality, age, religious background, geographical location, immigration status, and more."). Kimberlé Williams Crenshaw first coined the term "intersectionality" in 1989. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). Lifting up Black women's employment discrimination claims as an example, Crenshaw draws out the weaknesses of our legal system's antidiscrimination framework, explaining that antidiscrimination laws designed to tackle a single form of marginality (e.g., race, gender, etc.) only partially address the harms experienced by those who hold multiple marginalized identities across more. *Id.*
94. *See* SINS INVALID, *10 Principles, supra* note 93 ("When we talk about ableism, racism, sexism & transmisogyny, colonization, police violence, etc., we are not looking to academics and experts to tell us what's what—we are lifting up, listening to, reading, following, and highlighting the perspectives of those who are most impacted by the systems we fight against.").
95. *See id.* ("The nature of our disabled bodyminds means that we resist conforming to 'normative' levels of productivity in a capitalist culture, and our labor is often invisible to a system that defines labor by able-bodied, white supremacist, gender normative standards. Our worth is not dependent on what and how much we can produce.").
96. *See id.* ("Disability justice can only grow into its potential as a movement by aligning itself with racial justice, reproductive justice, queer and trans liberation, prison abolition, environmental justice, anti-police terror, Deaf activism, fat liberation, and other movements working for justice and liberation.").
97. *See id.* at 2 ("Each person is full of history and life experience. Each person has an internal experience composed of our own thoughts, sensations, emotions, sexual fantasies, perceptions, and quirks. Disabled people are whole people.").

sustainability,[98] commitment to cross-disability solidarity,[99] interdependence,[100] collective access,[101] and collective liberation.[102] Each of these principles is discussed in turn in *Skin, Tooth, and Bone: The Basis of Movement is Our People*, published by Sins Invalid.[103]

The disability justice framers acknowledge the disability rights movement of the mid-twentieth century for advancing independence and possibility for disabled people, but they offer several critiques, signaling that there is further to travel on the road to liberation for queer, gender nonconforming, disabled people of color.[104] They describe the disability rights movement as centering on a single identity, that of disability, thus not accounting for the multiple other identities—race, gender, sexuality, immigration status—that might also contribute to discrimination and marginality.[105] The disability justice framers also point out that the disability rights movement was led by white disabled people, who often failed to acknowledge the privileges they possess. This failure results in the centering of the needs and interests of "people who can achieve status, power and access through a legal or rights-based framework."[106] The

98. *See id.* ("We learn to pace ourselves, individually and collectively, to be sustained long-term. We value the teachings of our bodies and experiences, and use them as a critical guide and reference point to help us move away from urgency and into a deep, slow, transformative, unstoppable wave of justice and liberation.").

99. *See id.* The disability justice framers acknowledge and enumerate all forms of disability and highlight the importance of inclusive approaches to movement-building:

> We value and honor the insights and participation of all of our community members, even and especially those who are most often left out of political conversations. We are building a movement that breaks down isolation between people with physical impairments, people who are sick or chronically ill, psych survivors and people with mental health disabilities, neurodiverse people, people with intellectual or developmental disabilities, Deaf people, Blind people, people with environmental injuries and chemical sensitivities, and all others who experience ableism and isolation that undermines our collective liberation.

Id.

100. *See id.* ("[W]e all share one planet. We work to meet each other's needs as we build toward liberation, without always reaching for state solutions which inevitably extend state control further into our lives.").

101. *See id.* ("We can share responsibility for our access needs, we can ask that our needs be met without compromising our integrity, we can balance autonomy while being in community, we can be unafraid of our vulnerabilities, knowing our strengths are respected.").

102. *See id.* at 3 ("We move together as people with mixed abilities, multiracial, multi-gendered, mixed class, across the sexual spectrum, with a vision that leaves no bodymind behind.").

103. *See* SINS INVALID, SKIN, TOOTH, AND BONE, *supra* note 91.

104. *See id.* at 15–16.

105. *Id.* at 10–15.

106. *Id.* at 15.

framers assert that "[t]he political strategy of the Disability Rights Movement relied on litigation and the establishment of a disability bureaucratic sector at the expense of developing a broad-based popular movement."[107] They argue that absent a widespread change in the public perception of disability, disability rights laws can only achieve the bare minimum.

Finally, and perhaps most saliently for our discussion, those who set forth disability justice as a second-wave movement point out that, "[. . .] the Disability Rights Movement . . . invisibilized the lives of disabled people of color, immigrants with disabilities, disabled people who practice marginalized religions, . . . queers with disabilities, trans and gender nonconforming people with disabilities, people with disabilities who are houseless, people with disabilities who are incarcerated, people with disabilities who have had their ancestral lands stolen, amongst others."[108] Our work seeks to make visible the particular forms of oppression experienced by disabled immigrants in the U.S. immigration system in order to center their wholeness, the importance of their leadership, and their liberation as the pathway to collective liberation.[109]

Disability justice has generated an approach to abolition that brings together the emphasis on deinstitutionalization, access, and inclusion of the disability rights movement and the antiracist decarceration imperatives of abolition. The framers and proponents of disability justice have prioritized approaches to abolition that recognize the inextricable linkage between racism and ableism.[110] The disability justice movement has worked to advance

107. *Id.*

108. *Id.*

109. *See, e.g.*, Katherine Perez, *A Critical Race and Disability Legal Studies Approach to Immigration Law and Policy*, UCLA L. REV. (Feb. 2, 2019), https://www.uclalawreview.org/a-critical-race-and-disability-legal-studies-approach-to-immigration-law-and-policy [https://perma.cc/5P5Z-5R3W]; Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683 (2021).

110. *See* Lewis, *supra* note 49 (highlighting the interactions between ableism and the carceral systems, and urging advocates to bring disability justice to the forefront of abolitionist movements); Saya Abney, *Toward Communities of Care: Disability Justice as a Cornerstone of Abolition*, DAILY CALIFORNIAN (Oct. 23, 2020), https://dailycal.org/2020/10/23/communities-of-care-disability-justice-as-abolition [https://perma.cc/XG93-QPFT] (explaining the necessity of disability justice to deconstruct ableist societal structures and to challenge racist carceral institutions); Talila A. Lewis, *Disability Justice in the Age of Mass Incarceration*, *in* DEAF PEOPLE IN THE CRIMINAL JUSTICE SYSTEM 229, 230 (Debra Guthmann et al. eds., 2021) (examining intersectional advocacy approaches guided by antiracist, anti-ableist, anticapitalist, and abolitionist values by and for disabled people against the criminal legal system); Carly Naughton, Moderator, Disability and Prison Abolition: A Discussion on Carceral Ableism conducted by Willamette University Events (Nov. 18, 2020), https://pncaevents.

liberation for disabled people of color locked inside systems of oppression. These systems encompass institutionalization, criminal incarceration, and immigrant detention—issues that abolitionist scholars and activists have critiqued principally through the prism of race.

In the early 2010s, Telila Lewis founded HEARD, a "cross-disability abolitionist organization that unites across identities, communities, movements, and borders to end ableism, racism, capitalism, and all other forms of oppression and violence."[111] Since its founding, HEARD has focused on abolishing systems of police violence and incarceration that oppress Deaf and disabled individuals.[112] These advocacy efforts included creating fact sheets to inform Deaf and disabled prison inmates of their rights, collecting and elevating the stories of Deaf and disabled people who suffered harm in prison or at the hands of police, and offering public comment on Federal Communications Commission rules affecting Deaf individuals in prison, among many other initiatives.[113] These efforts contributed to more widespread activism and advocacy led by disabled communities of color, all of which has been rooted in the principles of disability justice.

In 2020, as tens of thousands of people across the United States rose up in protest after the murder of George Floyd at the hands of police in Minneapolis, Black disabled activists, under the banner of the National Alliance of Multicultural Disabled (NAMD) came to the forefront. They organized accessible forms of resistance and served as a poignant reminder to the larger Black Lives Matter movement about its commitment to understanding police violence as an issue of both racism and ableism.[114]

Keri Gray, one of the key Black Disabled Lives Matter movement organizers, noted, "I think it's so critical for us to decide on what way we can be involved—if that means physically showing up in the streets to do that, if that means amplifying messages online, then do that. If that means talking to our elected officials—this experience is showing us how critical local and state

willamette.edu/e/2971 [https://perma.cc/KWF9-4TWG] (advertising a conversation with Carly Naughton, a disability scholar, about interactions between disability, incarceration, institutionalization, and capitalism).

111. *About Us*, HEARD, https://behearddc.org [https://perma.cc/4XTG-GQ2K].

112. *See id.*

113. *See Resources*, HEARD, https://behearddc.org/resources [https://perma.cc/SB4T-VJYK].

114. *See* Sarah Kim, *Black Disabled Lives Matter: We Can't Erase Disability in #BLM*, TEEN VOGUE (July 3, 2020), https://www.teenvogue.com/story/black-disabled-lives-matter#main-content [https://perma.cc/59RG-TDAD].

elections are," Gray continues, "Because [those elected officials] will be the first ones to respond to any type of situation. And so, if you're [sic] part of this is to vote, if your part of this is to have conversations and meetings with people who are making decisions about protesting, about assistance, about accessibility, then do all of that."[115]

Disabled leadership of color is not only essential to advancing intersectional and disability-related issues inside of movement formations (as evidenced by the efforts to end policing and incarceration of disabled communities of color), but it is also a key ingredient to generating cross-movement solidarity. In this sense, these two disability justice principles walk hand in hand when it comes to abolishing systems of oppression. *Skin, Tooth, and Bone* explains: "Disability justice can only grow into its potential as a movement by aligning itself with racial justice, reproductive justice, queer and trans liberation, prison abolition, environmental justice, anti-police terror, Deaf activism, fat liberation, and other movements working for justice and liberation." The disability justice framers further clarify that, "This means challenging white disability communities around racism and challenging other movements to confront ableism."[116] "[A]ny attempt to rid the nation of racism without doing away with ableism yields practically nothing," writes Talila Lewis. "The same is true in reverse. Disabled communities attempting to rid the nation of ableism find themselves having made very little headway because they are still practicing racism."[117]

Natalie Chin offers the amended complaint in *Sixth District of the American Methodist Episcopal Church v. Kemp* as an illustration of effective cross-movement solidarity at work in the context of legal advocacy: "The complaint uses language that squarely asserts the disproportionate impact that S.B. 220 will have on voters of color with disabilities and Black Georgians with disabilities, in particular."[118]

Finally, Chin notes the broad coalition of organizations, including civil and disability rights organizations, as well as civic and religious groups, who collaborated to file the complaint.[119]

115. *Id.*
116. *See* SINS INVALID, SKIN, TOOTH, AND BONE, *supra* note 91, at 24.
117. Talila A. Lewis, *Emmett Till & the Pervasive Erasure of Disability in Conversations About White Supremacy & Police Violence*, TALILA A. LEWIS (Jan. 28, 2017), https://www.talilalewis.com/blog/archives/01-2017 [https://perma.cc/5ZF6-72QR].
118. Chin, *supra* note 109, at 746–47.
119. *Id.*

Similarly, disabled immigrant leaders have emerged in recent years as cross-movement alliances have driven intersectional approaches to legal advocacy in furtherance of abolitionist objectives. The Trump Administration's public charge regulations and their potentially disproportionate impact on disabled immigrants catalyzed disabled immigrant leaders to speak out about the catastrophic and concrete negative impacts these policies would have on their lives.[120] Media and online movement spaces like the Disability Visibility Project and #CripTheVote began amplifying the voices of disabled immigrants to spread awareness, build the movement, and garner broad-based support.[121] The National Coalition for Latinxs with Disabilities (CNLD), founded in 2016, was comprised of thirty Latinx members and their allies.[122] In 2018, the NCLD penned a sign-on letter to congressional leaders calling for policy changes including a "clean DREAM Act"[123] that acknowledges the educational and employment barriers that disabled people face and calls for an end to ICE detentions in sensitive locations, including medical facilities that disproportionately affect disabled people.[124]

Building on the disability justice principle of intersectionality, scholars have also employed a Dis/ability/ Critical Race Theory (DisCrit) lens to

120. *See, e.g.*, Rebecca Cokley & Hannah Leibson, *Trump's Public-Charge Rule Would Threaten Disabled Immigrants' Health and* Safety, CTR. AM. PROGRESS (Aug. 8, 2018), https://www.americanprogress.org/article/trumps-public-charge-rule-threaten-disabled-immigrants-health-safety [https://perma.cc/3LTS-P6T3]; *How Proposed Immigration Changes Will Make It Harder for People With Disabilities*, ROOTED IN RTS., https://rootedinrights.org/publicchargeinfo/#doc-content [https://perma.cc/5MLT-VFQU]; Kristin Garrity Sekerci & Azza Altiraifi, *A US Immigration History of White Supremacy and Ableism*, AL JAZEERA (Jan. 31, 2018), https://www.aljazeera.com/opinions/2018/1/31/a-us-immigration-history-of-white-supremacy-and-ableism#main-content-area [https://perma.cc/Y4ZK-82G4].

121. *See Disability Visibility Podcast: Disabled Immigrants*, *supra* note 1; *see also* Alice Wong, *9/19 #CripTheVote Twitter Chat on Immigration*, #CRIPTHEVOTE (Sept. 9, 2021, 3:19 AM), http://cripthevote.blogspot.com/2021/09/919-cripthevote-twitter-chat-on.html [https://perma.cc/86RP-MHRG].

122. Perez, *supra* note 109.

123. *See* AM. IMMIGR. COUNCIL, THE DREAM ACT 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_an_overview.pdf [https://perma.cc/P26U-LK39] (describing the origin and various iterations of the Development, Relief, and Education for Alien Minors Act or "DREAM Act").

124. *See* COALICIÓN NACIONAL PARA LATINXS CON DISCAPACIDADES, STATEMENT ON POLICIES REGARDING IMMIGRANTS & REFUGEES WITH DISABILITIES (2018), http://www.latinxdisabilitycoalition.com/uploads/7/4/2/0/74201671/cnld_sign-on_immigration_refugees_disability_english.pdf [https://perma.cc/75P6-JGJT].

interrogate present and past immigration laws.[125] The DisCrit lens recognizes the way race and disability have been used independently and together to deny rights in the immigration system, to exclude, and to deport.[126]

These examples demonstrate the power of the disability justice principles to galvanize new movement formations that have pushed for a vision of abolition that acknowledges and includes the dismantling of ableism as among its core objectives. With this understanding of ableism and the unique approach that disability justice brings to tackling it, we may now more closely examine how ableism operates in our immigration system—the ways in which it defines the worthiness of bodies, robs disabled immigrants of self-determination, and invisibilizes disability. In turn, this consciousness leads to concrete, abolitionist solutions that dismantle ableist immigration structures and carve a path for immigration policies that honor the humanity of all.

II. DEPLOYING DISABILITY JUSTICE TO DISMANTLE THE ABLEIST IMMIGRATION SYSTEM

Alice Wong launched the Disability Visibility Project (DVP) in 2014 to elevate the stories and lived experiences of disabled people across the United States and the world. From 2014 to 2015, DVP partnered with National Public Radio's StoryCorps to create oral histories of disabled people around the country ahead of the twenty-fifth anniversary of the ADA.[127] On this project, Alice Wong reflected, "The struggle for disability and human rights continues and it is important for future generations to have this history to guide them."[128]

125. *See, e.g.*, Kashyap, *supra* note 9, at 87; Jasmine E. Harris, *Reckoning With Race and Disability*, 130 YALE L.J. F. 916, 918–19 (2021). We do not address here the question of whether ableism was born out of racism, or vice-versa; rather, we posit that the principles of disability justice, which include intersectionality, help us understand and dismantle the white supremacist foundations upon which our immigration system was constructed.

