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Stuck in the Middle With(out) You: How American Immigration Law Trapped "Defective" Immigrants Between Two Worlds

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"How often does a parent of an imbecile or diseased child or one mandatorily excluded from admission to the United States," Judge Henry Goddard of Manhattan's federal district court wrote dispassionately, "complain that the separation is a hardship and should not be countenanced by the United States. Can it not be said that the hardship is caused by the parent leaving the land of her or his nativity, and insisting on bringing a child who is mandatorily excludable to the United States? Is this hardship," he continued, "not caused by the very act of the parents themselves?"[1] While, Goddard acknowledged, American immigration legislation did have its flaws, its restrictions nonetheless served a distinct purpose in the United States's nationalist project, which Goddard described as laudable. By rejecting immigrants perceived as mentally or physically "defective" in the eugenics-rooted parlance of the day, the law, Goddard explained, enabled "the people of the United States … to bar out from America the feeble-minded, the insane, the criminals and persons likely to become public charges, in order that we may be a nation strong in body, sound in mind, and healthy in soul," thus restricting "undesirable" immigrants from entering and selecting "desirable" ones to join the American body politic.[2]

Louis Marshall and his son James, venerated American Jewish lawyers who defended Esther Kaplan, the immigrant girl regarding whose fate as an American citizen Judge Goddard ruled—and whose case emblematized the travails of countless other immigrants—had heard and dealt with similar opinions from the bench before. The senior Marshall in particular had emerged as an eminent attorney at the uppermost echelon of the American Jewish communal leadership, and in that capacity had long

worked on public charge cases with his prominent legal colleagues such as Max Kohler, Abram Elkus, and Simon Wolf, all of whom also shared a history of collaborating with their sociopolitically minded compatriots, notably Sadie American and Cecilia Razovsky of the National Council of Jewish Women (NCJW), who had advocated for immigration reform since the landmark Immigration Act of 1891, as immigration rates of Eastern European Jews rapidly increased in their quest for economic opportunity. The act had amended the eugenics-inflected public charge provision of 1882 that Congress made increasingly stringent by the Immigration Act of 1917, which contained the version of the statute that ensnared Esther. Esther's case, viewed through the paradigm of transnational American studies, and refracted through disability studies and medical humanities, illuminates the true breadth of the legislation's impact. In particular, an analysis of Esther Kaplan's story—alongside her American Jewish lawyers' defense strategies—demonstrates the bias inherent within the US immigration system, specifically constructed to discriminate on the bases of ethnicity, ability, gender, and sexuality. So too, it reveals the dedication of American Jewish community leaders to resisting these policies at the federal level, while also helping individual immigrants like Esther and her family.

Congress had initially codified public charge, drawing particularly from the long-standing precedent of New York's and Massachusetts's mid-nineteenth-century laws that rejected impoverished and ill immigrants, as part of its sweeping Immigration Act of 1882 that it later revised in 1891, proceeding to make it increasingly harsh as the years progressed. The law had a sweeping impact on European immigration, restricting who could migrate based on health status, gender, sexuality, and financial means, thereby shaping America's image on the international stage. As legislators modified the language of the law and added new exclusionary categories that mandated immigrants' exclusion from the country as "likely to become a public charge" because they would allegedly come to depend on taxpayers' coffers due to their physical, mental, or economic conditions, the law soon became inseparable from refusing entry to immigrants on account of real or perceived illness or impairment.[3] Although relatively few Jewish immigrants felt the full brunt of public charge, with approximately 98% finally making it through the rigorous rigamarole of Ellis Island inspections each year, the trials and tribulations of those whom public charge did entrap either at Ellis Island or after entering the United States spurred American Jewish leaders to marshal their resources to ensure that the law threatened as few immigrants as possible and provoked minimal psychological distress among those who heard the traumatizing stories of immigrants denied entry or—even worse—later deported as public charges.[4]

With the revision of 1891 that introduced the more open-ended language "likely to become a public charge," the law resulted in the emergence and explosion of excludable conditions and categories that medical officials could apply to immigrants and, as such, an increasingly draconian legal landscape that immigrants had to navigate. It excluded "mental and physical defectives," including but not limited to

"[a]ll idiots, insane persons, paupers or persons likely to become a public charge, [and] persons suffering from a loathsome or a dangerous contagious disease" ostensibly rooted in the assumption that immigrants afflicted with these conditions would be unable to work and, even worse, would threaten the American gene pool.[5] Emanating from the transatlantic eugenics movement, in which the United States, Europe, and Canada separately but simultaneously sought to eliminate the presence of disability from within their borders, the term "defect" operated elastically to denote perceived physical, mental, and moral traits—assumed to be heritable—that could manifest in a variety of ways and that allegedly threatened the American race and the economic health of the nation.[6] The public charge provision and the theory underlying its restrictive classifications, then, did not function in a vacuum, but within a broader transnational effort to "perfect" national stock as countries simultaneously competed with each other to optimize the quality of their citizenry while drawing from each other's policies and scientific studies to validate their own laws and practices.[7]

In essence, public charge measured immigrants' value premised on their perceived ability to contribute economically and genetically to the country. Establishing a precedent for increasingly austere eugenics-based legislation that swiftly proliferated from 1882 onwards, American lawmakers marshalled public charge to exclude and deport "undesirables," predominantly emphasizing "defective" immigrants, as they described those purportedly ill or disabled. Additionally, public charge subjected assisted immigrants, or those who received financial assistance for their passage, to intensive examination and medical surveillance, which might disclose a real but previously undetected disease or provide a prejudiced immigration official with an excuse to diagnose an immigrant with an excludable condition under false pretenses.[8] Immigrants became cases or bodies, whose voices often did not appear in reports and who could be quantitatively weighed and measured, rather than human beings with their own agency and aspirations. The flexibility of public charge enabled officials to exploit it to exclude immigrants at their own discretion, often for dubious causes that required little more than a brief visual inspection.[9]

