

EXCLUDING NON-CITIZENS FROM THE SOCIAL SAFETY NET

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I want to begin by offering many thanks to Professor Weeks, Sarah Quinn, and the students on the *Georgia Journal of International and Comparative Law*. Thank you for organizing this terrific and timely conference. I am honored to speak to you today and be a part of this formidable panel.

In my brief time, I want to discuss how the exclusion of noncitizen immigrants from our social safety net undermines public health—especially, but not only, during a pandemic. But first, Professor Weeks suggested that I begin by speaking a bit about my own work in this area. I first thought deeply about immigration law's impact on health in 2009 when my home state, Massachusetts, passed a law that withdrew coverage from a state-funded health insurance program for about 35,000 non-citizens.¹ This happened only a few years after the state adopted a health reform measure that its supporters heralded as leading us to universal care.² By excluding immigrants, I thought, the state had reneged on its promise. It also threatened to unravel the social solidarity upon which the state's health reform was founded. So, along with some great lawyers from Health Law Advocates, a public interest law firm that focuses on health care access, I sued the state, charging that the exclusion violated the equal protection provisions of the state constitution. We won!³

My work on the *Finch* case, as it was known, forced me to look deeper into the ways that immigration-focused laws—including those in other nations—undermine the health of immigrants and the population writ large. In 2017, my colleague Patricia Illingworth and I published a book on the subject called *The Health of Newcomers: Immigration, Health Policy & the Case for Global Solidarity*.⁴ One of the key findings of that book was that almost all nations, even those that ostensibly have universal health care, limit access to all but non-emergency care to at least some classes of immigrants, usually those who are undocumented.⁵ Another important takeaway was that non-citizens are often scapegoated—blamed for causing epidemics and diseases—even though, in general, they tend to be healthier than native-born citizens.⁶ Finally, and perhaps most

¹ Act of Aug. 7, 2009, 2009 Mass. Acts ch. 65, § 31.

² Richard Knox, *Romney's Mission: Massachusetts Health Care*, NPR (Apr. 8, 2006), <https://www.npr.org/templates/story/story.php?storyId=5330854> (quoting House Speaker Sal DiMasi stating, “[n]obody in Massachusetts will ever be turned away for health care”).

³ *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970 (Mass. 2012) (holding that the state violated the equal protection provisions of its constitution in withdrawing coverage from lawfully present non-citizens); *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262 (Mass. 2011) (holding that strict scrutiny was required to review state law denying coverage to lawfully present non-citizens).

⁴ PATRICIA ILLINGWORTH & WENDY E. PARMET, *THE HEALTH OF NEWCOMERS: IMMIGRATION, HEALTH POLICY & THE CASE FOR GLOBAL SOLIDARITY* (New York Univ. Press 2017).

⁵ *Id.* at 102–14.

⁶ *Id.* at 27–51.

critically, we explored the many ways that nativist laws and policies undermine the health of newcomers and native-born residents alike. Health, we argued, is largely a public good. By threatening the health of immigrants, nations imperil the health of everyone.⁷

All that was before COVID-19. Once the pandemic struck, it quickly became apparent that immigration law and policies would impede our nation's response to the pandemic. In my contribution to *Assessing Legal Responses to COVID-19*, a comprehensive report on the role that law has played during the pandemic, I identified three mechanisms through which immigration laws and policies have adversely impacted the U.S. response to the pandemic.⁸ These include distorting the nation's response, spreading contagion at the border and in detention facilities, and increasing vulnerability to the pandemic by erecting barriers to vital goods and services.⁹ In my remarks today, I highlight the third mechanism.

To begin, however, it is worth remembering that the story of immigration and epidemics is an old one. Throughout history, societies have scapegoated newcomers, blaming them for frightening diseases.¹⁰ So, too, immigration law has been used widely to keep out immigrants who were thought to carry disease, even though there has never been evidence that immigrants are a major source of infectious disease.¹¹ At the same time, the treatment of immigrants residing within the United States has always made them more vulnerable to outbreaks.¹² In effect, immigration laws and policies act as adverse social determinants of health.¹³

This has been especially evident during the pandemic. Both before and during the COVID-19 pandemic, immigration laws and policies have operated to exclude millions of immigrants from accessing health care and other critical social

⁷ *Id.* at 115–32. See also Wendy E. Parmet, *The Worst of Health: Health and Policy at the Intersection of Health & Immigration*, 16 IND. HEALTH L. REV. 211, 218–25 (2019).

⁸ Wendy E. Parmet, *Immigration Law's Adverse Impact on COVID-19*, in ASSESSING LEGAL RESPONSES TO COVID-19 240 (Scott Burris et al. eds., 2020), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook_Aug2020+Full.pdf.