126. *See* Kashyap, *supra* note 9, at 105–07. Applying a DisCrit critique, for example, Kashyap argues that current mental health-based exclusions under INA § 212(a)(1)(A)(iii) enforced by mandatory medical exams are rooted in white supremacist and ableist ideologies that sought to protect the "purity and homogeneity" of the white Anglo-Saxon race. *Id.* at 89, 106. Professor Kashyap describes how modern-day assessments of what constitute "mental disorders" are socially constructed, rooted in white supremacist notions of normalcy or disproportionately applied to Black men and people of color. *Id.* at 105–07.

127. *See* Press Release, Disability Visibility Project, Disability Visibility Project to Record Stories for the 25th Anniversary of the Americans With Disabilities Act (July 25, 2014), https://disabilityvisibilityproject.com/2014/07/25/press-release-disability-visibility-project-to-record-stories-for-the-25th-anniversary-of-the-americans-with-disabilities-act/#site-content [https://perma.cc/SU2C-447A].

128. *Id.*

Acknowledging the historical role that ableism has played in our immigration system is likewise essential to navigating the pathways to abolition. This Part analyzes three ways in which ableism operates in the immigration system. We theorize that the immigration system assesses the worthiness of disabled immigrants based on the economic burden they are perceived to place on American society. We further posit that immigration policy and practice limit disabled immigrants' self-determination. Finally, disabled persons and their experiences are sidelined and rendered invisible as they navigate immigration processes. We argue that tackling these challenges using the principles of disability justice offers new and transformative solutions that build upon the radical reimagining that many immigration abolitionists have called for. Acknowledging ableism and viewing disability justice as a tool for dismantling it will result in an immigration system that achieves liberation for all.

A. Ableism and the Worthy Immigrant

The immigration system has long used perceptions of economic productivity and health to measure the worth of people seeking to enter and remain on American shores.[129] Across centuries, various groups of immigrants have been banned for fear that they would spread contagion or fail to contribute to economic prosperity, thus promoting health and able-bodiedness as national characteristics. Here, we describe how admission policies and the exercise of prosecutorial discretion have evolved and remained rooted in ableism. We argue that the disability justice principles of anticapitalism and intersectionality offer tools to identify and execute abolitionist solutions by disentangling ableist beliefs about the superiority of nondisabled bodies from immigrant admission and prosecutorial discretion policies.

1. Inadmissibility and Economic Burden

The capacity of a body to produce labor in furtherance of capitalist imperatives gave rise to an immigrant admission policy scheme centered on perceived physical and mental ability. Ability-based exclusion explicitly emerged in U.S. immigration law in the late nineteenth century, at the height of the Industrial Revolution, when immigrants' capacity to perform labor in

129. *See* Roxana Galusca, *From Fictive Ability to National Identity: Disability, Medical Inspection, and Public Health Regulations on Ellis Island*, 72 CULTURAL CRITIQUE 137 (2009).

service to profit became central to the question of admissibility.[130] The exclusion that originally barred any person "unable to take care of himself or herself without becoming a public charge," evolved to exclude those "likely to become a public charge" in 1891.[131] This language transmuted in 1907 into the elimination of anyone "mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living."[132] One immigration officer declared: "[The] immigrant of poor physique is not able to perform rough labor, and even if he were able, employers of labor would not hire him."[133] These capitalist considerations combined with eugenics principles emerged to reduce and devalue disabled bodies and minds. In a letter to the Commissioner General, the Ellis Island Commissioner wrote that the Bureau of Immigration had:

> [N]o more important work to perform than that of picking out all mentally defective immigrants, for these are not only likely to join the criminal classes and become public charges, but by leaving feebleminded descendants they start vicious strains which lead to misery and loss in future generations and influence unfavorably the character and lives of hundreds of persons.[134]

These particular forms of ableism reflect the medical and social pathology models of disability. Jonathan Drimmer explains: "The basic tenet of the medical model is that disability is an infirmity that can only be properly addressed by doctors and rehabilitation professionals who attempt to 'cure' or 'fix' the person with a disability."[135] In the case of immigrants, rather than engaging in costly rehabilitation activities, it was far easier as a policy matter to exclude those with disabilities altogether.

130. *See* Mark C. Weber, *Of Immigration, Public Charges, Disability Discrimination, and, of All Things*, Hobby Lobby, 52 ARIZ. STATE L.J. 245, 247–48, 253 (2020).
131. *Compare* An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214, 214 (1882) (authorizing government agents to search incoming vessels for persons "unable to take care of [themselves] without becoming a public charge" and bar them from landing), *with* Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (excluding "all . . . persons likely to become a public charge").
132. Immigration Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 899. *See also* Weber, *supra* note 130, at 253.
133. Baynton, *supra* note 14, at 35.
134. *Id.*
135. *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People With Disabilities*, 40 UCLA L. REV. 1341, 1347 (1993).

Likewise, the social pathology model of disability offers a backdrop to understand the exclusion of immigrants with mental health and developmental disabilities. Under this model, certain disabilities are explained through sociological constructions of "deviation" and deviant groups. According to Drimmer, "[m]ost of the nondisabled groups associated with this type of sociological abnormality are 'criminals, delinquents, prostitutes, religious fanatics, [and] addicts,' who are subjected to 'widespread social disapproval and censure.'"[136] Scholars have explored how conceptions of defectiveness and deviation have been attached to the bodies of entering migrants to justify exclusion: exclusion that has been sanctioned and codified in our immigration laws.[137]

The disability rights movement of the mid-twentieth century brought with it the social model of disability, which views society, and not the disabled individual, as defective. In this model, the barriers facing disabled people do not arise solely from their physical limitations, but instead are largely created through standards established by an ableist society.[138] In alignment with the civil rights initiatives of that era, a shift is evident in immigration policy. This transition involved the scaling back of overt disability-based exclusions and a focus on economic productivity and family reunification.[139] U.S. immigration policy moved away from dividing immigration admissions evenly between employment- and family-based categories to prioritize family-based admission.[140] The 1965 passage of the Immigration and Nationality Act granted approximately 75 percent of all permanent visas to family-based categories.[141]

136. *Id.* at 1348.

137. *See generally* DOLMAGE, *supra* note 10 (describing the sizing up and categorizing of bodies at Ellis Island as an example of how disability was ascribed to immigrant bodies as a justification for exclusion). *See also* An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214, 214 (1882); Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

138. *See* Immigration Act, ch. 551, § 1. The social model of disability was first introduced as a concept by Michael Oliver in 1976, and it formed the bedrock of the disability rights movement, resulting in laws like the Americans with Disabilities Act that sought to eliminate barriers to social, political, and economic access for disabled people. *See also* Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1252 n.2 (2007) (citing MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990) and Tom Shakespeare, *Introduction*, *in* THE DISABILITY READER (Tom Shakespeare ed., 1998)).

139. *See* Weber, *supra* note 130, at 263.

140. Philip E. Wolgin, *Family Reunification Is the Bedrock of U.S. Immigration Policy*, CTR. AM. PROGRESS (Feb. 12, 2018), https://www.americanprogress.org/article/family-reunification-bedrock-u-s-immigration-policy [https://perma.cc/83EB-NEYP].

141. *See id.* Nonetheless, many have critiqued the family-based immigration system as furthering race-based disparities:

The Immigration Reform and Control Act of 1986 and the Omnibus Immigration Act of 1990 removed most explicit disability-based exclusions as the labor market shifted and the objectives of the immigration process changed from focusing on supplying labor to family reunification.[142]

Though disability civil rights legislation and policy imperatives for admitting immigrants evolved throughout the course of the twentieth century, public charge related inadmissibility and other medical-based grounds of exclusion remained in place, perpetuating the narrative that a worthy immigrant is one whose body holds the capacity to produce labor. Additional financial and merit-based requirements, like the requirement of an affidavit of financial support for both admission and to adjust status to that of a permanent resident, remain in place.[143]

The Trump Administration ushered in renewed focus on public charge as a ground for exclusion, with political rhetoric centered around the productivity of immigrant bodies within a capitalist system. This shifted the conversation about immigration policy to focus on maximizing profits and minimizing costs.[144] In 2019, after receiving over 260,000 public comments, the Trump Administration promulgated a public charge rule that greatly expanded the tools that the government could use to exclude disabled immigrants.[145] The definition of public charge was expanded to include any person who had received public benefits for twelve months within a thirty-six-month period.[146]

> As Rep. Emanuel Celler (D-NY), a co-sponsor of the 1965 act who had been fighting to dismantle the racial quotas since his first speech in Congress in 1924, put it, "[S]ince the peoples of Africa and Asia have very few relatives here, comparatively few could immigrate from those countries." Sen. Sam Ervin (D-NC) put it even more bluntly: "[T]he bill does not open the doors for the admission of all the people all over the face of the earth."

Id.

142. Makhlouf, *supra* note 90, at 191 (citing 136 CONG. REC. H13238 (daily ed. Oct. 26, 1990) (Joint explanatory statement of the Committee of Conference) (stating that the amendments to the Immigration and Nationality Act "repealed several outmoded grounds for exclusion based on health").
143. *See Affidavit of Support*, U.S. CITIZENSHIP & IMMIGR. SERV. (Mar. 19, 2021), https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support [https://perma.cc/4UWN-ET5W]; Weber, *supra* note 130, at 256.
144. Yet note, prior to 2019 a consular officer or immigration adjudicator could designate a noncitizen to be a public charge if they determined that the individual was primarily likely to rely on the government for financial support. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28690 (May 26, 1999).
145. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41305 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).
146. *Id.* at 41432.

The types of public benefits included in this assessment were expanded to include Supplemental Nutrition Assistance Program (SNAP) benefits, Section 8 housing vouchers, and cash assistance—all benefits that disabled people rely upon.[147] Having financial liabilities, lacking a college degree, lacking English skills to successfully enter the job market, and having a medical condition that will interfere with school or work are all factors that were weighed negatively against applicants.[148] Like Black immigrants, Muslim immigrants, and other long-marginalized groups, disabled immigrants were targeted as perceived threats to the United States. But in this case the threat was not of terrorism or public safety, but of economic burden.

In response to outrage from advocates and practitioners, DHS conceded that the public charge rule may have an outsized impact on applicants with disabilities but noted the rule was not intended to discriminate, but "[r]ather [. . .] intended to better ensure that aliens subject to this rule are self-sufficient."[149] They went further to note that "Congress did not specifically provide an exemption for individuals with disabilities."[150] Though the public

147. *Id.* at 41295.

148. *Id.* at 41473 ("Under the rule, DHS will conduct a public charge inadmissibility determination when an alien seeks an adjustment of status, by evaluating an alien's particular circumstances, including an alien's age; health; family status; assets, resources, and financial status; education and skills; required affidavit of support; and any other factor or circumstance that may warrant consideration in the public charge inadmissibility determination."). Weber specifies how the preceding factors would have an outsized exclusionary effect on immigrants with disabilities:

> Moreover, having a disability that could interfere with work, having a low income, being at the ends of the age spectrum, and being in a large family, are all common conditions for immigrants, but they are apt to disqualify immigrants from entry or lawful permanent residency under the new regulations. Immigrants with disabilities are especially likely to be in need of in-kind benefits or low levels of cash assistance in order to be self-sufficient members of American society. Given the reality of limited accommodation in the workplace, they are disproportionately likely to have low incomes or to be subject to temporary periods of unemployment as well. They are likely to have conditions that could be described as medical and may interfere with school or work or require treatment.

Weber, *supra* note 130, at 248 (footnotes omitted).

149. *How Trump's Public Charge Changes Hurt People With Disabilities*, DISABILITY RTS. EDUC. & DEF. FUND (Aug. 14, 2019), https://dredf.org/2019/08/14/how-trumps-public-charge-changes-hurt-people-with-disabilities [https://perma.cc/3DA5-KBGD] (citing the Department of Homeland Security's 2019 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41309).

150. *Id.* (citing further the 2019 guidance in Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41368).

charge inadmissibility rule was litigated and enjoined multiple times,[151] the Biden Administration ceased defense of the rule in March 2021.[152]

An anticapitalist lens magnifies the insufficiency of scaling back Trump-era public charge regulations to eradicate ableism in the admission policy framework. The Biden Administration's Final Rule on public charge, published in September 2022, took important steps in explicitly excluding crucial benefits utilized by disabled immigrants, such as SNAP, Medicaid, and the Children's Health Insurance Program (CHIP) from public charge determinations. However, the new rule retained the definition of public charge to be anyone who "is likely at any time to become primarily dependent on the government

151. The public charge rule has existed since the first federal immigration statute was enacted in 1882. *See* An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214, 214 (1882). In 2018, the Trump Administration issued a public charge rule that expanded the types of benefits that may impact inadmissibility to include Medicaid, food stamps and housing assistance. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248). The rule was finalized in August 2019 and litigation ensued with various federal courts enjoining the implementation of the rule. *See* Casa de Md., Inc. v. Trump, 414 F. Supp. 3d 760, 767 (D. Md. 2019); Cook County v. McAleenan, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019); New York v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 334, 340 (S.D.N.Y. 2019); City & County of San Francisco v. U.S. Citizenship & Immigr. Servs., 408 F. Supp. 3d 1057, 1073 (N.D. Cal. 2019); Washington v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1191, 1199 (E.D. Wash. 2019). The injunctions in Washington and the Northern District of California were stayed, as was the Maryland injunction. *See* City & County of San Francisco v. U.S. Citizenship & Immigr. Servs., 944 F.3d 773, 807 (9th Cir. 2019); Casa de Md., Inc. v. Trump, No. 19-2222, 2020 U.S. App. LEXIS 1271 (4th Cir. Jan. 14, 2020). The U.S. Supreme Court lifted two preliminary injunctions in early 2020, allowing the rule to go into force, until federal district courts again enjoined its implementation later the same year. *See* Wolf v. Cook County., 140 S. Ct. 681 (2020) (staying the District of Illinois's statewide injunction); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (lifting S.D.N.Y.'s nationwide injunction); New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d 208 (S.D.N.Y. 2020) (reinstating an injunction). On February 2, 2021, President Biden issued an executive order directing agencies to review public charge policies and make recommendations. *See* Executive Order No. 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8277 (Feb. 2, 2021). In turn, the Biden Administration dropped defense of the Trump-era rule, leading to dismissal of pending cases challenging the DHS rule. *See* Press Release, Alejandro N. Mayorkas, U.S. Sec'y Homeland Sec., U.S. Dep't. of Homeland Sec., DHS Secretary Statement on the 2018 Public Charge Rule (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule [https://perma.cc/XK89-98L2]. For a timeline of litigation, including litigation of the companion DOS public charge rule, *see* Public Charge Timeline, IMMIGRANT LEGAL RES. CTR. (Sept. 13, 2021), https://www.ilrc.org/resources/public-charge-timeline [https://perma.cc/9E2W-CDL8].