Pathologizing poverty and commodifying health to exclude and deport immigrants based on real or assumed illnesses or impairments, or "defects," public charge ultimately rested on the stated belief that such immigrants would be unable to earn their own livings and would thus become burdens on the state. Whether immigration officers assumed that allegedly disabled immigrants would be unable to find employment, or whether such immigrants later became hospitalized or institutionalized in a public facility, even briefly, the United States's capitalistic society had no place for them. "America," as Razovsky had written in her pamphlet *What Every Emigrant Should Know* in 1922, just a year before Esther received her deportation order, did not want any immigrants with a "sickness of mind or body."[10] These restrictions, reflecting popular feelings among the American citizenry, provide critical context for understanding Esther's convoluted case. Moreover, the framework of transnational American studies offers a valuable perspective regarding the motivations and

strategies of immigrant communities in the United States, as they marshaled their limited influence to take a political stand.[11] As Esther's encounters with the law highlight, American Jewish lawyers—frequently in tandem with social workers, public health proponents, and other communal leaders—resisted the public charge provision as well as other legislation that would sharply curb admission to the United States of both Jewish and non-Jewish immigrants deemed "defective" or "undesirable." Together, this coalition of American Jewish advocates possessed deep familiarity with the origins of the eugenics-rooted public charge provision, from its origins as a state-based law on the Eastern Seaboard to its growing power as a federal law to exclude and deport immigrants whom authorities perceived as drains on the public purse or threats to the health of the nation—or, more often, both at once.[12]

Historical Antecedents: Public Charge Legislation and Eugenics

Public charge drew from decades of scientific and social scientific thought about heredity, particularly how to apply the Darwinian notion of "survival of the fittest" to humanity and nations. Eugenics, the idea of socially engineering a population to reproduce "desirable" characteristics and eliminate "undesirable" ones had gained traction among intellectual elites in the late nineteenth century when the British statistician and explorer Francis Galton, Charles Darwin's cousin, coined the term in 1883. By the early decades of the twentieth century, as a new band of immigrants sought to enter America's gates, the philosophy had become fully entrenched in American policy, intellectual discourse, and public imagination, grounded in scientific ideas of "perfecting" humanity.[13] These ideas, generally speaking, predated Galton, but they now had considerably more cohesiveness than they had before. Prior to 1883, various scientific and social scientific theories of heredity had captivated social reformers, legislators, and scientists alike, but this constellation of ideas lacked the framework that Galton and his intellectual heirs in the United States like Madison Grant and Charles Davenport supplied.[14] This, in turn, shaped the legislative landscape that Jewish and other immigration advocates contested on behalf of their coreligionists who aimed to enter the United States in the late nineteenth and early twentieth centuries.

Disability studies scholars, and more recently historians of the United States, have begun to investigate how increasingly popular eugenics-based ideas of the period promulgated the belief that individuals of specific genders or sexes, or from certain regions of the world—notably southern and Eastern Europe, and the continents of Asia and Africa—allegedly demonstrated greater susceptibility to specific hereditary "defects" that would threaten the United States in future generations.[15] The United States, as a global leader in eugenics in the early twentieth century, drew intensively upon mid-nineteenth-century state-level immigration restrictions that targeted the Irish, as historian Hidetaka Hirota has detailed in his study of the provenance of the United States's regime of immigration control. And as scholars John Richardson,

Douglas Baynton, and Jay Dolmage have thoroughly documented, it also drew on the developing philosophies of leading eugenicists Galton and Grant in crafting American immigration law and its enforcement.[16] According to these justifications for immigration restriction, immigrants functioned as impersonal subjects manipulable at will, evoking the dehumanization that medical humanities would, towards the end of the 1960s, seek to understand and correct.[17] When examining Esther's case—and the many like it—the fruitful intersection between the fields of medical humanities and American Jewish history readily emerges, disclosing the influence of eugenics on over a century of immigration policy and practice in the United States.

Particularly with the growth of mechanized industrial capitalism in the late nineteenth century, as the assembly line model gained prominence and employers gradually came to depend upon interchangeable bodies and minds to maximize productivity, the state increasingly viewed ill and disabled individuals as useless encumbrances on society, or public charges.[18] It followed logically that, much as cities spanning the United States passed a series of so-called "ugly laws" that criminalized disabled people who were out of work, Congress contemporaneously opposed admitting immigrants who not only, they claimed, would endanger the superiority of the American race, but would serve as drains on taxpayers' funds.[19]

In the heyday of eugenics from the late nineteenth century until the aftermath of the Nazi atrocities, the theory functioned as a reputable branch of the sciences that white men, and to a lesser extent white women, studied at university as part of their professional training and utilized in numerous fields.[20] These intellectuals and policymakers shared their ideas across national borders, reinforcing and contributing to the reputability of eugenics.[21] Many of these elite men pursued careers in law, medicine, academia, and government, while women pursued a variety of social reform movements, and both brought their understanding of eugenics as crucial to maintaining the health of their clientele and the nation with them. Moreover, eugenic thought served as a scare tactic that federal representatives who wished to curb immigration could deploy to rile voters against immigrants and garner support for restrictive legislation and policies intended to segregate disabled people from the rest of society, a strategy that European countries and Canada similarly exercised in their shared antipathy to disability.[22]

Beyond the realm of academia and public intellectuals, eugenics undergirded some reform ideologies and instigated schisms within a range of Progressive Era projects, from the birth control movement to the origins of the welfare state.[23] Eugenics provided a tool for experts eager to reform social problems and anti-immigrant restrictionists keen to keep out "undesirable" populations, offering them a language and methodology to fashion the society and country they envisioned whether for good or for ill, and a scientific justification for their actions. Certain individuals, adherents to eugenics claimed, simply could not overcome their mental or physical "defects." If allowed to enter the United States, these immigrants would genetically pass down their defects to successive generations, threatening the