⁹ *Id.* at 240–43.

¹⁰ See, e.g., ILLINGWORTH & PARMET, *supra* note 4, at 27–31.

¹¹ *Id.* at 28.

¹² See Parmet, *supra* note 7, at 224 (discussing ways in which immigration policies have threatened the health of immigrants); Wendy E. Parmet, *Reversing Immigration Law's Adverse Impact on Health*, in COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 210, 210–12 (Scott Burris et al. eds., 2021) <https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/6064ad386b6e756cabb56f96/1617210684660/COVIDPolicyPlaybook-March2021.pdf> (discussing how immigration laws have increased immigrants' vulnerability to COVID).

¹³ See Stephen P. Wallace et al., *A Social Determinants Framework Identifying State-Level Immigrant Policies and Their Influence on Health*, 7 SSM-POPULATION HEALTH 1,7 (2019) (stating that immigration-focused policies should be seen as a social determinant of health).

supports.¹⁴ This has made them—and in turn everyone—more vulnerable to the pandemic.¹⁵

Unfortunately, immigration law's adverse impact on the pandemic is not fully known. States do not report COVID-19 case data by immigration status. Nevertheless, the poor data that we have reveal that communities with high levels of immigrants—especially Latinx immigrants—have suffered disproportionately.¹⁶ Further, the age-adjusted death rate in the Latinx population, which is heavily comprised by immigrants, is more than twice as high as the rate for whites.¹⁷ Without question, structural racism has worked alongside immigration law to magnify these vulnerabilities.

Immigration law exacerbates vulnerability through several different mechanisms. Importantly, these mechanisms did not start with President Trump. In 1994, Republicans took control of Congress after a campaign in which they promised, through the so-called “Contract with America,” to cut public benefits and promote personal responsibility.¹⁸ In 1996, they made good on that promise, passing the Personal Responsibility and Work Reconciliation Act, PRWORA,¹⁹ which generally bars undocumented individuals from accessing most federally funded benefits and blocks even lawfully present non-citizens from eligibility for the first five years in which they have that status.²⁰

PRWORA is a complex law, and there are many exceptions and exceptions to those exceptions.²¹ Further, subsequent laws allowed states to expand access to publicly financed health care, with federal support, to health care for pregnant women and children.²² But there is no doubt that PRWORA bars many non-citizens from large portions of the social safety net, increasing their social vulnerability.²³ And because two-thirds of non-citizens live in households with citizens,

¹⁴ Parmet, *supra* note 12, at 210–12.

¹⁵ Parmet, *supra* note 7, at 241–42.

¹⁶ Eva Clark et al., *Disproportionate Impact of the COVID-19 Pandemic on Immigrant Communities in the United States*, PLOS NEGLECTED TROPICAL DISEASES (July 13, 2020), <https://journals.plos.org/plosntds/article?id=10.1371/journal.pntd.0008484>; Jose F. Figuerora et al., *Community-Level Factors Associated With Racial And Ethnic Disparities In COVID-19 Rates In Massachusetts*, 39 HEALTH AFFS. 1984, 1984–92 (2020).

¹⁷ *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RESEARCH LAB (Mar. 5, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race>.

¹⁸ Edward J. Rymysza, Note, *The Contract with America: The Crystallization of the GOP's Racial Agenda*, 1 N.Y.C. L. REV. 481, 481–82 (1996).

¹⁹ Personal Responsibility and Work Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105 (1996).

²⁰ 8 U.S.C. § 1613 (2021).

²¹ *Id.*

²² See Medha D. Makhoul, *Laboratories of Exclusion, Medicaid, Federalism & Immigrants*, 95 N.Y.U. L. REV. 1680, 1702–22 (2020) (discussing how different states expanded access to Medicaid to different categories of noncitizens).

²³ Parmet, *supra* note 12, at 218.

and 13% of citizen children have a non-citizen parent, immigrants' vulnerability cannot and is not limited to non-citizens.²⁴

The Affordable Care Act (ACA) expanded some immigrants' access to health care, but also left many holes in place.²⁵ Most importantly, it did not repeal PRWORA. It also imposed significant verification requirements designed to deter undocumented immigrants.²⁶ The law did permit lawfully present immigrants to purchase insurance on the exchanges, but the Obama Administration concluded that Deferred Action for Childhood Arrivals (DACA) recipients did not qualify.²⁷ Largely as a result of these laws, as well as their vulnerabilities in the labor market, immigrants of every status were far less likely than native born citizens, even before President Trump took office, to have insurance or a usual source of care.²⁸