152. *See* Joint Stipulation to Dismiss, U.S. Dep't of Homeland Sec. v. New York, 141 S. Ct. 1292 (2021) (No. 20-449).

for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense."[153] The Biden Administration proclaimed that the new rule "reinforces a core principle of the Biden-Harris Administration: that healthcare is a right, not a privilege, and no one should be deterred from accessing the care they need out of fear."[154] Yet, as the New York Lawyers for the Public Interest point out in their public comment, the new public charge rule can still be used to discriminate against immigrants with serious health needs and disabilities.[155]

The Biden Administration's public charge rule, with all of its improvements from the previous administration, re-entrenched the ableist construction of disabled immigrants as unworthy burdens that was perpetuated through the sweeping welfare reforms of the 1990s. After the passage of the Personal Responsibility and Work Opportunity Act (PRWORA),[156] many immigrants were forced to wait up to five years or more after achieving qualifying immigration status to receive Temporary Assistance for Needy Families (TANF) and SNAP assistance. This required welfare administrators and attorneys to become well versed in complex immigration laws at the expense of disabled immigrants with urgent needs.[157] Even elderly and disabled refugees could only receive Supplemental Security Income (SSI) for a limited period, forcing them and their advocates to navigate a complex web of rules to ensure they had the resources necessary to live in their communities. Likewise, under the rebooted public charge rubric, disabled immigrants who may require institutional care or extra government support to live independently in their communities will still be forced to choose between obtaining financial assistance

153. Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472, 55636 (Sept. 9, 2022) (to be codified at 8 C.F.R. pts. 103, 212, 213, 245).

154. *New Rule Makes Clear That Noncitizens Who Receive Health or Other Benefits to Which They Are Entitled Will Not Suffer Harmful Immigration Consequences*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Sept. 8, 2022), https://www.hhs.gov/about/news/2022/09/08/new-rule-makes-clear-noncitizens-who-receive-health-or-other-benefits-which-they-are-entitled-will-not-suffer-harmful-immigration-consequences.html#:~:text=media%40hhs.gov-,New%20Rule%20Makes%20Clear%20that%20Noncitizens%20Who%20Receive%20Health%20or,Not%20Suffer%20Harmful%20Immigration%20Consequences [https://perma.cc/5W7G-JR3W].

155. *NYLPI's Statement on Biden Administration's Changes to Public Charge Rule*, N.Y. LAWS. FOR PUB. INT. (Sept. 19, 2022), https://www.nylpi.org/nylpis-statement-on-biden-administrations-changes-to-public-charge-rule [https://perma.cc/AVX7-G2KK].

156. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

157. N.Y. LAWS. FOR PUB. INT., *supra* note 155.

and protecting their immigration status.[158] Specifically the current rule counts public cash assistance, like SSI[159] and TANF, against immigrants, benefits that many disabled immigrants must rely upon due to the manner in which services to disabled individuals are administered by the federal government.[160] According to research from the Urban Institute, for example, one in eight nonelderly immigrants with disabilities reported receiving SSI during a recent survey period.[161]

Disability justice and its emphasis on maintaining an anticapitalist politic offers solutions that challenge the legitimacy of ability-based exclusions like public charge.[162] This, we argue, furthers the deconstruction of ableist framing in the immigration system, thus advancing an anti-ableist vision of abolition. The Autistic Self Advocacy Network proposed an alternative framing of public charge which exempts those with disabilities with the following proposed alternative definition:

> Individuals who are likely to rely solely on government assistance due to disability, and individuals who, due to their disability, are likely to be required to rely on direct financial assistance from the federal government in order to maintain eligibility for programs that are direct payers of disability and/or support services, cannot be deemed inadmissible based on their likelihood of becoming a public charge.[163]

158. *See, e.g.*, *id.*

159. *See* PAOLA ECHAVE & DULCE GONZALEZ, URBAN INST., BEING AN IMMIGRANT WITH DISABILITIES: CHARACTERISTICS OF A POPULATION FACING MULTIPLE STRUCTURAL CHALLENGES 4 (2022), https://www.urban.org/sites/default/files/2022-04/Being%20an%20Immigrant%20with%20Disabilities.pdf [https://perma.cc/CVG6-LNKD] (outlining the eligibility criteria for Supplemental Security Income (SSI) benefits, and detailing the additional complex criteria that disabled noncitizens must meet to receive these benefits).

160. *See ASAN Comments on Public Charge ANPRM*, AUTISTIC SELF ADVOC. NETWORK (Oct. 26, 2021), https://autisticadvocacy.org/2021/10/asan-comments-on-public-charge-anprm [https://perma.cc/48TE-BUPJ].

161. ECHAVE & GONZALEZ, *supra* note 159, at 12.

162. Some scholars have posited this could be done by treating disability as a "mere difference" in immigration admissions "modeled on the civil rights approach, which supports reforms that would treat disability as a neutral factor in admissions decisions. Although such a strategy would likely result in the admission of a subset of disabled noncitizens who would otherwise be denied, it would be ineffective at destigmatizing disabilities that are difficult or impossible to accommodate, and that have inherent costs." Makhlouf, *supra* note 90, at 188, 199.

163. AUTISTIC SELF ADVOC. NETWORK, *supra* note 160.

This elegant solution, crafted by disabled leaders who are most impacted by such a policy disassociates governmental support for disabled individuals desiring to live in their own communities with immigration eligibility challenging the eugenicist foundations of immigration law.[164]

Notions of self-sufficiency, productivity, and ability also manifest themselves through the creation of preferred immigrant admission categories. At the outset, those with extraordinary abilities are rewarded with an elite visa category, the EB-1, with streamlined application procedures.[165] Those who make sizeable investments in the United States qualify for the EB-5 Investor Visa, which comes with automatic conditional permanent residency. In contrast, unskilled[166] workers, labeled as "other workers" under the EB-3 category, fight against a ten thousand visa a year limit, after proving that there are no American workers ready, able, and willing to do the job they are seeking at their intended destination in the United States.[167] The distinction between opportunities for immigration for those with extraordinary abilities and investors compared to other workers with lesser training or educational attainment highlights that distinguishing immigrants based on notions of productivity, education, and skill is a legislatively, constitutionally, socially,[168] and politically acceptable way of differentiating between which immigrants we accept and which we exclude.[169]

164. Though this proposed exemption to the public charge rule may appear incremental in nature, and thus at odds with an abolitionist approach that would call for the wholesale elimination of the public charge ground altogether. *See* discussion on abolition, *infra* Subpart II.B (decoupling the governmental supports that disabled people might need to live in their community from eligibility to obtain immigration status aligns immigration policy with the nondiscrimination imperatives of our disability rights laws and moves towards the abolition of ableism that has long undergirded U.S. immigration policy).

165. *See* Petitions for Employment-Based Immigrants, 8 C.F.R. § 204.5(h)(2) (2009).

166. "Other workers" or "Unskilled workers" in the EB-3 Employment-Based Immigration Category are defined as those whose labor requires less than 2 years of training or experience. 8 C.F.R. § 204.5(l)(2).

167. Immigration and Nationality Act (INA) § 203, 8 U.S.C. § 1153(b)(3)(A)(iii).

168. *See* PHILLIP CONNOR & NEIL G. RUIZ, PEW RSCH. CTR., MAJORITY OF U.S. PUBLIC SUPPORTS HIGH-SKILLED IMMIGRATION 3 (2019), https://www.pewresearch.org/global/wp-content/uploads/sites/2/2019/01/Pew-Research-Center_Majority-of-U.S.-Public-Supports-High-Skilled-Immigration_2019-01-22_Report.pdf [https://perma.cc/NU3W-NNBC] ("[E]ight-in-ten U.S. adults (78%) support encouraging highly skilled people to immigrate and work in the U.S.").

169. *See generally* Kayleigh Scalzo, Note, *American Idol: The Domestic and International Implications of Preferencing the Highly Educated and Highly Skilled in U.S. Immigration Law*, 79 GEO. WASH. L. REV. 926 (2011).

Though disabled people are by no means any less likely to exhibit extraordinary abilities, the Immigration and Nationality Act measures these abilities through factors such as: participation on panels; original scholarly, artistic and other qualifications; and evidence of showcased work and commercial success. These factors are areas where disabled individuals may be put at a comparative disadvantage due to ableist exclusion and structural barriers of access,[170] in addition to other prejudice preventing their ability to "have risen to the very top of their field of endeavor."[171] In many origin countries, people with disabilities are also excluded from the education system, leading to high unemployment.[172] This exclusion in one's home country then has a direct impact on their ability to immigrate to the United States and gain legal permanent residence.

Scholars have noted that, "most immigrant rights advocates have not prioritized opposition to the destructive power of global capitalism."[173] By

170. *See Barriers to Employment for People With a Disability*, U.S. BUREAU LAB. STAT.: THE ECONS. DAILY (July 29, 2020), https://www.bls.gov/opub/ted/2020/barriers-to-employment-for-people-with-a-disability.htm [https://perma.cc/4ZRF-UC5B] (reporting in July 2019 that "47.5 percent of people age 16 and older with a disability who were not employed (either unemployed or not in the labor force) reported at least one barrier to employment"); *Barriers to Employment for Adults With Disabilities*, RISE: BLOG (Nov. 15, 2018), https://riseservicesinc.org/news/barriers-to-employment-for-adults-with-disabilities [https://perma.cc/66N2-WMW3] (explaining general barriers ranging from physical to social the persons with disabilities face in the workplace); Anthony Dexter Giannelli, *A World of Barriers: Questioning Access for Disabled Artists and Audiences*, ARTLAND MAG., https://magazine.artland.com/questioning-access-for-disabled-artists-and-audiences [https://perma.cc/7SHF-AEUP] (critiquing structural barriers that impact artists with disabilities); BRITISH COUNCIL, TIME TO ACT (2021), https://www.disabilityartsinternational.org/wp-content/uploads/2022/01/TIMETO2.pdf [https://perma.cc/6BP6-68N2] (reporting structural barriers that negatively impact disabled artists in Europe); Marie A. Bernard, *Barriers to Inclusion of Individuals With Disabilities in the Scientific Workforce*, NAT'L INSTS. HEALTH (Dec. 16, 2020), https://diversity.nih.gov/blog/2020-12-16-barriers-inclusion-individuals-disabilities-scientific-workforce [https://perma.cc/5BNB-JT2U] (explaining structural barriers impacting disabled individuals entering biomedical careers); Sarah Matysiak, *STEM Students With Disabilities Face Extra Barriers in Earning Degree*, BADGER HERALD (Sept. 15, 2022), https://badgerherald.com/news/2022/09/15/stem-students-with-disabilities-face-extra-barriers-in-earning-degree [https://perma.cc/87TE-QRMK] (reporting that "[d]isabled and chronically ill students are wholly underrepresented in STEM" due to structural barriers).

171. 8 C.F.R. § 204.5(h)(2).

172. *See* Lenore Manderson, *Disability, Global Legislation and Human Rights*, 47 DEV. 29 (2004); MAJID TURMUSANI, DISABLED PEOPLE AND ECONOMIC NEEDS IN THE DEVELOPING WORLD: A POLITICAL PERSPECTIVE FROM JORDAN (2003).

173. Marcel Paret, Sofya Aptekar & Shannon Gleeson, *Capitalism and the Immigrant Rights Movement in the United States*, 34 SOCIALISM & DEMOCRACY 180, 180 (2020). "As we show

centering the disability justice tenet of anticapitalism, deportation abolitionists can shift from a focus on justifying whether an immigrant deserves to enter or stay to a focus which centers a human right to migration.[174]

An anticapitalism lens also recognizes the contribution of capitalism and imperialism to the movement of persons. As Harsh Walia writes, phrases like "migrant crisis" often "depict migrants and refugees as the cause of an imagined crisis at the border, when, in fact, mass migration is the outcome of the actual crisis of capitalism, conquest and climate change."[175] International law scholar E. Tendayi Achiume further frames migration as a manifestation of redistributive politics and decolonization, reordering the benefits of the global order.[176]

Movimiento Cosecha demonstrated this commitment to anticapitalism by mounting a campaign called #All11million undocumented residents. This effort focused on local organizing campaigns to advocate for policies that advance immigrant integration into the social, economic, and political fabric of their communities, including access to driver's licenses and the allocation of funding to immigrant families through mutual aid programs during the COVID-19 pandemic.[177] The Migration Policy Institute highlights this framing by pushing for systemic reforms for immigrant inclusion, recognizing that continued marginalization "lead[s] the host community to view immigrants as net consumers" of public assets and as

below, few US-based immigrant right movements are anti-capitalist. Rather than challenging the logic of capitalism, many fight for a more equitable inclusion of migrants into the capitalist order. Since contemporary capitalism relies on the entrenchment of national borders, many immigrant rights movements do not challenge their existence." *Id.* at 181.

174. *See* Kenny Fries, *How We Can Make the World a Better Place for Immigrants with Disabilities*, QUARTZ (Apr. 19, 2019), https://qz.com/1600200/why-disabled-immigrants-are-one-of-the-most-invisible-populations [https://perma.cc/9K5Y-52JV]. "This clause also contradicts the United Nations Charter on the Rights of Persons with Disabilities (UNCRPD)." *Id. See also* G.A. Res. 61/106, annex I, Convention on the Rights of Persons with Disabilities, art. 18 (Dec. 13, 2006) (calling upon participating nations to "recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others").

175. *See also* Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472 (Sept. 9, 2022) (to be codified at 8 C.F.R. pts. 103, 212, 213, 245).

176. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

177. *Campaigns*, MOVIMIENTO COSECHA, https://www.lahuelga.com/our-campaigns [https://perma.cc/TSE9-U383].

social and political liabilities, rather than "as the social, economic, and political resources that most indeed are."[178]

Even when disabled immigrants are not subject to the public charge ground of inadmissibility as they seek humanitarian relief from deportation, ableism plays a significant role in the discretionary decisions of adjudicators who are tasked with determining who is worthy of receiving this humanitarian relief. Those who are seen as less productive or more burdensome on U.S. social welfare systems are more likely to be disadvantaged in this process. For example, all discretionary forms of relief including parole, Temporary Protected Status, asylum, applications for lawful permanent residence, and naturalization require the requestor to demonstrate they merit a "favorable exercise of [adjudicative] discretion" in order to receive the benefit.[179] In making this assessment, adjudicators are guided to consider "[a]ny facts related to the person's conduct, character, [and] family ties . . . ."[180] To assess conduct, adjudicators are tasked with assessing "what [an immigrant] has done since arrival, such as employment, schooling or any evidence of criminal activity."[181] Adjudicators are also told to look toward the "applicant or beneficiary's value and service to the community," "[p]roperty or business ties in the United States," "[h]istory of taxes paid," and "[h]istory of employment."[182] As we discuss in Subpart 2, even though disability may function as a mitigating factor in the exercise of discretion, the determination of who is disabled enough to warrant such an exercise is viewed through the prism of decisionmakers who operate within an ableist framework.

2. Prosecutorial Discretion and Assessments of Worth

Prosecutorial discretion refers to the broad flexibility that the Department of Homeland Security has in determining how, who, and when to prosecute for

178. Corrie Macleod, *The Changing Concepts Around Immigrant Integration*, MIGRATION POL'Y INST.: MIGRATION INFO. SOURCE (Sept. 17, 2021), https://www.migrationpolicy.org/article/changing-concepts-immigrant-integration [https://perma.cc/EY8P-JVQV].