American people and the country as a whole. As disability historian Douglas Baynton has elucidated in his examination of the origins of American immigration legislation, immigration officials needed to comb through new arrivals to select "desirable" immigrants for admission and restrict "undesirable" ones from entering, or otherwise risk permanent harm to the nation.[24] Critically, the parameters of "desirable" and "undesirable"—also interrogated by Davina Höll and Mita Banerjee in this special forum[25]—remained remarkably elastic, encompassing real or perceived illness or impairment, gender, sex, nationality, and race, all comprised within the public charge provision. Although public charge ostensibly intended to ensure that immigrants would not become financial burdens on the government, in practice it functioned as a mechanism for immigration officials to debar and deport immigrants they deemed "defective," often with little material evidence. Meanwhile, the immigration officials assigned to perform this task did so with minimal federal oversight or standardization, such that the definition of "defective" under public charge continually changed over time, from port to port, and depending upon the proclivities and biases of the particular Immigration Commissioner in charge.[26]

Moreover, as Baynton elaborates, though only a select number of individuals from particular races carried dangerous traits through their "germ plasm" that they might pass on to their offspring, certain races supposedly possessed a heightened predisposition to certain defects. Already by 1905, the Commissioner General of the Bureau of Immigration F. P. Sargent declared that "[o]f all causes for rejection, outside of dangerous, loathsome, or contagious diseases, or for mental disease, that of 'poor physique,'" most often applied, as he affirmed, to Jewish immigrants from Eastern Europe, "should receive the most weight."[27] Different immigrant groups, notably those from southern and Eastern Europe, allegedly possessed a tendency towards specific unassimilable defects. Such immigrants, Sargent contended, would become public charges due to their presumed inability to work and earn a sufficient living, and still worse, poor physique supposedly represented a hereditary condition that would damage American stock. In allowing such inferior immigrants to enter the United States, Sargent emphasized, "we admit likewise progenitors to this country whose offspring will reproduce, often in an exaggerated degree, the physical degeneracy of their parents."[28] Public Health officials could diagnose the presence of these qualities and level of "fitness" based on the "physiognomy" of immigrants coming from various parts of the world, such as Eastern Europe, Ireland, Greece, Portugal, and Syria, exposing these newcomers to a higher level of scrutiny upon arrival.[29] The various elements of public charge did not have to directly target specific immigrant populations for administrators and inspectors to view race and ethnicity as intimately intertwined with specific defects, and given races as allegedly prone or susceptible to specified undesirable conditions.[30]

The Case of Esther Kaplan and American Jewish Resistance to Restrictive Immigration Law

By the late nineteenth century, the increasing rates of Jewish immigration predominantly originating from Eastern Europe, thanks to new technology that enabled immigrants seeking better lives and economic opportunity in the United States to travel more affordably and expeditiously, propelled American Jewish advocates still more forcefully into action as immigration quickly ramped up to become the principal order of the day and newcomers daily knocked on America's doors.[31] Alongside a diverse group of advocates at the front lines of the fight against increasingly rigorous federal immigration control, these American Jewish communal leaders possessed intimate familiarity with public charge itself, the urgent need to alleviate the burden it placed on hopeful Jewish immigrants, and years of skill in navigating federal and state officials and legislation to ease Jewish immigrants' path to admission into the United States.

The public charge provision especially disturbed established American Jews, since the first Jews to settle on American shores in 1654 had received permission to do so only if they guaranteed that they would not become financial burdens on the community, a promise their descendants continued to take seriously generations later.[32] In the nineteenth century, once public charge became federal policy, it split immigrants into two categories: those whom officials claimed would become assets to the country, and those who would supposedly harm it irreparably. Ultimately, rooted in increasingly popular ideas of "desirable" bodies and minds, informed by the field of eugenics, public charge regulated immigration by assessing immigrants' physical, mental, and economic conditions, inseparable under the law, to select those "fittest" to become Americans.

Accordingly, Esther's case exemplified numerous facets of public charge that these organizational leaders routinely confronted in their work on the intertwined issues of public charge, illness, and disability, or "defectiveness." By the time she arrived in the United States from Russia in July 1914 at thirteen years of age, public charge and defect, or disability, had become virtually synonymous and inextricable categories. While immigrants could find themselves excluded as public charges for reasons other than alleged physical or mental incapacity, if immigration officials certified them as mentally or physically defective, that almost invariably spelled mandatory debarment or deportation as a public charge, either immediately or once they had lived in the country for a period of time, leaving them trapped in a liminal state between countries and associated legal and political statuses. Furthermore, medical inspectors could certify the presence of illness or impairment where none existed to exclude immigrants as public charges, if they could not find another reason to exclude an immigrant they deemed "undesirable."[33] Once Congress codified the 1917 Act, immigrants remained subject to public charge for a period of five years from their most recent entry, even if their "departure" occurred on a train that briefly

crossed the United States border, effectively holding immigrants hostage in the United States until they successfully underwent the complex process of naturalization to become citizens.[34]

To her family's unhappiness, Esther had the misfortune to fall into the former category, that of mental defectiveness, when she arrived in 1914. Accompanied by her mother and brothers, Esther and her family had planned to join her father, who had preceded them a few years earlier. Immediately on reaching American shores, public health authorities certified her as feeble-minded, a compulsorily excludable condition within a term of three years from arrival under the public charge provision of the Immigration Act of 1907. Nowhere in the records, the Marshalls emphasized in their appeal of the first decision against Esther, did immigration authorities explain either how they arrived at this determination, or the evidence they used to issue Esther's diagnosis.[35] Since feeble-mindedness, diagnosed by whatever means, counted as a mandatorily excludable mental defect, immigration officials had initially ordered Esther's immediate deportation. However, the Marshalls explained, due to the outbreak of war in Europe, the Department of Labor sanctioned her admission in 1915 under a thousand-dollar bond until such time as the United States could deport her "safely."[36] Meanwhile, the Hebrew Immigrant Aid Society (HIAS) took responsibility for her custody, promising to ensure that Esther would not become a public charge while she remained in the country, and that they would return her to the immigration authorities for deportation when the time came.[37] Tellingly, the voices of Esther and her family remained absent from the case records, mediated instead through government officials and her attorneys.