179. *Chapter 8 - Discretionary Analysis*, U.S. CITIZENSHIP & IMMIGR. SERVS.: POL'Y MANUAL (Aug. 1, 2023), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8 [https://perma.cc/Z9R3-2N3D].

180. *Id.*

181. *Id.*

182. *Id.*

alleged immigration violations.[183] Discretion in this context can range from a variety of tools including when and whether to institute removal proceedings in the first place; effectuate orders of removal; stipulate to relief against removal; or grant motions to reopen closed cases.[184] As in the criminal context, discretion is a tool of necessity for agencies with limited resources and also serves a humanitarian function, granting people reprieve despite immigration violations where they are seen to have redeeming qualities or merit other considerations. Shoba Wadhia explains that using discretion to allow "such persons to live free from apprehension, detention, or removal is in some ways a reward for their good deeds and in part a judgment by society that some people are morally desirable and more likely to succeed in the future."[185]

Prosecutorial discretion, like other humanitarian forms of relief, feeds into binary perceptions of disabled immigrants as either threats or charity cases deserving of humanitarian assistance. Guidance from multiple administrations about the use of discretion explicitly references individuals who care for or have serious medical or psychological conditions as ideal recipients of this form of discretion. Thus, despite historical perceptions of those with disabilities as being burdensome, deficient, morally stained, or threatening, prosecutorial discretion can be used to aid those with physical, psychological, or developmental disabilities. For example, the 2011 Prosecutorial Discretion guidance explicitly directed the Department of Homeland Security to consider "aliens with citizen children with serious medical conditions or disabilities" as humanitarian conditions warranting a favorable exercise of discretion.[186] Thus, discretionary relief for disabled immigrants is relegated to a "charity model," which portrays people with disabilities as objects of pity who need humanitarian assistance or discretionary relief.[187]

Where some disabled immigrants may be denied under employment or family-based immigration categories on inadmissibility grounds, they may receive limited relief, such as deferred deportation or case termination,

183. *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF'T (July 27, 2023), https://www.ice.gov/about-ice/opla/prosecutorial-discretion [https://perma.cc/33G8-3D7B]; *see also Featured Issue: Prosecutorial Discretion*, AM. IMMIGR. LAWS. ASS'N (June 29, 2023), https://www.aila.org/advo-media/issues/featured-issue-prosecutorial-discretion [https://perma.cc/2JZY-WJ2A].

184. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 183.

185. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 245 (2010).

186. 2011 DHS Guidance, *supra* note 110.

187. Rhoda Olkin, *Conceptualizing Disability: Three Models of Disability,* AM. PSYCH. ASS'N, (Mar. 29, 2022), https://www.apa.org/ed/precollege/psychology-teacher-network/introductory-psychology/disability-models [https://perma.cc/D44R-3UYU].

through an exercise of prosecutorial discretion, allowing for indefinite residence in the United States with no status. For example, advocates have used the humanitarian aspects of prosecutorial discretion to aid disabled immigrants who would be unable to access care networks if deported to their home country; immigrant caretakers of disabled family members whose family members would suffer if they were deported; and those with ongoing medical needs who would experience a gap in medical care if deported. But humanitarian considerations are stopgaps, not sustainable remedies. Such a model of funneling disabled immigrants through discretionary humanitarian policies further underpins how disabled immigrants are not preferred or deemed desirable in the current admissions framework but relegated to temporary humanitarian relief programs that lack a pathway to citizenship and the benefits, status, and access it brings.[188]

Prosecutorial discretion, by its very definition, is fraught with individual judgment, translating into various forms of racial, religious, and other types of bias against marginalized communities.[189] Though prosecutorial discretion has taken different forms in different administrations, it has uniformly advantaged those who are employable, educated, and lacking a criminal record. In the most recent iteration of prosecutorial discretion, put into place by the 2022 Doyle Memorandum, the Department of Homeland Security was directed to focus prosecutorial resources on cases involving threats to national security,

188. For a parallel discussion in the Canadian immigration system, see Yahya El-Lahib & Samantha Wehbi, *Immigration and Disability: Ableism in the Policies of the Canadian State*, 55 INT'L. SOC. WORK 95 (2011).

189. A 2007 study found that "[p]reference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains" (e.g., gender, race, religion, sexuality, weight, political orientation, etc.), with only age showing more implicit bias. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36, 54 (2007) (examining data obtained between July 2000 and May 2006 from more than 2.5 million test takers who completed the Implicit Association Test and self reports across seventeen topics). *See also* Kashyap, *supra* note 9, at 111 ("As DisCrit [analysis] reveals, these inadmissibility waivers impart broad discretionary power to immigration officers whose determinations concerning 'risk of harm to society' and 'national interest' are informed by white supremacist beliefs about race and ability and pseudoscience-based myths about immigrants as deviant, morally weak, emotionally unstable, dangerous, and frightening."); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 419 (2011) ("The Article concludes that implicit bias plays a critical role in shaping administrative immigration adjudication and therefore, EOIR reform should be a fundamental feature of any sound comprehensive immigration reform bill.").

public safety, and border security.[190] Intersectionality calls for a careful examination of how prosecutorial discretion may impact an immigrant with multiple marginalized identities. It prompts us to question: How may an immigrant with disabilities experience prosecutorial discretion?

Given the lack of empirical data about how prosecutorial discretion is granted in the immigration context and who benefits from its use, it is difficult to measure the way in which discretion enables bias in decisionmaking.[191] Agency guidance sets out various mitigating and aggravating factors that can help inform public safety assessments. Current mitigating factors include: "a mental condition that may have contributed to criminal conduct" and "a physical or mental condition requiring care or treatment."[192] Aggravating factors include, but are not limited to: "length and nature of the sentence imposed" and "the gravity of the offense of conviction."[193] Those who are deemed threats to border security are defined as those "apprehended at the border" or "a recent entrant, apprehended in the United States entering after November 2020."

To understand how these factors could impact disabled immigrants requires interrogating the layer of institutions that ICE relies on to make prosecutorial discretion decisions—in this case, a focus on the criminal system and U.S. Customs and Border Protection (CBP) decisionmaking about border apprehension. Both systems have failed those with disabilities. Research from the Center for American Progress shows that people with disabilities are overrepresented in the nation's prisons and jails and are more likely to be victims of police violence.[194] Reentry programs for disabled individuals often lack

190. Memorandum from Kerry E. Doyle, Principal Legal Advisor, to All OPLA Att'ys, U.S. Immigr. & Customs Enf't (Apr. 3, 2022).

191. There is limited study of prosecutorial discretion in the criminal context that is a useful parallel. *See, e.g.*, Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972); Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394 (2010) (presenting an empirical study where results indicate that some extralegal characteristics are intricately tied to the likelihood of charge reductions; moreover, these effects sometimes interact to produce compound disadvantages for some groups of offenders).

192. Memorandum from Alejandro N. Mayorkas, U.S. Sec'y Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't (Sept. 30, 2021).

193. *Id.*

194. REBECCA VALLAS, CTR. FOR AM. PROGRESS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS 1–2 (2016), https://www.

necessary accommodations such that they are not equipped to meet the needs of those with disabilities.[195] Thus, to the extent that an immigration adjudicator looks towards the criminal system for mitigating factors to inform discretionary decisions, ableism within the criminal system is directly transferred into the immigration system. For those with other marginalized identities—like disabled individuals who are Black—these disadvantages are compounded.[196]

In some cases, disability weighs towards the grant of discretionary relief on a humanitarian basis. Research on grants of prosecutorial discretion, namely deferred action, has revealed that serious illness is viewed as a favorable factor influencing the grant of deferred action. Leon Wildes,[197] one of the first empirical researchers of prosecutorial discretion cases, notes that in deferred action cases involving mental incompetency, the historic grounds of deportability ("mental defects" or "institutionalization after entry") were ironically the grounds that favored the grant of discretion.[198]

Though these studies demonstrate how visible and severe disabilities may weigh in favor of an exercise of discretion, invisible or less-visible disabilities that still have compounding impacts of unemployment and social isolation may hurt an applicant's chance of receiving discretion. Disability justice tenets can help inform a robust prosecutorial discretion model that includes the voices of disabled immigrants and their individualized experiences to ensure disabled individuals are not viewed binarily as either societal burdens or severely ill individuals requiring humanitarian relief but as vibrant members of an inclusive society.

Analyzing immigration policy through an intersectionality lens reveals the ways in which these measures have served to curtail the rights and access of immigrants with disabilities. Katherine Perez uses the intersectionality

americanprogress.org/wp-content/uploads/sites/2/2016/07/SummaryCriminal JusticeDisability-report.pdf [https://perma.cc/67VR-7JW2].

195. *Id.* at 3.

196. *See* Harris, *supra* note 125.

197. *See* Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 53 (1976) (analyzing a data set of deferred action grants, noting that "the elderly, the young, the mentally incompetent, the infirm, and those who would be separated from their families were treated favorably"); *see also* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 42–43 (2012) (analyzing a data set of deferred action grants and finding most grants are made for humanitarian reasons, many considering serious medical conditions).

198. Wildes, *supra* note 197, at 57.

framework to analyze Deferred Action for Childhood Arrivals (DACA), a specific form of prosecutorial discretion that granted temporary status to individuals who came to the United States as youth and attained a certain level of educational achievement.[199] DACA is an example of how the executive can choose to shift resources away from deporting those with certain educational and employment records.[200] Though the immigration advocacy community fought for DACA as a solution in the face of legislative gridlock, Perez describes how the laws privilege immigrants who can attain a higher education and employment, two systems that disproportionately discriminate against disabled individuals.[201] Advantaging employment and education furthers a merit-based hierarchy that treats poverty, unemployment, lesser educational attainment, and criminal records as markers of undesirability. In this manner, an intersectional approach peels back the layers of DACA to acknowledge it as a temporary stopgap that further entrenches the good immigrant versus bad immigrant narrative, disadvantaging a vast majority of already marginalized immigrant populations. Importantly, Perez's analysis of DACA highlights the role of ableism in advancing the good immigrant and bad immigrant archetypes.[202]

Intersectionality and wholeness analysis brings us closer to policy reforms that achieve the abolition of ableist hierarchies in our immigration system. Intersectionality requires an interrogation of prosecutorial discretion that considers how disability and ableism interrelate with carceral systems that have ensnared communities of color, lessening reliance on systems that disproportionately affect disabled and marginalized people and exacerbate disabilities. This means a divorcing of the immigration and criminal system. In the context of prosecutorial discretion specifically, this means withdrawing reliance on the criminal system to make discretion assessments. In the case of DACA, intersectionality requires lesser reliance on educational and workplace assessments of productivity and progress, as well as the criminal system's determinations of so-called dangerousness. All of these spaces rely on institutions that have systematically oppressed disabled individuals and doubly oppressed disabled individuals with other marginalized identities.

199. *See* Perez, *supra* note 109.
200. *See* Memorandum from Janet Napolitano, Sec'y Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Protection, Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012).
201. *See* Perez, *supra* note 109.
202. *See id.*

As discussed above, inadmissibility and discretion frameworks further problematic understandings of worth and self-sufficiency tied to labor and production. In the following Subpart, we look at some common defenses to removal to interrogate the role of ableism in pathologizing disability to challenge credibility, and overrelying on the testimony of medical experts to prove claims for relief. All these manifestations of ableism deprive disabled immigrants of the self-determination necessary to gain power in the system; and in so doing, strangle the pathway to abolition. Examining these problems through the prism of disability justice offers new approaches to achieving abolitionist ends.

B. Disabled Immigrants and Self-Determination

The immigration system repeatedly puts the onus on individual immigrants to prove their disability and the resultant need for reasonable modifications to immigration-related programs, services, and activities. This can be challenging for disabled immigrants, as they often have to prove the physical, economic, communication-based, legal, and attitudinal barriers they face.

Alongside basic access to systems, buildings, and institutions, disabled immigrants must also educate courts about how their disability may impact notions of credibility and eligibility. Consequently, disabled immigrants—many of whom appear in the immigration system without legal representation—face multiple burdens in gaining access to the immigration system and status within it. Disabled immigrants are encouraged to provide lengthy and detailed medical documents and expert reports to prove their need for accommodations.[203]

203. Note, though the U.S. Citizenship and Immigration Services (USCIS) Policy Manual notes that:

> While a requestor is not required to include documentation of a medical condition in support of a reasonable accommodation request, an office may need documentation to evaluate the request in rare cases. In these situations, the office must consult the Public Disability Access Coordinator for guidance before the USCIS office requests medical documentation to support an accommodation request.

Chapter 6 - Disability Accommodation Requests, U.S. CITIZENSHIP & IMMIGR. SERVS.: POLICY MANUAL (Aug. 1, 2023), https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-6 [https://perma.cc/QL3X-A4MX]. Anecdotal experience from practitioners reflects that the provision of medical documentation to prove need is a common practice. *Id.* In contrast, ICE's policy states:

> ICE is entitled to ask for and receive medical information establishing that the Requestor has a disability that requires a reasonable accommodation. In

Without effective access, disabled immigrants cannot meaningfully participate in deportation proceedings, credible fear interviews, and other key moments when interfacing with the government to seek relief or defend against deportation. This lack of clarity about how to request accommodations, and the high evidentiary burden involved in securing even basic accommodations, can result in adverse outcomes, including deportation or prolonged detention. As such, the system is designed to disempower in its centering of the nondisabled individual as the end user.

Inaccessibility and deprivations of agency when navigating government systems is a familiar struggle in the movements for disability rights and justice. A key slogan of the disability rights movement is "nothing about us, without us."[204] This principle permeated the strategies of the movement, from disabled-led protests to the development of national organizations, such as the National Federation of the Blind and the National Association of the Deaf, founded to advocate for and protect the rights and interests of various disabled communities.[205] This notion that disabled people should have a stake in matters that directly affect them has been carried forward in the disability justice principle of leadership by those most impacted. The centrality of self-determination is also reflected in the principles of cross-movement solidarity, cross-disability solidarity, collective access, collective liberation, and wholeness, which emphasize that communities of disabled and nondisabled people alike have a responsibility to work toward access and liberation, while also honoring the unique gifts, strengths, and needs of each individual. On the contrary, ableism devalues the perspectives of disabled people because it assumes that they

> some cases the disability and need for accommodation will be obvious or otherwise already known to the Decision-maker. In these cases, ICE will not seek further medical information. However, when a disability and/or need for reasonable accommodation are not obvious or otherwise already known to the Decision-maker, ICE may require that the individual provide medical documentation.

OFF. DIVERSITY & C.R., PROCEDURES TO FACILITATE THE PROVISION OF REASONABLE ACCOMMODATIONS 11 (2002), https://www.ice.gov/doclib/about/offices/dcr/pdf/facilitateProvisionRAs.pdf [https://perma.cc/TRF9-HYQW].

204. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US (1998). The slogan, "[n]othing about us without us," was coined in 1993, first becoming the clarion call of the South African disability rights movement. *See id.* at 3. It has since become a global disability rights slogan. *Id.* at 3–4.

205. *See History and Governance*, NAT'L FED'N OF THE BLIND, https://nfb.org/about-us/history-and-governance [https://perma.cc/83YE-V444]; *NAD History*, NAT'L ASS'N OF THE DEAF, https://www.nad.org/about-us/nad-history [https://perma.cc/5Z92-8TP3].

are inferior and therefore incapable of making decisions for themselves. Instead, nondisabled people are centered as arbiters and decisionmakers and are free to cast disabled people into narratives of overcoming or triumph, regardless of disabled people's own perceptions of themselves.

Elizabeth Emens refers to this phenomenon as the insider versus outsider view of disability, where outsiders (nondisabled individuals) view disability as tragedy while insiders (disabled individuals) view it as a mundane aspect of daily life.[206] Emens and other scholars have explored the limitations of disability civil rights laws to overcome social attitudes that would effectively transform policies, processes, and physical spaces to be truly accessible to all. This transformational approach stands in stark contrast with the current approach, which views disability accommodations as patchwork solutions to meet individual needs.[207]

The immigration system is also worthy of this critique in light of how it approaches disability access, credibility determinations in the adjudicatory process, and medical and psychiatric evidence. In the following Subparts, we explore these three aspects of the immigration process to understand the ways in which ableism manifests in each. We offer solutions—rooted in the principles of disability justice—that disrupt ableist policies in favor of more liberatory approaches that advance our vision of abolition.

1. Collective Access as Power

As in various other government systems, the process for seeking access for disabled people in the immigration process is driven by individualized requests for reasonable modifications and effective communication as proscribed in Section 504 of the Rehabilitation Act.[208] In contrast, interrogating the

206. Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1386 (2012).

207. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009).

208. *See* 6 C.F.R. § 15.30(a) (2015) This provision implements the provisions of Section 504 for the Department of Homeland Security, stating that:

> [N]o qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Department . . . .
> . . . . [and] take appropriate steps to effectively communicate with applicants, participants, personnel of other Federal entities, and members of the public . . . .

immigration system under the lens of collective access requires a look not only at the specific needs of individuals at the moment they request modifications to an established process, but rather, also at collectively assuming responsibility for access by integrating it into the initial design of systems and processes.[209] Collective access demands that all people, disabled and nondisabled alike, have a responsibility to ensure that access is provided. As we discuss in Part I, a failure to think collectively about access leaves disabled people disempowered and, we argue, unable to fully participate in achieving their own liberation.[210] Therefore, understanding access barriers and advocating for their toppling must be a core imperative of immigration abolition.

Advocates have called upon immigration agencies to fulfill the promises and protections of disability rights laws.[211] Self-evaluations from the DHS Office for Civil Rights and Civil Liberties have found that, though DHS, for example, has established a robust set of standards and guidelines to ensure access for asylum-seeking disabled immigrants,[212] implementation of these policies is

> . . . . furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Department . . . .
> . . . . [and] give primary consideration to the requests of the individual with a disability.

Id. §§ 15.30(a), 15.60(a), (a)(1), (a)(1)(i).

209. *See, e.g.*, Karla Gilbride, *Evolving Beyond Reasonable Accommodations Towards "Off-the-Shelf Accessible" Workplaces and Campuses*, 30 AM. U. J. GENDER SOC. POL'Y & L. 297, 304 (2022).

210. *See* Mia Mingus, *Changing the Framework: Disability Justice*, LEAVING EVIDENCE (Feb. 12, 2011, 1:56 PM), https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/#content [https://perma.cc/UZQ6-Z3WR] ("Accessibility is concrete resistance to the isolation of disabled people.").

211. *See* Ruby Ritchin, *"I Felt Not Seen, Not Heard:" Gaps in Disability Access at USCIS for People Seeking Protection*, HUM. RTS. FIRST (Sept. 19, 2023), https://humanrightsfirst.org/library/i-felt-not-seen-not-heard-gaps-in-disability-access-at-uscis-for-people-seeking-protection/#maincontent [https://perma.cc/Y3FB-YANE] (recommending that USCIS improve access to the asylum process for disabled immigrants by establishing disability access coordinators in each asylum office, providing disability training for asylum officers, and clarifying the process for requesting reasonable accommodations, among other recommendations); Ruby Ritchin, *"You Suffer a Lot:" Immigrants With Disabilities Face Barriers in Immigration Court*, HUM. RTS. FIRST (July 19, 2023), https://humanrightsfirst.org/library/you-suffer-a-lot-immigrants-with-disabilities-face-barriers-in-immigration-court/#maincontent [https://perma.cc/Y79B-PBSK] (describing the barriers that respondents with physical, cognitive, developmental, and mental health disabilities face in immigration court).

212. *See e.g.*, OFF. C.R. & C.L., U.S. DEP'T OF HOMELAND SEC., GUIDE 065-01-001-01, COMPONENT SELF-EVALUATION AND PLANNING REFERENCE GUIDE (2016), https://www.dhs.gov/sites/default/files/publications/disability-guide-component-self-evaluation.pdf. [https://perma.cc/7323-QT7G].

often limited.[213] The recommendations that have been set forth as the result of these reports are critical first steps in realizing an abolitionist vision of a government that centers access as a praxis and a collective responsibility, but, as we discuss below, there is further to travel on the road to this desired destination.

The disability justice principle of collective access also provides a pathway to critique the Biden Administration's requirements that asylum seekers use inaccessible technology to seek asylum. To discourage border crossings, the Biden Administration introduced a phone app, CBP One, which requires all those seeking to present at Southern Border checkpoints to make an appointment with Customs and Border Protection.[214] When an asylum seeker attends this preset appointment, CBP assesses whether they are allowed to enter the country to seek asylum. Those who enter without a CBP One appointment are presumed to be ineligible to seek asylum and have to meet a difficult evidentiary standard in order to overcome this presumption.[215] Migrants, advocates, and fellow lawmakers—including thirty-four House Democrats[216]—issued statements regarding issues of inaccessibility and equity with the app. Alongside the glitches and malfunction inherent in the app itself, critics noted that using the app required high levels of technological literacy, required access to a charged and working cell phone with an internet connection, and was offered only in limited languages.[217] The inaccessibility of this app functions as

213. *See supra* note 209.

214. *See* Press Release, White House, Fact Sheet: Biden-Harris Administration Announces New Border Enforcement Actions (Jan. 5, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions [https://perma.cc/P76M-RF29].

215. Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31399 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, 1208). Limited groups exempted from this presumed ineligibility include unaccompanied minors, trafficking victims, and people facing medical emergencies or imminent threat of death. *Id.* at 31322.

216. Press Release, Joaquin Castro, Congressman for 20th Dist. Tex., As Asylum-Seekers Report Ongoing Issues with CBP One App, Congressman Castro and House Democrats Demand Action From DHS (Mar. 14, 2023), https://castro.house.gov/media-center/press-releases/as-asylum-seekers-report-ongoing-issues-with-cbp-one-app-congressman-castro-and-house-democrats-demand-action-from-dhs [https://perma.cc/5KFE-9T6B].

217. Ayelet Parness, *For Asylum Seekers, CBP One App Poses Major Challenges,* HEBREW IMMIGRANT AID SOC'Y (Nov. 8, 2023), https://hias.org/news/asylum-seekers-cbp-one-app-poses-major-challenges/ [https://perma.cc/2Y6C-EZ4Z]; Austin Kocher, *Glitches in the Digitization of Asylum: How CBP One Turns Migrants' Smartphones into Mobile Borders*, 13 SOCIETIES 149 (2023); LAWS. FOR GOOD GOVT: PROJECT CORAZÓN ET AL., CBP ONE: THE LATEST ROADBLOCK TO ASYLUM IN THE UNITED STATES (2023), https://networklobby.org/wp-content/uploads/2023/08/CBPOneReportFINAL83123.pdf [https://perma.cc/SQ43-UNNS].

a constructive digital border, limiting asylum to those who can overcome such obstacles to entry. The CBP One App is an example of an ableist initiative designed to lessen access for all asylum seekers. Because the inaccessibility of this app impacts so many asylum seekers, accessibility and issues with its usage became a mainstream conversation in the asylum advocacy space.

The disability justice principle of collective access suggests that the process of developing accessibility solutions is owned equally by government institutions, advocates, and individuals. Access should be built into the design of programs, while also attending to the specific individual needs of applicants. As we describe in Subpart C, publicly available data can illuminate trends in requests for accommodation. This data can assist immigration agencies, like U.S. Citizenship and Immigration Services (USCIS), in working with disability communities and other stakeholders. The goal of sharing this data is to identify process and design changes that directly address some of the most common barriers underlying accommodation requests. For example, for asylum seekers and others pursuing a reprieve from exile, the availability of corroborating evidence related to circumstances in the home country is often limited due to the nature of their escape from persecution, crime, and trafficking. By addressing these common barriers, resources can be freed up to focus on less common and specialized individual needs.

Disability justice activist Mia Mingus emphasizes that, though access is an essential tool for building power and realizing self-determination, it is not the terminus point for achieving the true liberation that abolition demands. She urges: "[w]e must understand and practice an accessibility that moves us closer to justice, not just inclusion or diversity."[218] To that end, she poses the question, "[h]ow do we acknowledge that all bodies are different, while also not ignoring the very real ways that certain bodies are labeled and treated as 'disabled'"?[219] This normative framing pervades the immigration system, particularly in the context of credibility determinations, which cast certain behaviors as believable or not believable based upon nondisabled understandings of the indicia of truthfulness. As such, access alone cannot save disabled immigrants from the power of the nondisabled gaze.

218. Mingus, *supra* note 210.
219. *Id.*

2. Ableism & Credibility

Establishing credibility in the eyes of immigration adjudicators has become an essential gatekeeping device to size up individuals seeking humanitarian relief from deportation. However, for asylum seekers and others pursuing relief from deportation, the availability of corroborating evidence related to circumstances in their home country is often limited due to the nature of their escape from persecution, crime, and trafficking. Thus, claims for relief often rest on an applicant's own testimony alone. For those seeking two major forms of humanitarian relief, asylum and withholding of removal, an immigration judge must make a credibility determination before one can qualify for relief.[220] Some have called this the single most important step in preventing deportation to countries where an individual may face serious human rights violations.[221] Disabled immigrants whose demeanor, cognition, memory, and communications do not comport with nondisabled standards for measuring credibility are disadvantaged in this process.

Credibility determinations are governed by the REAL ID Act, a statute which requires immigration judges to consider the totality of circumstances and all relevant factors.[222] These relevant factors include the demeanor, candor, and responsiveness of the applicant, internal consistencies between the applicant's testimony and submitted evidence, and the inherent plausibility of the applicant's account.[223] The statute expressly notes that any inconsistency, inaccuracy, or falsehood could be used against the applicant, regardless of whether the inconsistency goes to the heart of the claim or not.[224]

Numerous empirical studies have demonstrated the extent and scope of how immigration judges employ the REAL ID Act to render adverse credibility judgments. A 2010 study tabulated the reasons judges offer for underlying negative credibility findings in over 360 cases brought before the Court of Appeals.[225] Judges cited the candidate's demeanor in 18 percent of the cases,

220. 8 U.S.C. § 1158(b)(1)(B)(iii).
221. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367 (2003).
222. 8 U.S.C. § 1158(b)(1)(B)(iii). The same statute applies to credibility determinations by an asylum officer. *Id.* § 1158(b)(3)(C). To a large degree the REAL ID Act simply codified factors immigration judges had long considered on a case-by-case basis.
223. *Id.* § 1158(b)(1)(B)(iii).
224. *Id.*
225. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum,* 56 SANTA CLARA L. REV. 457, 475–76.

frequently describing the applicant's testimony as vague, unresponsive, or evasive[226] Some judges have critiqued the use of demeanor to assess credibility as a vehicle for implicit bias.[227] Such determinations could be based on an immigration judge's personal and even unconscious feelings about the applicant and colored by culturally instructed ideas about body language and expression.[228]

An increasing number of immigration courts have begun using video teleconferencing, triggering additional questions about access, perception, and participation in immigration court hearings.[229] Other types of seminal appearances—such as credible fear interviews which determine whether individuals arriving at the border are allowed to apply for asylum—are often completed telephonically or via video feed.[230] For those who are appearing for

226. *Id.* at 477. ("Judges who did so frequently described the applicant's testimony as 'implausible,' 'vague,' 'lacking in detail,' 'unresponsive,' or 'evasive.' Less frequently, judges described an applicant's testimony as 'confusing,' 'hesitant,' 'disjointed,' 'incoherent,' or 'unreliable.'").

227. *See, e.g.*, Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1332 (2015).

228. *See* Nicholas Narbutas, Note, *The Ring of Truth: Demeanor and Due Process in U.S. Asylum Law*, 50 COLUM. HUM. RTS. L. REV. 348, 363–66 (2018) ("For example, in cases of racial implicit biases, studies have shown that 'implicit attitudes lead individuals to read unfriendliness or hostility into the facial expressions of blacks but not whites' as well as 'to more negative evaluations of ambiguous actions by racial and ethnic minorities.'").

229. *See* Liz Bradley & Hillary Farber, Virtually Incredible*: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference*, 36 GEO. IMMIGR. L.J. 515 (2022).

230. A DHS Inspector General Report highlights the myriad of technological and logistical issues that those appearing for hearings and interviews telephonically or via video feed face:

> The addition of the sally port phone booths is an improvement, though aliens still experience challenges conducting private consultations and interviews. Border Patrol officials told us they recently modified the booths, adding padding to the walls and Plexiglas to close in the ceiling, to provide additional soundproofing. However, issues still remain. For instance, the phones inside the booths do not have handsets or headphones for security reasons, so aliens must use the speakerphone function. During our site visit, we observed that conversations were partially discernable from outside the booths. Additionally, while listening to a telephonic credible-fear screening interview from a separate office, OIG team members could hear a constant muffled background noise emanating from the other phone booths. This created a distraction during the interview and, at times, either the asylum officer or interpreter had to repeat questions or answers.

OFF. INSPECTOR GEN., U.S. DEP'T HOMELAND SEC., OIG-21-16, DHS HAS NOT EFFECTIVELY IMPLEMENTED THE PROMPT ASYLUM PROGRAMS 18 (Jan. 25, 2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-16-Jan21.pdf [https://perma.cc/5PN4-ZJVS].

immigration court hearings and administrative interviews from ICE detention facilities, such video and telephonic appearances have long been a reality. Scholars have written about the due process issues that such forums trigger, such as limiting access to and hindering communication with one's counsel.[231]

This construction of credibility based on a standard set of factors applied to each unique body comports with the ways in which disability studies scholars explore the establishment of disability as a category. In her seminal work, *Extraordinary Bodies*, Rosemarie Garland-Thomson coins the term "normate," explaining that, "the concept of disability unites a highly marked, heterogeneous group whose only commonality is being considered abnormal."[232] As such, we argue that ableist policy frameworks such as those centered on credibility create what Garland-Thomson describes as "a hypothetical set of guidelines for corporeal form and function arising from cultural expectations about how human beings should look and act."[233] Building upon Garland-Thomson's conceptualization of the normate, Stephanie Jenkins further argues that the rise of American industrial capitalism in the nineteenth century resulted in the construction of the normate citizen as a white able-bodied man.[234] This is consistent with Jay Timothy Dolmage's account of the immigration policies and practices that emerged during the same time period, which cast the normate gaze on arriving immigrants to justify exclusion based on physical and mental defects.[235] We argue that the continued focus on credibility as a requirement for achieving humanitarian relief from deportation reflects a modern-day manifestation of normate primacy, and its dismantling is essential to the abolition of ableism in the context of migration.