Citizenship, Naturalization, and "Defect"

But time passed, and the government did not issue a deportation warrant for Esther until 1923, almost a decade after she had first arrived in the country. Yet as promised, Esther had not at any point become a public charge, or even required private aid, though this too would not have made her a public charge under the law. Quite the contrary, throughout these years Esther lived in New York City with her mother and father, who became a naturalized American citizen in December of 1920. Under the terms of the law, when her father naturalized, Esther too became a citizen alongside her mother and siblings since a man's naturalization automatically applied to his wife and their minor children.[38]

This served as the primary point, as Louis and James Marshall saw it and argued before the court. According to United States naturalization law, Esther's father's citizenship extended to his wife and minor children, all of whom he listed on his naturalization certificate. At this point, six years had transpired since Esther had first landed in the United States, securely beyond the period of time during which an immigrant remained liable to deportation as a public charge. No exemption, the Marshalls informed the Supreme Court in their appeal, existed within naturalization

law that omitted minors perceived as feeble-minded who resided in the United States from receiving the citizenship of their naturalized parents.[39] As such, for all of these reasons, the Marshalls explained that Esther had lived with her family in the United States past the three-year statute of limitation in the 1907 public charge clause, then past the five-year statute of limitation in the even stricter 1917 public charge clause, and had finally become a citizen under her father's naturalization papers *after* the latter five-year period during which she remained exposed to deportation on account of feeble-mindedness. As such, immigration authorities could not summarily deport her without a fair hearing and due process of law. American Jewish immigration attorneys had underscored this critical point with increasing intensity since the first modification of the public charge rule in 1891. As they saw it, and asserted ever more vehemently, immigrants and citizens alike had the basic right to a fair hearing and due process. Anything less, these attorneys averred, violated the founding democratic ideals of the United States, and the Supreme Court as such should not permit it to stand.[40]

Nevertheless, in late February of 1922, immigration officials arrested Esther, conducted a new medical examination, and recertified her as feeble-minded. Once again, premised on her alleged feeble-mindedness, these officials recommended that the Department of Labor deport her, even though the Marshalls maintained that Esther, as an American citizen, could not be deported as a public charge. A month later, the Department concurred with the immigration officials, issuing a warrant for Esther's deportation by April 1st, 1923, in turn compelling Esther's lawyers to obtain a writ of *habeas corpus* on her behalf, demanding her release in accordance with the United States Constitution's prohibition on unwarranted detention. By this point, the laws governing American immigration had changed, but that in no way altered Esther's case. Just six years earlier, Congress had ratified the Immigration Act of 1917, which, among other provisions like the literacy test and Asiatic Barred Zone, designed to exclude Asian immigrants, contained a new, considerably more severe, version of public charge. Not only did it expand the array of excludable medical conditions, it extended the length of time to five years following entry during which an immigrant remained subject to deportation on public charge grounds, whether due to an alleged defect or receiving any kind of support from taxpayers' funds.

Esther, however, had not once depended on public relief, her lawyers accentuated. Contrary to the image that government lawyers and immigration officials attempted to paint of her, as an incapacitated and incompetent invalid, her congressional representative Samuel Dickstein—himself an Eastern European Jewish immigrant, the son of a rabbi, who had arrived in the United States with his parents in 1887—reported that "[t]he girl is physically in good health and converses quite well," stating that "she takes care of her mother's household and shops at the grocers and butchers. She knows how to count and read slightly."[41] Her mother, Dickstein added, in a refrain to which he returned repeatedly throughout the winding course of Esther's case, "has turned white-haired since this trouble began," desperate to keep her only

daughter with her in the United States.[42] Dickstein, a Democratic congressman dedicated to his constituents on the Lower East Side, overwhelmingly immigrants and including a sizable population of immigrant Jews, would soon rise to prominence as chair of the House Committee on Immigration and Naturalization, cofound the group that eventually became the House Un-American Activities Committee (HUAC) to root out Nazi sympathizers and communists in the United States, and eventually become a Justice of the New York State Supreme Court. But even earlier in his career, before he attained this level of prominence, Dickstein repeatedly demonstrated his willingness to move mountains for members of his district and personally intervened in their immigration cases to advocate on their behalf.[43] He agreed with the Marshalls that whether or not Esther truly was feeble-minded according to the public health authorities' definition did not matter given her citizenship, and because she had the basic skills and home support that she required, even had she not already become a citizen. Bottom line, under the laws of the United States, Esther's citizenship was not, and could not be, in question. No scenario, therefore, existed in which the government could legally deport Esther as a feeble-minded public charge. Esther had now lived in the United States with her self-supporting parents for nearly a decade, and she had become a naturalized American citizen under the terms of both constitutional law and judicial precedent.[44]