The disability justice principle of wholeness breaks down the normate framework with an insistence that each body should be recognized for its unique gifts, desires, and needs. The creation of spaces where those identities and needs can be fully expressed is one pathway towards liberation for asylum-seeking disabled immigrants. Thus, establishing a rebuttable presumption of credibility would mitigate the impact of adjudicator bias by placing the onus on the

231. *See* Bradley & Faber, *supra* note 229.
232. ROSEMARIE GARLAND THOMSON, EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE xii, 24 (20th Anniversary ed. 1997).
233. *Id.* at 6–7. *See also* LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS AND THE BODY 23–24 (1995) ("To understand the disabled body, one must return to the concept of the norm, the normal body . . . . [T]he 'problem' is not the person with disabilities; the problem is the way that normalcy is constructed to create the 'problem' of the disabled person.").
234. *See* Stephanie Jenkins, *Constructing Ableism*, GENEALOGY, July 16, 2021, at 1, 2.
235. *See* DOLMAGE, *supra* note 10.

government to produce, verifiable evidence to challenge an applicant or respondent's credibility. The Executive Office of Immigration Review must collect data on the disability status of respondents to identify any disparate impacts of credibility determinations on disabled respondents, allowing for the identification of evidence-based solutions. As we explain below, a similar reexamination is necessary with respect to other forms of evidence required to substantiate eligibility for humanitarian relief. These evidentiary burdens further entrench the ableist construction of the normate, depriving disabled immigrants of the opportunity to define their experiences on their own terms while also receiving the protections they have the right to pursue.

3. Reinforcing Medical Models of Disability & Tragedy Narratives

Evidence of disability born of harm or persecution can be used to support applications for humanitarian relief in the immigration process. However, the validation of this evidence is often directed by factors other than the disabled immigrant's personal account. Instead, it relies on the assessment of physical and psychological markers of suffering, usually determined through evidence such as medical expert testimony, medical documentation, and forensic evaluations.[236] Most humanitarian forms of relief are anchored on the severity and type of harm the applicant suffered. For example, an asylum seeker must prove that the harm they survived rose to the level of "persecution,"[237] a U-Visa applicant must prove "substantial physical or mental abuse,"[238] and one seeking cancellation of removal must show a qualified family member would face

236. *See* Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach*, 101 CALIF. L. REV. 1013, 1017 (2013) (describing how such categorizations move "excludable immigrant[s]" to "admissible refugee[s]," in turn moving them from the category of "undesirable alien" to "deserving immigrant"). "Thus, in contrast to refugee law, which looks abroad to see who can be pulled in, immigration law looks inside the nation to see who should be kept out. Despite some overlap, the two bodies of law are thus treated as embodying different legal and normative foundations, furthering divergent policy agendas, and relying on separate legal rules." *Id.* at 1042.

237. For a discussion of the types of harm that rise to the level of persecution, see Nermeen S. Arastu, *Access to a Doctor, Access to Justice? An Empirical Study on the Impact of Forensic Medical Examinations in Preventing Deportation*, 35 HARV. HUM. RTS. J. 47, 48 (2022).

238. Created as part of the Trafficking Victims Protection Act of 2000 alongside the T-Visa, the U-Visa opens a path to permanent residence for survivors of criminal activity suffered in the United States and their family members. 8 C.F.R. § 214.14(b)(1) (2019). *See also* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 25 (noting "USCIS provides a number of humanitarian programs and protection to assist individuals in need of shelter or aid from disasters, oppression, emergency medical issues and other urgent circumstances").

"severe and unusual hardship."[239] In all these instances, practitioners seek out medical evidence to diagnose or document physical and mental conditions that could rise to the requisite severity to qualify as the persecution, harm, or hardship necessary to prove eligibility to EOIR and USCIS.

Forensic evaluators are specially trained to obtain facts relevant to an immigrant's history of torture, ill treatment, or persecution and establish the consistency between this history and the findings of a medical and psychological exam.[240] For example, if an asylum seeker describes an assault by government forces which led to broken limbs, a forensic medical evaluator may look for physical and psychological indicators of that trauma in the form of scars, poorly healed bones, mobility challenges, or resulting mental health conditions.[241]

Forensic medical evaluations play a significant role in adjudicator decisionmaking. In the largest-of-its-kind study analyzing the use of forensic medical evaluations and their impact on immigration case outcomes, 81 percent of immigrants who requested these evaluations from the Physicians for Human Rights network received a positive outcome in their case before EOIR or USCIS.[242] In comparison, grant rates for those applying for asylum before USCIS or EOIR during this period ranged from a low of 33.7 percent to a high of 55.6 percent depending on the year and the case posture.[243] Even when compared to similarly situated immigrants who were represented by counsel and not detained, those who received a forensic medical evaluation fared significantly better.[244]

The U.S. government's emphasis on medical evidence, in the form of medical documentation and forensic medical and psychological evaluations, to assess the eligibility for relief and discretion, further diminishes the self-determination of disabled immigrants by conveying the message that medical

239. Immigration and Nationality Act § 240A(b)(1)(D), 8 U.S.C. § 1229(b)(1)(D).
240. *See, e.g.*, Hope Ferdowsian, Katherine McKenzie & Amy Zeidan, *Asylum Medicine: Standard and Best Practices*, 21 HEALTH & HUM. RTS. J., no. 1, June 2019, at 215, 217 ("The purpose of an asylum evaluation is to obtain facts pertinent to the asylum seeker's history of torture, ill treatment, or persecution; perform a focused exam to document physical and psychological evidence of trauma; and establish the level of consistency between the person's history and exam findings.").
241. *Id.* at 218 tbl.1.
242. Holly G. Atkinson, Katarzyna Wyka, Kathryn Hampton, Christian L. Seno & Elizabeth T. Yim, Deborah Ottenheimer & Nermeen S. Arastu, *Impact of Forensic Medical Evaluations on Immigration Relief Grant Rates and Correlates of Outcomes in the United States,* J. FORENSIC & LEGAL MED., Oct. 28, 2021, at 1, 6.
243. *Id.* at 2.
244. *See id.*

professionals are in the best position to determine who is disabled. Such emphasis on medical perceptions and records does not fully account for invisible or hidden disabilities that can only be described by the individuals who experience them. Further, a focus on diagnosis and documentation overlooks the broader societal impacts of harm or disability, including financial, social, or cultural factors. This demonstrates a complete reliance on the medical model of disability, rather than the social model.[245]

Forensic evaluators are tasked with documenting and corroborating an individual's experience with torture and persecution in an immigration system where relief from deportation is often hinged on proof of extreme suffering. They—like immigration attorneys who craft arguments to defend their clients against deportation—are often focused on defining an individual by the worst thing that ever happened to them in the country they fled from. In turn, forensic evaluations often do not capture an individual's traits of resilience and survival, serving as another vehicle of disempowerment in the immigration system by propping up the notion of disability as tragedy. While a medical diagnosis, for example, may conclude that one individual has Post Traumatic Stress Disorder (PTSD), another individual who has also gone through a disabling experience may not develop PTSD given a host of other factors. "Situationally, social support and connection to community" may serve as a form of protection that "support[s] resilience and post-traumatic growth," rendering PTSD an inaccurate marker to indicate severity of past harm.[246] Thus, a codification of trauma and disability, and the medically driven symptomology of these experiences, only perpetuates an exclusionary cycle.

An intersectionality analysis which examines the compounding challenges of disability and noncitizen status (alongside other marginalized identities) helps in examining the problematic evidentiary requirements that demand immigrants to substantiate their disability with medical proof and documentation. For example, disabled immigrants may encounter obstacles to medical access due to their immigration status and/or their disability status,

245. *See e.g.*, Anne Levesque & Ravi Malhotra, *The Dawning of The Social Model? Applying a Disability Lens to Recent Developments in the Law of Negligence*, 13 MCGILL J.L. & HEALTH 1 (2019) (Offering a critique of the prevalence of the medical model of disability in adjudicating negligence claims in Canadian tort litigation). *See also* Drimmer, *supra* note 135 (Explaining the medical model of disability as focused on individual medical impairment, versus the social model's emphasis on the systemic social exclusion of disabled people as the result of inaccessible design and discrimination).

246. *See* Raquel E. Aldana, Patrick Marius Koga, Thomas O'Donnell, Alea Skwara & Caroline Perris, *Trauma as Inclusion*, 89 TENN. L. REV. 767, 823 (2022).

incarceration, lack of insurance, and difficulties in accessing agencies which coordinate forensic evaluations.[247]

Principles of wholeness further call for humanitarian relief adjudications that promote the resilience of trauma survivors and seek to understand the myriad of ways disability has impacted their lives. This helps the adjudicator understand the many ways individuals may have experienced harm without the limited nature of medical diagnosis to expand understandings of what constitutes severe or substantial harm, hardship, or persecution. Wholeness calls for a greater reliance on an applicant's testimony as the expert on their disabling condition, rather than an outsized dependence on hard-to-get specialized forensic medical evaluations.

Further, the disability justice principle of leadership by those most impacted requires a shift in who is considered an expert, requiring greater participation of and reliance on the testimonies of those with lived experience. For example, there is a growing movement in social science research to rely on the input of lived experience experts to design research studies, including the development of research questions, as well as the framing and dissemination of research findings in what are called community-based, participatory models.[248]

Indeed, health policy researchers have noted that, when asked to self-report disabilities using open-ended questions, disabled people provide a more accurate picture of the overall disabled population.[249] These researchers argue that this allows more accurate accounting of the total number of disabled people and the range of disabilities for purposes of allocating adequate resources for healthcare delivery.[250] Likewise, shifting the evidentiary requirements in immigration proceedings will result in fairer, more accurate remedies. By prioritizing the direct testimony or written account of immigrant respondents and applicants, the immigration system can disentangle itself from ableist reliance on the perspectives of medical experts in favor of the expertise of the respondent or applicant themselves.

247. *See* Tara Lagu, Carol Haywood, Kimberly Reimold, Christene DeJong, Robin Walker Sterling & Lisa I. Iezzoni., *'I Am Not the Doctor for You': Physicians' Attitudes About Caring for People With Disabilities*, 41 HEALTH AFFS. 1387 (2022); *see, e.g.*, Atkinson et al., *supra* note 242.

248. *See, e.g.*, Erin J. Bush, Reshmi L. Singh & Sarah Kooienga, *Lived Experiences of a Community: Merging Interpretive Phenomenology and Community-Based Participatory Research*, INT'L J. QUALITATIVE METHODS, 2019, at 1.

249. *See* Jean P. Hall, Noelle K. Kurth, Catherine Ipsen, Andrew Myers & Kelsey Goddard, *Comparing Measures of Functional Difficulty With Self-Identified Disability: Implications for Health Policy*, 41 HEALTH AFFS. 1433 (2022).

250. *See id.* at 1440.

C. Ableism and Invisibility

Despite the reality of an immigration system built upon ableist assumptions about the worth of immigrant bodies, the lived experiences and needs of disabled immigrants remain invisible.[251] In this Subpart, we explore this erasure through the prism of empirical data available both from the government and immigration practitioners regarding disabled immigrants navigating admission and removal processes, the gaps in advocacy strategies that result when we do not fully consider the experiences of disabled immigrants, and the failure of the family-based immigration rubric to recognize the communities of care necessary to sustain disabled people. Advancing visibility and centering care will build the sustainable communities that abolitionists have called for as necessary to replace the carceral state. With its emphasis on collective access, cross-movement solidarity, and collective liberation, disability justice allows us to envision a world in which migration is driven by an imperative to build communities, rather than break them apart.

1. Silence in the Data

Disability impacts communities across the United States, including immigrant communities. According to the American Community survey, 5.6 percent of immigrant adults ages eighteen to sixty-four have a disability, and 2.3 percent have multiple disabilities.[252] Ambulatory, cognitive, and independent-living related disabilities are the main types of disabilities reported.[253] We do not know how many disabled immigrants are actively intertwined in the immigration system. Efforts to obtain data on the prevalence of disabled immigrants in proceedings before the EOIR have yielded no information. Similarly, EOIR did not produce evidence of policies, training materials, or other guidance on the treatment of respondents with disabilities.[254] Furthermore, it is

251. Jasmine E. Harris argues that disabled people have been rendered invisible in various adjudicatory processes through the "privatization" of disability-specific matters such as guardianship, special education proceedings, and social security hearings, thus perpetuating common stereotypes of disabled people as deviants, overcomers, or objects of pity, thus reinforcing stigma and obscuring lived experience. *See* Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457 (2015).

252. *See* ECHAVE & GONZALEZ, *supra* note 159, at 2.

253. *Id.*

254. *See* Letter from J.R. Schaaf, Senior Couns., Admin. L., U.S. Dep't of Just., Exec. Off. for Immigr. Rev., Off. of the Gen. Couns., to Yashna Eswaran, Cal. Reg'l Envt. Educ. Cmty. (Dec. 19, 2019) (on file with author).

unclear what—if any—policies govern EOIR's implementation of Section 504 of the Rehabilitation Act of 1973, the principle set of legal protections available for disabled immigrants navigating immigration courts.[255]

There is clearer guidance regarding the implementation of disability civil rights protections within DHS, but given the department's conflicting mandates regarding border security, immigrant apprehension, and detention, these provisions fall short. DHS issued Section 504 implementing regulations in 2003.[256] These regulations mandate that, "No qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Department."[257]

Pursuant to these regulations, DHS was required to conduct a self-evaluation of its compliance with Section 504 by March 7, 2005, but the results of this self-evaluation were not available until 2016.[258] Importantly for our analysis, the implementing regulations do not include data collection and reporting requirements.

The Section 504 implementing regulations fail to detail the ways in which immigration enforcement agencies within the department—such as ICE and CBP—identify disabled immigrants, the volume and nature of requests for accommodation, and the ways in which these requests are handled. This data could increase transparency and reveal the most common types of requested accommodations. It could then guide policy and practice to make accessibility a standard part of the immigration system. More information about the needs of disabled immigrants could facilitate human-centered design, rather than reactive responses to individual requests for accommodation.[259]

Disabled immigrants are not viewed as a unique demographic category, and thus, their particular experiences are often obscured.[260] For example, 2022 was the first year that any polling agency ran a poll assessing how the disability

255. *See id.*
256. 6 C.F.R. § 15 (2003).
257. *Id.* § 15.30(a).
258. *Id.* § 15.10. *See also* OFF. C.R. & C.L., *supra* note 212.
259. *See* Gilbride, *supra* note 209.
260. *See, e.g.*, BRIANNA BLASER & RICHARD E. LADNER, WHY IS DATA ON DISABILITY SO HARD TO COLLECT AND UNDERSTAND? 1–2 (2020); *and 2.2 Recognize That Disability Can Be Used as a Demographic Variable*, DISABILITY IN PUB. HEALTH, https://disabilityinpublichealth.org/2–2recognize-that-disability-can-be-used-as-a-demographic-variable [https://perma.cc/Y2YV-WHZY].

community feels about abortion, despite the fact that reproductive health and autonomy are issues that directly impact this population.[261]

Many assessments of disability focus solely on the disabled person's ability to participate in activities of daily living or the nature of their particular impairment. These assessments use a fixed set of questions and lack insights from disabled individuals about their experiences of disability.[262] As such, immigration agencies must work together with agencies across the federal government to identify the appropriate approach to understanding disability among the population involved in their programs. This can be achieved through active engagement—including listening sessions—federal advisory committees, and other approaches.

Collective access and liberation also require a deeper understanding of the access needs of disabled immigrants in all stages of the immigration process with an aim towards true liberation as they seek all forms of relief. Building upon initiatives across the movement, the CUNY Law School Immigrant and Noncitizen Rights Clinic (INRC) is engaging in an effort to leverage the Freedom of Information Act to request data regarding disabled immigrants. Specifically, a request to DHS includes materials related to the department's compliance with Section 504. It also includes requests for data related to complaints of Section 504 violations, requests for accommodations, approvals and denials of such requests, and demographic data of requesters. Public availability of aggregated data of this kind from DHS, DOJ, the Department of State, and other agencies responsible for the management of the immigration process will assist in uncovering trends and identifying potential areas for reform that will improve accessibility and eliminate harm.

Disability justice framing creates the space for data-driven approaches to create access and liberation in the immigration system. Once data is publicly available, the voices and leadership of those most impacted can develop solutions rooted in lived experience. One potential model for elevating the voices of disabled immigrants is the National Council on Disability (NCD). "NCD is an independent federal agency charged with advising the President, Congress, and other federal agencies regarding policies, programs, practices,

261. *See* Sara Luterman, *Exclusive: How Do People With Disabilities Feel About Abortion? New Poll Sheds Light for the First Time*, THE 19TH (May 10, 2022, 3:00 AM), https://19thnews.org/2022/05/how-people-with-disabilities-feel-abortion [https://perma.cc/H9YL-29DY].

262. *See* Hall et al., *supra* note 249, at 1434.

and procedures that affect people with disabilities."[263] NCD was first established in 1978 as an advisory council within the Department of Education.[264] In 1984, it was formalized as an independent agency charged with reviewing all federal policies and programs related to disability.[265] NCD members have always included disabled people, with the majority of council members identifying as disabled today.[266] Most notably, the NCD first called for the ADA in 1986, and a bill was introduced in Congress two years later in 1988 as the result of those efforts.[267]

Immigration is not currently listed among NCD's policy areas, but this area of work should be established in the future. Alternatively, the U.S. president could establish another independent commission that includes disabled immigrants with lived experience to analyze the implementation of existing disability protections by immigration agencies and issue recommendations.

In addition to the absence of disabled immigrant voices at the government level, a similar silence pervades the practice of immigration law. This invisibility may stem in part from the gross underrepresentation of disabled people in the legal profession. According to the National Association for Law Placement, only 5.5 percent of law graduates identified as disabled in the class of 2021.[268] These graduates were less likely to be people of color and, overall, the employment rate for disabled graduates was six percentage points lower than the average rate for the 2021 graduating class.[269] Disabled lawyers account for just 1.2 percent of large law firm attorneys, and employed law graduates with disabilities were almost twice as likely to take public interest jobs as the overall cohort of graduates.[270] Thus, we can deduce that the representation of disabled lawyers in

263. *About Us*, NAT'L COUNCIL ON DISABILITY, https://www.ncd.gov/about [https://perma.cc/X6UF-GGRZ].
264. *Equality of Opportunity: The Making of the Americans With Disabilities Act*, NAT'L COUNCIL ON DISABILITY, https://www.ncd.gov/publications/1997/equality_of_Opportunity_The_Making_of_the_Americans_with_Disabilities_Act [https://perma.cc/2QMX-68S9].
265. *Id.*
266. *NCD Council Members*, NAT'L COUNCIL ON DISABILITY, https://www.ncd.gov/council_and_staff/ncd_council_members [https://perma.cc/G6BN-J7T2].
267. NAT'L COUNCIL ON DISABILITY, *Equality of Opportunity*, *supra* note 264.
268. *Employment Outcomes for Graduates With Disabilities*, NAT'L ASSOC. FOR L. PLACEMENT (Dec. 2022), https://www.nalp.org/1222research [https://perma.cc/2ZR8-L6PS].
269. *Id.*
270. *Id.*

immigration practice is quite small, limiting the impact of the disabled experience and voice in the practice.[271]

There have been numerous efforts in recent years to build cross-movement solidarity between immigrant and disability advocacy spaces, but there remains a dearth of knowledge among immigration practitioners regarding inclusive and accessible practices that center the needs and voices of disabled immigrant clients.[272] To bridge this gap, CUNY Law's INRC developed a needs assessment survey targeting immigration practitioners to better understand practices related to the identification and representation of disabled immigrant clients. This survey assesses gaps in practitioner knowledge regarding disability rights laws and disability justice principles and identifies the most critical needs from the perspective of practitioners.

Early analysis of the survey results suggested that immigration practitioners lack familiarity with disability rights laws but expressed a strong interest in better understanding this legal framework.[273] The majority of respondents, or 59 percent, indicated that they were somewhat familiar with disability rights laws, while 14 percent said they were very familiar, and 27 percent said they were not familiar at all. The survey responses also suggested a significant need for further training for immigration practitioners regarding disability rights laws. More than two-thirds of respondents, or 66 percent, indicated that they had not received training on disability rights laws in the course of their immigration practice. However, an overwhelming 97 percent of survey respondents stated that they would like to receive more training and resources on this topic.

Similarly, Human Rights First has launched a project to develop resources and tools for practitioners representing disabled immigrant clients.[274] The

271. *See id.* NALP notes that societal stigma might prevent disabled law graduates from disclosing their disability, resulting in undercounting. Likewise, we suspect undercounting of the number of disabled lawyers in immigration practice due to stigma and fear of discrimination.

272. *See, e.g.*, *Mobilities Conference*, LOY. L. SCH.: THE COEHLO CTR. https://www.lls.edu/coelhocenter/events/mobilitiesconference [https://perma.cc/V6YR-JELH]; Emily DiMatteo, Mia Ives-Rublee & Trinh Q. Truong, *The ADA at 32: Understanding the Rights of Disabled Asylum-Seekers*, CTR. FOR AM. PROGRESS (Aug. 25, 2022), https://www.americanprogress.org/article/the-ada-at-32-understanding-the-rights-of-disabled-asylum-seekers [https://perma.cc/WV7B-HRBT].

273. This finding and the other findings in this paragraph can be found in the preliminary survey results, which remain on file with the authors.

274. *See PSVF Fellow: Ruby Ritchin (J.D. '22)*, OPIA ALUMNI BLOG (July 15, 2022), https://hls.harvard.edu/psvf-fellow-ruby-ritchin-j-d-22/#content [https://perma.cc/9P69-BRW8].

project culminated in two reports that offer concrete recommendations for EOIR and DHS to improve access for disabled respondents in removal proceedings and asylum applicants before USCIS.[275]

Building the capacity of immigration practitioners to vindicate the rights of disabled immigrants under disability civil rights laws and to align their advocacy efforts with the tenets of disability justice can bring to light new ways of thinking about this work, as well as new visions for change. For example, disability justice leaders Leah Lakshmi Piepzna-Samarasinha and Stacey Park Milbern envisioned an audit tool for organizations led by people of color that are not disability focused to assess their progress when it comes to implementing disability justice principles.[276] Immigration organizations could also benefit from such a tool.

2. Gaps in Advocacy Strategy

Movements for immigration abolition cannot tackle ableism without engaging the partnership of the movements for disability rights and disability justice. The Women's Refugee Commission (WRC), for example, encourages advocates to engage with individuals with disabilities and their caregivers to formulate a better understanding of their needs.[277] The WRC specifically highlights the needs of children and young people with disabilities; disabled people who have experienced violence; and those with multiple disabilities as absent in discussions about just and fair immigration.[278]

Along with the failure to identify needs and risk factors that disabled immigrants face, the lack of cross-movement solidarity also has led to the underutilization of legal and advocacy tools. For example, state protection and advocacy organizations (P&As) are mandated to defend the personal and civil rights of those in the disability community and, through this mandate, many P&As are entitled to request access to state and private immigration facilities. Disability P&As, including Disability Rights California, Texas, and Florida, have

275. *See* Ritchin, *"You Suffer A Lot," supra* note 211; Ritchin, *"I Felt Not Seen, Not Heard," supra* note 211.

276. *Disability Justice: An Audit Tool*, NW. HEALTH FOUND., https://www.northwesthealth.org/djaudittool#page [https://perma.cc/3ARL-VUPE].

277. *See* EMMA PEARCE ET AL., WOMEN'S REFUGEE COMM'N, DISABILITY INCLUSION: TRANSLATING POLICY INTO HUMANITARIAN ACTION 3–4 (2014), https://reliefweb.int/attachments/b956fd60-95e3-3edb-bf9b-0f1675d5fc2f/Disability%20Inclusion_Translating%20Policy%20into%20Practice%20in%20Humanitarian%20Action.pdf [https://perma.cc/8UZL-7FBZ].

278. *See id.* at 10–14.

exercised these rights to enter and inspect immigration facilities.[279] Cross-movement solidarity in this context involves leveraging the disability community's expertise and access to detention facilities to inspect facilities to the benefit of all detained there, a practice that could be more widely adopted by greater cross-movement coordination.

Further, given the disabling impact of immigration detention, mental health conditions are common inside ICE facilities.[280] Individuals with mental health disabilities can gain protection under disability law. This type of cross-movement collaboration has led to advocacy against harmful solitary confinement conditions,[281] increased tracking of instances of self-harm in ICE facilities,[282] and the creation of physically accessible facilities and access to information.

The strategic approach in *Fraihat v. ICE* is key example of this new cross-movement solidarity.[283] A nationwide class action lawsuit, *Fraihat*, was filed on behalf of fifteen individuals detained across eight different facilities in six states; they represented a class of approximately fifty-five thousand immigrants imprisoned by ICE on any given day. The lawsuit was filed by a cross-movement coalition featuring both disability and immigrant rights organizations, including Disability Rights Advocates (DRA) and Southern Poverty Law Center on behalf of Al Otro Lado and the Inland Coalition for Immigrant Justice.[284] The complaint described how the plaintiffs—all

279. *See* s.e. smith, *Meet the People Fighting for Health Care Access for Disabled Kids Detained at the Border*, VOX (June 26, 2019, 8:30 AM), https://www.vox.com/first-person/2019/6/26/18716078/concentration-camps-border-detention-kids-immigrants-disability [https://perma.cc/G7L8-6H7E].

280. *See* Renuka Rayasam, *Migrant Mental Health Crisis Spirals in ICE Detention Facilities,* POLITICO (July 21, 2019, 6:54 AM), https://www.politico.com/story/2019/07/21/migrant-health-detention-border-camps-1424114 [https://perma.cc/Q8NH-DM5W] ("Federal inspectors visiting a California migrant detention center made a shocking discovery last year: Detainees had made nooses from bedsheets in 15 of 20 cells in the facility they visited. The inspection revealed the extent of a largely unseen mental health crisis within the growing population of migrants who are being held in detention centers in border states.").

281. *See Ashker v. Governor of California*, CTR. FOR CONST. RTS. (June 9, 2023), https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown [https://perma.cc/HP82-RMA8].

282. *See* Press Release, Disability Rts. Cal., Disability Rights California Investigation Finds Immigration Detention Conditions Pose Extreme Risks of Harm for People with Disabilities (Mar. 5, 2019), https://www.disabilityrightsca.org/press-release/disability-rights-california-investigation-finds-immigration-detention-conditions [https://perma.cc/SC3L-HCRP].

283. *See* Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal. 2020).

284. *Id.*

immigrants, and many torture and persecution survivors—had been denied healthcare, refused disability accommodations, and subjected to punitive isolation, among other conditions.

The plaintiffs had medical and mental health conditions which included diabetes, cerebral palsy, and bipolar disorder. The complaint made specific allegations about how plaintiffs with disabilities had been denied accommodations. For example, plaintiff Raul Chavez is Deaf and was denied an American Sign Language interpreter in detention, which prevented him from receiving effective communication with medical staff and his lawyer. Other plaintiffs were denied leg braces and wheelchairs. The case resulted in the court granting a preliminary injunction and requiring ICE to reevaluate the detention determination of individuals with certain medical conditions that were exacerbated by the COVID-19 pandemic.[285] In turn, many individuals were released from detention.

Though *Fraihat* had a wide-ranging impact leading to an overhaul of ICE's medical care, accommodations, and hygiene related policies, it had unexpected results for some populations, namely those in ICE detention who had been deemed legally incompetent and were eligible for court appointed representation. About a decade before *Fraihat*, José Franco-González, a person with schizophrenia, was deemed legally incompetent to appear in immigration court.[286] After a medical determination that confirmed he had no understanding of the nature or subject of the proceedings, a federal district judge determined that one who is formally declared incompetent by the court must be offered a court appointed representative in a first-of-its kind ruling on behalf of a class of immigration detainees with disabilities in Arizona, California, and Washington.[287]

This litigation led to the establishment of the National Qualified Representative Program, which provides court-appointed representation to those deemed legally incompetent in non-*Franco* states. When individuals were released through *Fraihat*, those represented through *Franco* counsel lost their access to court-appointed representatives.[288] Romina Nemaei described this clash of incentives, noting "the difficulty of the decision between losing representation and gaining their freedom is incomprehensible," yet that is

285. *Id.* at 750–51.
286. *See* Franco-Gonzales v. Holder, 828 F. Supp. 2d 1133, 1136, 1150 (C.D. Cal. 2011).
287. *Id.*
288. *See* Romina Nemaei, Franco *and* Fraihat: *The Unexpected Consequences of Overlap*, 26 LOY. PUB. INT. L. REP. 159, 159 (2022).

precisely the position into which those who qualify for representation under *Franco* were forced.[289]

Fraihat and *Franco* demonstrate the importance of incorporating and naming the experience of disabled individuals in immigration litigation and advocacy, a practice that will not be realized unless there is a concerted effort to include disabled advocates with diverse experiences in brainstorming strategies. Immigration courts have cobbled together a series of policies and practices that are decentralized, hard to follow, and often uninformed by the lived experience of those with disabilities. A process that follows the lead of impacted individuals calls for temporal and procedural flexibility where cases may be closed or paused, individuals may be released from detention facilities, and burdens of proof shifted and lowered, alongside other accommodations which are tailored and specific given the diversity of disabled individuals and their needs.[290] These solutions become clearer when ableism within the practice of immigration law itself is acknowledged and addressed such that practitioners are equipped with the tools and attitudes necessary to identify and uplift the capacities of disabled immigrants to participate as fully as possible in their removal cases, rather than presuming incapacity and legal incompetence.[291] Centering the perspectives and leadership of disabled immigration lawyers and other practitioners is one approach to achieving this type of empowerment for immigrants in removal proceedings.

Other areas of immigration law are also ripe for these types of collaborations. In *United States* v. *Carrillo-Lopez*,[292] for example, immigrants pointed towards the history of criminal reentry statutes to argue the

289. *Id.* at 169.

290. *See, e.g.*, 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, 258 n.119, 259–60 (2022) (discussing need for robust accommodations for litigants and citing illustrative case law).

291. *See* Convention on the Rights of Persons with Disabilities, *supra* note 174, art. 12 ("States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life . . . . States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."); *see also* U.N. SECRETARIAT FOR THE CONVENT. ON RTS. OF PERSONS WITH DISAB. ET AL., FROM EXCLUSION TO EQUITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES 77–92 (2007), http://archive.ipu.org/PDF/publications/disabilities-e.pdf [https://perma.cc/T4GQ-4HZP] (citing the CRPD's presumption of the legal capacity of persons with disabilities and offering practical guidance for supported decisionmaking that centers the wishes of the person with a disability in the adjudicatory process).