In Nubibus: Esther's Lawyers Appeal to the Supreme Court

Herein lay the critical fact that Esther's lawyers, on succeeding in their appeal, argued in 1925 before the Supreme Court in *Kaplan v. Tod*. Since Esther "actually dwelt" with her father at the time he attained his citizenship, they contended, "*ipso facto*, she ceased to be an alien and became a citizen," both according to the letter of the law and judicial precedent that immigrants "dwell" within the United States to become citizens.[45] As a minor child of her father, which at that time referred to children under the age of twenty-one, his citizenship automatically applied to her. To insist that Esther did not dwell in the United States was nonsensical, the Marshalls continued, as clearly she had for the past eleven years. "If the appellant did not 'dwell' in the United States, after she took up her abode in her father's habitation on Monroe Street in the City of New York," her attorneys rhetorically inquired, then "where did she 'dwell'? Certainly not in Russia; certainly not on the ship which brought her to this country, or at Ellis Island. Nor did she dwell *in nubibus*, a legal phrase meaning in the clouds, in a state of suspension, or in custody of law. Esther, her attorneys emphasized, was not stateless, nor did she live in a nebulous condition somewhere unknown or hovering in the ethers. Quite literally, on the contrary, she lived—or dwelt—with her family in their Lower East Side domicile. Not to belabor the obvious, they proceeded, "the only home she had was with her parents," who irrefutably lived at 249 Monroe Street on the Lower East Side of New York City in the State of New York in the United States.[46]

Moreover, the Marshalls reiterated to cover all their bases, she had already lived with her father for six years when he received his naturalization papers, exceeding the five-year statute of limitation during which the government could deport immigrants under the public charge clause of the 1917 Immigration Act. Since Esther had dwelt with her father in the United States at the time of his naturalization, she had become a citizen. Even if the justices refused to admit this argument, her legal team emphasized that as the five-year period during which she remained subject to deportation had elapsed, the government could not deport her as feeble-minded regardless of her citizenship status—though, marshalling both arguments at once, they continued to affirm that Esther was, undoubtedly, an American citizen because of her father's naturalization. "Far from being debarred from landing," her attorneys insisted, "before any deportation proceedings were instituted her acquired citizenship intervened to debar her deportation."[47]

The Supreme Court, however, remained unmoved by the Marshalls' arguments.[48] In a brief statement, Justice Oliver Wendell Holmes delivered the court's ruling. According to Holmes, Esther had never so much as landed in or entered the United States because of her initial certification of feeble-mindedness. Her mental defect, in Holmes's view, blocked Esther from the United States, no matter where she happened to exist physically. Permitting her to live with her family altered nothing other than the government's kindness of temporarily broadening "her prison bounds."[49] Due to her ostensible feeble-mindedness, Holmes asserted, she never could have dwelt within the United States. Simply put, in the majority's view, Esther's certification of feeble-mindedness prohibited her from becoming a United States citizen or even living on United States territory in any meaningful way. "Theoretically," he declared, solely because of her original diagnosis of feeble-mindedness in 1914, "she is in custody at the limit of the jurisdiction awaiting the order of the authorities," irrespective of the statutes of limitation in the versions of public charge contained in both the 1907 and 1917 Immigration Acts. "It would be manifestly absurd," Holmes concluded, "to hold that the five years run in favor of one held at Ellis Island for deportation."[50] Esther's status, the court affirmed, had not altered in the slightest, and her feeble-mindedness certified eleven years earlier alone sufficed to mandate her deportation.

Even here, however, Esther's attorneys refused to relinquish her case and permit Esther's deportation under what they avowed remained an unjust and incorrect interpretation of immigration law. Incensed by the court's verdict, Louis Marshall had not yet finished what by now had become his crusade to ensure that Esther could remain with her family in the country, rather than face deportation to a country she had not known for years. Its enforcement of the law, he claimed, was not only incorrect, but the court itself acted in a wrongheaded manner in issuing its ruling. "If Congress had intended to qualify the right of a minor child of a naturalized citizen, to become a citizen by virtue of his naturalization, in the case of a feeble-minded person" he avowed before the court, "it would have so stated in some act or acts dealing with

naturalization."[51] As he pointed out, the court had previously decided that, as Marshall concisely summarized, Congress "did not intend to disrupt families and that it contemplated, wherever possible, to unite each family under a single sovereignty."[52]

Much like many of his American Jewish contemporaries who advocated on immigrants' behalf, Marshall did not question the underlying logic of public charge that the United States government had the right and prerogative to exclude and deport immigrants certified as feeble-minded, whether premised upon the medical inspections they underwent at Ellis Island, or upon their commitment to a public medical institution after arrival. Rather, he asserted that the immigration authorities had exceeded their purview by taking matters extralegally into their own hands, and that the court erroneously ignored both federal naturalization law and previous judicial rulings. Only the Secretary of Labor could issue a final decision in Esther's case, as Marshall well knew. The court, if he could prevent it, would not have the final say.

With this in mind, he wrote again to Representative Dickstein in March of 1925. Dickstein, already hard at work on the matter and using all of the influence at his disposal to persuade the Secretary of Labor to permit Esther to remain in the country, proposed that Marshall compile a brief appealing Esther's case to the Secretary. "It is clear," Dickstein responded, "that the Court has no jurisdiction to order deportation, it being a matter entirely within the discretion of the Secretary of Labor."[53] Several months later, Esther received a startling letter, given the ongoing proceedings among Dickstein, Marshall, and the Labor Department, from Emory Buckner, the US attorney for the Southern District of New York. Buckner informed her that he "[had] the honor to enclose an order on mandate" directing her to surrender herself to the Ellis Island Commissioner of Immigration. Regrettably, Buckner explained, "[s]everal attempts to serve the office of your attorney has [*sic*] not met with success in view of the fact that [her previous attorney] Mr. Zoline has died," all the more baffling given that Marshall had represented her before the Supreme Court, but Buckner insisted that Esther must now appear promptly at Ellis Island to submit to deportation.[54] Acting quickly, Dickstein penned another letter to Marshall the following day, indicating that he had brought Esther and her mother before Secretary of Labor James Davis, who "displayed great sympathy and indirectly indicated that [he] would not disturb her stay in this Country."[55]