292. 555 F. Supp. 3d 996 (D. Nev. 2021), *rev'd*, 68 F.4th 1133 (9th Cir. 2023).

statutes were rooted in eugenicist and racist ideologies. Alongside arguments about the racial animus at the foundation of many immigration laws, litigators could also incorporate arguments regarding the ableist nature of eugenics and interlink the targeting of individuals based on racism and ableism under criminal reentry statutes.

The leadership of disabled immigrants and disabled immigration advocates, coupled with the partnership between disability rights, disability justice, and immigrant justice formations is promising, but insufficient to fully tackle the abolition project. As we describe above, disabled immigrants remain underrepresented in mainstream immigration legal and policy advocacy organizations. Moreover, these organizations have largely failed to integrate legal arguments and policy solutions that address the harms that disabled immigrants experience as they navigate punitive carceral settings, inaccessible immigration courts, and policies that are directly aimed at excluding disabled bodies. For the liberatory vision of immigration abolition to take effect, leadership by the most impacted and cross-movement solidarity are essential and first principles.

In addition to making visible the experiences and needs of disabled immigrants in the legal process, immigration abolition requires an examination of the role that ableism has played in shaping the understanding of disability in the United States. Reimagining the support systems that disabled immigrants depend on, guided by the principles of disability justice, paves the way for envisioning a world where migration does not necessitate exclusionary hierarchies and carceral structures. Instead, including disabled immigrants could be seen as a means to bolster the social fabric, rather than diminish it.

3. Strengthening Care Webs

Family-based immigration is a mainstay of modern U.S. immigration policy and currently comprises about sixty-five percent of greencard admissions into the United States.[293] Family-based immigrants fall into one of two categories: the immediate relative categories or the family preference categories. Spouses, parents, and children of U.S. citizens are considered immediate relatives and can

293. OFF. OF HOMELAND SEC. STATS., LEGAL IMMIGRATION AND ADJUSTMENT OF STATUS REPORT FISCAL YEAR 2023, QUARTER 2 (2024), https://www.dhs.gov/sites/default/files/2024-01/2023_1221_plcy_legal_immigration_adjustment_of_status_report_fy_2023q2.xlsx [https://perma.cc/H8XZ-CH9M].

migrate immediately upon being sponsored by the principal applicant.[294] The Immigration and Nationality Act defines "child" as an unmarried individual under the age of twenty-one.[295]

Preference categories apply to those who are not immediate relatives of U.S. citizens. Visa quotas and country-specific caps for these categories translate into multi-year or even decade-long waits before family reunification is possible. The family-based categories encompass unmarried adult sons and daughters of U.S. citizens, spouses and unmarried children of permanent residents, unmarried adult sons and daughters of permanent residents, as well as brothers and sisters of adult U.S. citizens.

Family-based considerations appear in other areas of immigration as well. Beneficiaries of humanitarian forms of relief like asylum seekers, U, T, and S-Visa recipients are allowed to include their spouses and children as derivatives. Immigrants in removal proceedings may also be allowed to remain in the

294. *See* 8 U.S.C. § 1151(b)(2) (1988). *See also Green Card for Family Preference Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 10, 2022), https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-family-preference-immigrants [https://perma.cc/8TLF-4EQV].

295. 8 U.S.C. § 1101(b)(1) (1988). Further, to qualify as a "child," an individual must fall into one of the six statutorily defined categories of children, which, while possibly more inclusive than in the past (because, for example, adopted children and children born out of wedlock are included), reflect what one would think of as a child in a nuclear family: (1) children born in wedlock, (2) stepchildren, (3) legitimated children, (4) children born out of wedlock, (5) adopted children, or (6) orphan children from abroad who will be adopted by American parents. *Id.* §§ 1101(b)(1)(A)–(F).

country where removal would result in "exceptional and extremely unusual hardship[296] to an alien's [U.S. Citizen or Resident] spouse, parent or child."[297]

In the U.S. immigration system, family reunification primarily is focused on the nuclear family comprised of a spouse and children under twenty-one. In some contexts, and often after a long wait or proof of extreme hardship, family-based benefits are extended to married children, children over the age of twenty-one, parents, and, in one limited context, siblings of U.S. citizens. Given the above rubric, disabled adult children of U.S. citizens and permanent residents may wait decades before being allowed to reunify with family in the United States, due to backlogs created by limited visa allocations for these large categories of aspiring immigrants. Siblings and parents of legal permanent residents are not able to be sponsored at all. Aunts, uncles, and grandparents are excluded for both U.S. citizens and legal permanent residents.

296. A qualifying relative's disability is a factor that weighs heavily in favor of finding that relocation or separation would result in extreme hardship:

> If the Social Security Administration or other qualified U.S. Government agency made a formal disability determination for the qualifying relative, the qualifying relative's spouse, or a member of the qualifying relative's household for whom the qualifying relative is legally responsible, that factor would often weigh heavily in favor of a finding that relocation would result in extreme hardship. Absent a formal disability determination, an applicant may provide other evidence that a qualifying relative or related family member suffers from a medical or physical condition that makes either travel to, or residence in, the relocation country detrimental to the qualifying relative or family member's health or safety. In cases where the qualifying relative or related family member requires the applicant's assistance for care because of the medical or physical condition, that factor would often weigh heavily in favor of a finding that separation would result in extreme hardship to the qualifying relative.

U.S. CITIZENSHIP & IMMIGR. SERVS., EXTREME HARDSHIP POLICY MANUAL GUIDANCE FOR PUBLIC COMMENT 18, https://www.uscis.gov/sites/default/files/document/outreach-engagements/DRAFT_Extreme_Hardship_Policy_Manual_Guidance_for_public_comment.pdf [https://perma.cc/CDR9-BQJK] (footnote omitted).

297. 8 U.S.C. § 1229b(b)(1)(D) (2008); *see also* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 510 n.4 (2010) ("Notwithstanding this provision, scholars have noted that the qualifications to this statute are so extreme that is virtually impossible to use it to prevent deportation on the basis of family unity."); Jeffery S. Lubbers, *Closing Remarks*, 59 ADMIN. L. REV. 621, 625 (2007) (noting that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 "cut to the bone the possibility of discretionary relief" on the basis of family unity by, inter alia, imposing a standard of "'exceptional and extremely unusual hardship'—a standard that few applicants are able to meet").

The American Immigration Council highlights the economic and social advantages of this rubric of family-based immigration, describing family-based immigrants as a "significant portion of domestic economic growth" and "among the most upwardly mobile segments of the labor force."[298] This report underscores the role of immigrant women in providing unpaid health and childcare, contributing to the physical, cognitive, and emotional development of household members.[299]

While family-based immigrants are lauded for their contributions to the U.S. economy, disabled immigrants remain invisible in policymaking around family-based immigration starting from the very categories of individuals who are considered family in the first place. Scholars have commented on how this rubric excludes "functional families," family formations which may not satisfy narrow conceptions of biological family but establish a network of care that is similar to a traditional family structure (e.g., adults caring for children).[300] Some have pushed for reform of the U.S. immigration law to reflect a broader conception of family to respect and protect children living in a nontraditional family formation. There has been little discussion of how this narrow family-based framework may exclude disabled immigrants.

Take, for example, Ms. A, an immigrant whose removal proceedings have been pending for over ten years due to U.S. government backlogs and delays. Ms. A is the sole caretaker for her thirty-five-year-old son with cognitive disabilities. Both mother and son are undocumented. If Ms. A prevails in her asylum case, Ms. A would eventually be able to obtain permanent resident status and U.S. Citizenship. However, her son would be unable to gain asylee status through his mother. As a thirty-five-year-old he would not be considered a child for derivative purposes. As such, if Ms. A were to win asylum and one day adjust to permanent resident status, she would face significant barriers when applying to sponsor her son for permanent residence.

First, given the current backlogs, Ms. A may not even have the opportunity to have her asylum claim heard for years. If she prevailed on that matter it would take another three to four years for her to achieve permanent residence. At that point, her middle-aged son would fall under the family preference category. She

298. *The Advantages of Family-Based Immigration*, AM. IMMIGR. COUNCIL (Mar. 14, 2013), https://www.americanimmigrationcouncil.org/research/advantages-family-based-immigration [https://perma.cc/DZ5P-H3VL].

299. *Id.*

300. King, *supra* note 297, at 510–15; *see also* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1644–48 (1991) (exploring the functionalist response to the pervasiveness of the traditional nuclear family in U.S. law).

could attempt to sponsor her son for permanent residence, but it would take seven years for a visa number to be available to him. For Ms. A and her son, in the best of circumstances, this could mean a decade-long uncertainty about whether her disabled son would be able to join her with permanent status. In some situations, even where Ms. A's immigrant visa became current, he would be required to travel back to his home country to apply for admission through a U.S. consulate abroad, where requesting and obtaining the necessary accommodations to successfully complete the process may be challenging.

To account for cases like the one above, the immigration system offers options of parole and discretion, discussed in previous Subparts, to prevent harmful family separation and abandonment of those with disabilities. These policies change at the whim of whatever administration takes power and are marred with further structural and procedural inequities. In this manner, disabled immigrants are directed to seek relief within fluctuating, temporary discretionary categories, with no acknowledgment in statutory or regulatory frameworks.

In the example above, the caretaking relationship between Ms. A and her son is given limited recognition in immigration laws. This limited perception of family alienates many realities of caretaking in immigrant families. For example, seventy-five percent of Latinx grandparents coparent with their grandchildren's parents.[301] For disabled children and adults in particular, larger villages of care, including grandparents, siblings, godparents, aunts, and uncles are intrinsic to mobility and survival. Yet, as outlined above, in many contexts including cancellation of removal, asylum and family-based immigration categories for legal permanent residents an applicant's grandparents are not recognized as family for immigrant visa or derivative status purposes.

The principles of wholeness, cross-movement solidarity and leadership by the most impacted support abolition solutions which expand the very framework of inclusion and membership in family-based immigration criteria. One solution is the expansion of "immediate" family categories to better reflect the realities of immigrant families and kinship relationships. The modification of hardship exemptions to deportation statutes in the Immigration and Nationality Act (INA) should also include other family members to reflect realities of kinship care in the United States, like grandparents, cousins, aunts,

301. Regina Day Langhout, Sara L. Buckingham, Ashmeet Kaur Oberoi, Noé Rubén Chávez, Dana Rusch, Francesca Esposito & Yolanda Suarez-Belcazar, *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 AM. J. CMTY. PSYCH. 3, 6 (2018), https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajcp.12256 [https://perma.cc/7UYH-LWXD].

and uncles. Finally, the categories of family members included as "derivatives" in asylum and other relief categories should similarly be expanded.

Another approach to make visible the care needs of both disabled immigrants and countless others who rely on home and community-based services to avoid institutionalization is to create clear pathways for immigrant care workers to reside lawfully in the United States. According to the National Immigration Forum, immigrants make up thirty-eight percent of the home health aide workforce, which is projected to be the third fastest-growing occupation as the American population ages.[302] At the same time, funding to support programs like Medicaid's Home and Community-Based Services (HCBS) has wavered in recent years. In 2021, the American Rescue Plan Act created a temporary ten percent increase in funding for HCBS for qualifying states.[303] However, this increase in funding was not made permanent in the Inflation Reduction Act passed in 2022.[304]

Home-based care is critical to the ability of many disabled people to live freely within their communities. Disability justice activist Sandy Ho explains, "[b]ecause I self-direct my services, Medicaid HCBS facilitates the ways I can be cared for and can provide care to those around me."[305] Ho sets out the intricate web of care that is necessary for her survival: "As a disabled person who is a wheelchair-user with a compromised respiratory system and needs a CPAP machine every night, I am alive because of my control over who provides my personal care, where and how I live, who comes in and out of my home, and how my care is provided."[306]

302. *See* DAN KOSTEN, NAT'L IMMIGR. F., HOME HEALTH CARE WORKERS: IMMIGRANTS CAN HELP CARE FOR AN AGING U.S. POPULATION 2 (2021), https://immigrationforum.org/wp-content/uploads/2021/05/HealthCare.pdf [https://perma.cc/X82D-NH89].

303. *Strengthening and Investing in Home and Community Based Services for Medicaid Beneficiaries: American Rescue Plan Act of 2021 Section 9817*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/home-community-based-services/guidance/strengthening-and-investing-home-and-community-based-services-for-medicaid-beneficiaries-american-rescue-plan-act-of-2021-section-9817/index.html#content [https://perma.cc/6CF4-Q57Z].

304. *See* Press Release, Amanda Guerrero, Senate Leaves Out of Reconciliation Bill a Badly Needed Investment in Disability Services (Aug. 7, 2022), https://aahd.us/wp-content/uploads/2022/08/SenateInflationReductionAct-LeavesOutHCBS-TheArc_08072022.pdf [https://perma.cc/7UZW-3VHA].

305. Sandy Ho, *Moving From Survival*, DISABILITY VISIBILITY PROJECT (July 25, 2021), https://disabilityvisibilityproject.com/2021/07/25/moving-from-survival/#site-content [https://perma.cc/STK9-AL7R].

306. *Id.*

In her book *Care Work: Dreaming Disability Justice*, Leah Lakshmi Piepzna-Samarasinha also explores the ways in which disabled communities care for one another. They articulate the many forms this care, whether it is private familial, or professional, can take shape.[307] Piepzna-Samarasinha describes "care webs" as groups of individuals who may be disabled, able-bodied/not disabled, or a combination of the two, who work together to provide care and access to resources for one another.[308]

The disability justice principle of interdependence envisions systems that facilitate the giving and receiving of care. In keeping with this principle, along with more expansive thinking around kinship care and our conception of family-based immigration, we must consider pathways for nonfamily, professional caregivers that facilitate permanency and the physical and financial wellbeing necessary to support a growing care economy. Disability justice allows us to craft immigration policies focused on care, facilitating the continued interconnectedness of care networks across borders to enhance the wellbeing of all.

CONCLUSION

The immigration system remains an ableist project of sorting bodies based on their ability to produce labor and otherwise conform to an imagined, nondisabled normate. Disability justice offers a new frame for analyzing immigration laws, policies, and practices, as well as specific solutions to transform the system from a sorting mechanism to one that more effectively and humanely facilitates migration. To deploy disability justice principles as tools for achieving this change, we must decouple admissibility and removability criteria from economic self-sufficiency and worthiness; make visible the experiences of disabled immigrants through data and the voices of those with lived experience in order to craft evidence-based solutions; and advance policies and practices that center agency and self-determination for this population.

We have set forth solutions to tackle each of these areas, and we hope that an analysis of the system through this lens leads to further scholarly inquiry, opening more pathways for change. Abolition cannot exist without disability justice, and it is with the acknowledgment of ableism as ever present at all

307. *See generally* LEAH LAKSHMI PIEPZNA-SAMARASINHA, CARE WORK: DREAMING DISABILITY JUSTICE (2018) (Explaining the concept of care webs as a core aspect of disability culture and the concept of disability justice).

308. *See id.* at 16.

intercepts in the immigration process that we can bring disabled genius to the table to reimagine migration.