Finally, approximately a year later, following a bout of crossed bureaucratic wires between the Justice and Labor departments, Marshall received word that the Labor Department had granted Esther permission to stay in the United States without fear of deportation, pending the fulfillment of a three thousand–dollar public charge bond.[56] Esther's mother, utterly at a loss regarding how to obtain three thousand dollars by the end of the calendar year to prevent the United States from deporting her daughter, desperately went to the American Jewish Committee and HIAS for guidance.[57] Here again, Jewish communal notables—this time from the organizational and financial, rather than the legal, elite—came to the family's aid to stop Esther's deportation. American Jewish businessmen, ranging from the Secretary of Rothman's

Chocolate Factory to the proprietor of Liberty Pleating and Button Manufacturing Company, among others, managed to cobble together $1,900 on Esther's behalf.[58] HIAS struggled to raise the remaining $1,100, asking to no avail whether the Labor Department would accept a lesser sum.[59] Yet by February of the following year, Isaac Asofsky, the general manager of HIAS, informed James Marshall to his great relief that, while he wrote, his organization was engaged in filing the requisite three thousand dollar– bond with the immigration authorities on Esther's behalf.[60] Thirteen years after Esther's ship had first reached the United States, she and her family could rest assured that they could remain safely there together, as citizens, without the looming terror of Esther's deportation due to her alleged feeble-mindedness.

Contextualizing the Case of Esther Kaplan: American Immigration Policy's "Disabling" Categories

Esther stands out as a young immigrant girl whose purported mental illness nearly resulted in her exclusion and deportation from the United States, but she does not stand alone, either among Jewish immigrants or the general immigrant population. Public charge resulted in the detention and debarment of many immigrants premised upon immigration officials' diagnoses of real or perceived illnesses and disabilities during the inspection process, or immigrants' recourse to publicly funded medical institutions. Four decades of federal legislation intended to prevent "undesirable" immigrants from entering the country had resulted in the creation of the category of "feeble-mindedness," which immigration officials hastily applied to Esther. In this context, the frameworks of medical humanities illustrate how the American government first fashioned, and then continually refined, this system of medical classification to weaponize the public charge provision against immigrants to the maximal extent. In a modified form, the law continues to persist into the present, flaring more strongly during periods of domestic panic over immigration or public health.

Esther's extensive encounters with American immigration law, encompassing her alleged "defectiveness," naturalization, and order of deportation, together bridge the lacunae between transnational American studies, medical humanities, and disability studies. About three years before Esther first reached the United States, the respected American Jewish lawyer Max Kohler had noted the controversy over the exclusion of immigrants whom examining physicians certified as "defective" in a recommendation that he wrote to Congress. "Even under the theory of the present statute," he wrote, "the question whether alleged … defect is likely to affect the immigrant's becoming a public charge is a quasi-judicial question and not really a medical one, and ought to be made reviewable on appeal."[61] The then-Secretary of Labor Charles Nagel, the son of immigrants himself, happened to agree with Kohler, who had just represented a comparable case of another young immigrant Jewish girl erroneously certified as insane and finally permitted to remain with her family in the

United States due to Kohler's intervention. In early January 1911, Kohler and Nagel discussed the same issue before the biennial Council convention of the Union of American Hebrew Congregations. After Kohler's introduction, Nagel took the floor. "[Y]ou may call me a lawbreaker if you want," he conceded, "but if I break the law it is in behalf of the alien and not against him … to do what I think must have been intended to be done, treating [public charge] as an administrative law, and I do not strain it to accentuate hardship or to bring tears and sorrow."[62] By the time the Marshalls represented Esther's case, these "conditions of despotism and arbitrary violations of individual rights," as Kohler called them, had been occurring for years.[63] As the Marshalls well knew, autocratic and corrupt immigration officials had a lengthy past of bending public charge to their will, while Congress looked the other way and the courts required attorneys' pressure to heed the limits of the public charge provision as written. Although Ellis Island represented but one of seemingly innumerable steps in the European migration process, it functioned as a dangerous threshold that could result in the absolute destruction of immigrants' migratory goals. Esther, thanks to their intervention, managed to obtain justice and remain in the United States with her family. Her experience, however, represents but one among the unnoticed fragments remaining in the historical record, of the anonymous thousands of immigrants termed "defective" who lacked a Louis or James Marshall to come to their aid.

Notes

1 United States of America ex rel Esther Kaplan, Relator, against Robert E. Tod, Commissioner of Immigration, Ellis Island, Port of New York, Respondent, Memorandum on Behalf of Respondent, United States District Court, Southern District of New York, Box 17, Folder 4, Louis Marshall Papers, American Jewish Archives, Cincinnati, OH.

2 United States of America ex rel Esther Kaplan, Memorandum on Behalf of Respondent, Marshall Papers; Douglas C. Baynton, *Defectives in the Land: Disability and Immigration in the Age of Eugenics* (Chicago: University of Chicago Press, 2016).

3 Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (New York, NY: Oxford University Press, 2017).

4 Britt Tevis, "'The Hebrews Are Appearing in Court in Great Numbers': Toward a Reassessment of Early Twentieth-Century American Jewish Immigration History," *American Jewish History* 100, no. 3 (2016): 319–20.

5 Immigration Act of 1891, 26 Statutes-at-Large 1084.

[6] David Mitchell and Sharon Snyder, "The Eugenic Atlantic: Race, Disability, and the Making of an International Eugenic Science, 1800–1945," *Disability & Society* 18, no. 7 (2003): 856.

[7] Mitchell and Snyder, "The Eugenic Atlantic," 852–56.

[8] Max J. Kohler, "The American Immigration Laws in Their Relation to the Jews," *The Jewish Review* 1, no. 3 (September 1910): 240; Baynton, *Defectives in the Land*, 15; Ronald H. Bayor, *Encountering Ellis Island: How European Immigrants Entered America* (Baltimore: Johns Hopkins University Press, 2014), 39–80.

[9] Kohler, "The American Immigration Laws in Their Relation to the Jews."

[10] Cecilia Razovsky, *What Every Emigrant Should Know* (New York: Department of Immigrant Aid, Council of Jewish Women, 1922), 28.

[11] Shelley Fisher Fishkin, "Crossroads of Cultures: The Transnational Turn in American Studies: Presidential Address to the American Studies Association, November 12, 2004," *American Quarterly* 57, no. 1 (2005): 17–57.

[12] Hirota, *Expelling the Poor*.

[13] Philippa Levine, *Eugenics: A Very Short Introduction* (New York, NY: Oxford University Press, 2017), 1–17.

[14] Levine, *Eugenics*, 3–9.

[15] Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009); Nancy J. Hirschmann, *Civil Disabilities: Citizenship, Membership, and Belonging* (Philadelphia: University of Pennsylvania Press, 2014); Alan M. Kraut, *Silent Travelers: Germs, Genes, and the "Immigrant Menace"* (Baltimore: Johns Hopkins University Press, 1995); Eithne Luibhéid, *Entry Denied: Controlling Sexuality At The Border* (Minneapolis: University of Minnesota Press, 2002); Howard Markel and Alexandra Minna Stern, "The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society," *The Milbank Quarterly* 80, no. 4 (2002): 757–88; Mitchell and Snyder, "The Eugenic Atlantic"; Jeanne D. Petit, *The Men and Women We Want: Gender, Race, and the Progressive Era Literacy Test Debate* (Rochester, NY: University of Rochester Press, 2010); Peter Schrag, *Not Fit for Our Society: Immigration and Nativism in America* (Berkeley, CA: University of California Press, 2010).

[16] Baynton, *Defectives in the Land*; Jay Dolmage, *Disabled Upon Arrival: Eugenics, Immigration, and the Construction of Race and Disability* (Columbus: The Ohio State University Press, 2018); Hirota, *Expelling the Poor*; Daniel Okrent, *The Guarded Gate: Bigotry, Eugenics and the Law That Kept Two Generations of Jews, Italians, and Other European Immigrants Out of America* (New York, NY: Simon and Schuster, 2019); Joel

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17 Anna Batistatou et al., "The Introduction of Medical Humanities in the Undergraduate Curriculum of Greek Medical Schools: Challenge and Necessity," *Hippokratia* 14, no. 4 (October 2010): 241–43; Daniel M. Fox, "Who We Are: The Political Origins of the Medical Humanities," *Theoretical Medicine* 6, no. 3 (October 1, 1985): 327–41.

18 Sarah F. Rose, *No Right to Be Idle: The Invention of Disability, 1840s–1930s* (Chapel Hill: University of North Carolina Press, 2017); James W. Trent, *Inventing the Feeble Mind: A History of Intellectual Disability in the United States* (New York, NY: Oxford University Press, 2017).

19 Susan M. Schweik, *The Ugly Laws: Disability in Public* (New York, NY: New York University Press, 2009).

20 Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (New York, NY: Penguin Books, 2017); Ian Robert Dowbiggin, *Keeping America Sane: Psychiatry and Eugenics in the United States and Canada, 1880-1940* (Ithaca, NY: Cornell University Press, 1997); Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America* (Baltimore, MD: University of Illinois Press, 2002); Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* (Berkeley, CA: University of California Press, 2005); Kevin Murphy, *Political Manhood: Red Bloods, Mollycoddles, and the Politics of Progressive Era Reform* (New York, NY: Columbia University Press, 2010); Nancy Ordover, *American Eugenics: Race, Queer Anatomy, and the Science of Nationalism* (Minneapolis, MN: University of Minnesota Press, 2003); Alexandra Stern, *Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America* (Oakland, CA: University of California Press, 2016).

21 Mitchell and Snyder, "The Eugenic Atlantic."

22 Mitchell and Snyder, "The Eugenic Atlantic."

23 Daniel E. Bender, "Perils of Degeneration: Reform, the Savage Immigrant, and the Survival of the Unfit," *Journal of Social History* 42, no. 1 (2008): 5–29; Mina Julia Carson, *Settlement Folk: Social Thought and the American Settlement Movement, 1885-1930* (Chicago, IL: University of Chicago Press, 1990); Dennis L. Durst, *Eugenics and Protestant Social Reform: Hereditary Science and Religion in America, 1860-1940* (Eugene, OR: Pickwick Publications, 2017); Joyce C. Follet, "Making Democracy Real:

African American Women, Birth Control, and Social Justice, 1910–1960," *Meridians* 18, no. 1 (2019): 94–151; Gordon, *The Moral Property of Women*; Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era* (Princeton, NJ: Princeton University Press, 2017); Michael A. Rembis, *Defining Deviance: Sex, Science, and Delinquent Girls, 1890-1960* (Urbana, IL: University of Illinois Press, 2011); Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York, NY: Pantheon Books, 1997).

[24] "Selection" and "restriction" resonated as terms directly from eugenics, grounded in the social Darwinian spin on natural selection, as Douglas Baynton points out in *Defectives in the Land*.

[25] Mita Banerjee, "Hygiene, Whiteness, and Immigration: Upton Sinclair and 'The Jungle' of the American Health Care System," in *Special Forum on Diagnosing Migrant Experience: Medical Humanities and Transnational American Studies*, ed. Mita Banerjee and Davina Höll, *Journal of Transnational American Studies* 14, no. 2 (2023): 165–91; and Davina Höll, "Migration in Times of Pandemic: Mark Twain's 3,000 Years Among the Microbes' and the Prospective for Planetary Health," in *Special Forum on Diagnosing Migrant Experience: Medical Humanities and Transnational American Studies*, ed. Mita Banerjee and Davina Höll, *Journal of Transnational American Studies* 14, no. 2 (2023): 141–65.

[26] Baynton, *Defectives in the Land*.

[27] F. P. Sargent, quoted in Dolmage, *Disabled Upon Arrival*, 17; Simon Wolf to Max Kohler, July 28, 1909, Box 10, Folder 2, Max James Kohler Papers (P-7), Collection of the American Jewish Historical Society, New York, NY.

[28] F. P. Sargent, quoted in Dolmage, *Disabled Upon Arrival*, 17.

[29] Baynton, *Defectives in the Land*, 27–19, 41–42.

[30] Baynton, *Defectives in the Land*, 19, 25–26, 30, 41–44, 46–47; Mitchell and Snyder, "The Eugenic Atlantic," 843–64.

[31] Simon Kuznets, "Immigration of Russian Jews to the United States: Background and Structure," in *Perspectives in American History, Vol. IX* (Cambridge, MA: Charles Warren Center for Studies in American History, Harvard University, 1975), 35–124.

[32] Hasia R. Diner, *The Jews of the United States, 1654 to 2000* (Berkeley, CA: University of California Press, 2004); Hasia R. Diner, "The Study of American Jewish History: In the Academy, in the Community," *Polish American Studies* 65, no. 1 (2008): 41–55; Report from Simon Wolf to National Jewish Immigration Council, Covering March 1, 1911 through January 31, 1912, Records of the National Jewish Immigration Council (I-85), American Jewish Historical Society, New York, NY.

[33] Baynton, *Defectives in the Land*.

[34] Immigration Act of 1917, 64 Statutes-at-Large 889.

[35] United States of America ex rel Esther Kaplan, Memorandum on Behalf of Respondent, Marshall Papers.

[36] Esther Kaplan, Appellant, v. Robert E. Tod, Commissioner of Immigration, Ellis Island, Port of New York, Appeal from the District Court of the United States for the Southern District of New York, Brief on Behalf of the Respondent, October Term 1924, Supreme Court of the United States, Box 17, Folder 4, Louis Marshall Papers, American Jewish Archives, Cincinnati, OH.

[37] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[38] Bruce H. Seger, "Married Women's Citizenship in the United States for a Century and a Half: An Overview," *Journal of Research on Women and Gender* 2, no. 1 (2011).

[39] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[40] "American Jewish Committee's Immigration Recommendations: Revision of Existing Laws Recommended," *The Jewish Exponent*, August 28, 1891; Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers; Kohler, "The American Immigration Laws in Their Relation to the Jews"; Max J. Kohler, "Immigration and the Jews of America," *The American Hebrew & Jewish Messenger (1903–1922); New York, NY*, February 3, 1911. This refrain occurs throughout the majority of Max Kohler's writings and casework on immigration but is especially clearly articulated here.

[41] Samuel Dickstein to Louis Marshall, January 19, 1925, Box 17, Folder 4, Louis Marshall Papers (MS-359), American Jewish Archives, Cincinnati, OH.

[42] Samuel Dickstein to Louis Marshall, January 19, 1925, Marshall Papers.

[43] While the evidence remains inconclusive, a number of sources contend that Dickstein was also a Soviet spy. It appears more likely that he may have received money from the Soviet Union starting in the late 1930s, but less so that he provided information on communist activity thanks to his work in HUAC. See "Dickstein, Samuel, 1885-1954," *SNAC*, https://snaccooperative.org/ark:/99166/w6vn540p; Peter Duffy, *Double Agent: The First Hero of World War II and How the FBI Outwitted and Destroyed a Nazi Spy Ring* (New York: Scribner, 2014); Joseph E. Persico, "The Kremlin Connection: A new study of Soviet espionage in America before the cold war makes some surprising revelations," *The New York Times,* January 3, 1999.

[44] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[45] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[46] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[47] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[48] "Will Petition Davis for Girl Deportee––'Death Sentence' to Send Her Back to Europe, Louis Marshall Asserts," March 11, 1925, *New York Times*, Box 17, Folder 4, Louis Marshall papers, AJA.

[49] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[50] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[51] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[52] Kaplan v. Tod, Brief on Behalf of the Respondent, Marshall Papers.

[53] Samuel Dickstein to Louis Marshall, March 10, 1925, Box 17, Folder 4, Louis Marshall Papers, AJA; Samuel Dickstein to Louis Marshall, July 7, 1925, Box 17, Folder 4, Louis Marshall Papers, AJA.

[54] Emory R. Buckner to Esther Kaplan, July 6, 1925, Box 17, Folder 4, Louis Marshall Papers, AJA.

[55] Samuel Dickstein to Louis Marshall, July 7, 1925, Box 17, Folder 4, Louis Marshall Papers, AJA.

[56] Inspector in Charge, Law Division, Office of Commissioner of Immigration, Ellis Island, US Department of Labor, Immigration Service, to Louis Marshall, July 19, 1926, Box 17, Folder 4, Louis Marshall Papers, AJA. In today's money, this equals approximately forty-seven thousand dollars.

[57] Harry Schneiderman to Louis Marshall, December 6, 1926, Box 17, Folder 4, Louis Marshall Papers, AJA.

[58] James Marshall to Isaac L. Asofsky, Esq., December 14, 1926, Box 17, Folder 4, Louis Marshall Papers, AJA.

[59] Isaac L. Asofsky to James Marshall, December 28, 1926, Box 17, Folder 4, Louis Marshall Papers, AJA.

[60] Isaac L. Asofsky to James Marshall, February 18, 1927, Box 17, Folder 4, Louis Marshall Papers, AJA.

[61] Max James Kohler, *Immigration and Aliens in the United States: Studies of American Immigration Laws and the Legal Status of Aliens in the United States* (New York: Bloch Publishing Co., 1936), 14.

[62] Max James Kohler, *Immigration and Aliens*, 191.

[63] Max Kohler to Congressman William Sulzer, May 26, 1911 (Box 13, Folder 16, Max James Kohler Papers, P-7, American Jewish Historical Society, Center for Jewish History).

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