Once in office, the Trump Administration undertook a series of policy changes that fortified the barriers, creating what some have called the invisible wall.²⁹ These steps—alongside heightened enforcement measures—deterred immigrants from accessing even the benefits to which they were legally entitled.³⁰ Most likely, these measures have also kept immigrants from feeling comfortable responding to contact tracers during the pandemic. And they threaten to undermine the vaccination campaign, as many fear interacting with the health care system unless absolutely essential.³¹

Perhaps the most pernicious policy was the public charge rule,³² which the Supreme Court allowed to go into effect in January 2020, just before the pandemic gained its toehold in the United States.³³ In brief, since the 19th century, the Immigration and Naturalization Act (INA) required immigration officials to deny entry or a green card to individuals who are found “likely at any time to

²⁴ Samantha Artiga & Matthew Rae, *Health and Financial Risks for Noncitizen Immigrants due to the COVID-19 Pandemic*, KAISER FAM. FOUND. (Aug. 18, 2020), <https://www.kff.org/report-section/health-and-financial-risks-for-noncitizen-immigrants-due-to-the-covid-19-pandemic-issue-brief/>.

²⁵ ILLINGWORTH AND PARMET, *supra* note 4, at 81–83.

²⁶ *Id.*

²⁷ Dinah Wiley, *For DACA Grantees, Health Insurance is (Only) a Dream*, GEO. UNIV. HEALTH POL'Y INST., CTR. FOR CHILD. & FAMS. (Apr. 11, 2014), <https://ccf.georgetown.edu/2014/04/11/for-daca-youth-health-insurance-is-only-a-dream/>.

²⁸ ILLINGWORTH & PARMET, *supra* note 4, at 77 (discussing insurance rates for immigrants prior to the Trump Administration).

²⁹ Amanda Holpuch, *How Trump's 'Invisible Wall' Policies Have Already Curbed Immigration*, GUARDIAN (Jan. 15, 2019, 1:00 PM), <https://www.theguardian.com/us-news/2019/jan/15/invisible-wall-trump-policies-have-curbed-immigration>.

³⁰ See Clark, *supra* note 16.

³¹ *How Fears Driven by Years of Anti-Immigrant Rhetoric are Complicating Vaccine Rollout*, PBS NEWSHOUR (Feb. 17, 2021), <https://www.pbs.org/newshour/health/how-fears-driven-by-years-of-anti-immigrant-rhetoric-are-complicating-vaccine-rollout>.

³² Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019).

³³ Dep't Homeland Sec. v. N.Y., 140 S. Ct. 599 (mem) (staying nationwide injunction).

become a public charge.”³⁴ However, longstanding interpretations of the provision held that use of non-cash benefits, other than long term care, would not render one a public charge.³⁵

Under the Trump Administration’s rule, a public charge was defined as a non-citizen who receives one or more public benefits—including Medicaid, SNAP, and federal housing assistance—for more than twelve months aggregate in a thirty-six-month period.³⁶ Further, past use of these benefits were heavily weighted factors in determining if one is likely to become a public charge at any time in the future.³⁷ Having a serious health condition could also be held against an immigrant.³⁸

On the one hand, because of PRWORA, and exceptions within the rule, very few non-citizens were both eligible for federal benefits—state benefits are not counted—and subject to the rule. But the point was fear—and the fear was significant. Studies have shown that non-citizens, even those who are not subject to the rule, chose not to enroll in or disenrolled from safety net programs for themselves and their children.³⁹ Thus, just as the pandemic and recession were striking, non-citizens withdrew from or avoided critical benefits.

On March 13, 2020, Department of Homeland Security (DHS) issued guidance stating it would not consider public support for “testing, treatment, nor preventive care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination.”⁴⁰ It further stated that immigrants who lost their job due to the pandemic could submit evidence to that effect for their public charge determination.⁴¹ During the Trump Administration, however, DHS never suspended the rule; nor did it publicize the guidance.⁴²

³⁴ Immigration and Nationality Act, 8 U.S.C. § 1182(a)(4) (2013).

³⁵ Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (May 26, 1999).

³⁶ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41397.

³⁷ Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 41398-99.

³⁸ *Id.* at 41298-99.

³⁹ Randy Capps, Michael Fix & Jeanne Batalova, *Anticipated “Chilling Effects” of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits use by Immigrant Families*, MIGRATION POL’Y INST. (Dec. 2020), <https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real>.

⁴⁰ *USCIS Clarified Public Charge Rules Do Not Restrict Access to Testing, Screening, or Treatment of Communicable Diseases*, AM. IMMIGR. LAW. ASSOC. (Mar. 13, 2020), <https://www.aila.org/infonet/public-charge-rules-do-not-restrict-access> (quoting DHS USCIS statement on COVID-19 and public charge).

⁴¹ *Id.*

⁴² Since I presented the talk this paper was based on, the Supreme Court granted the Biden Administration’s request to drop the government’s appeal of a lower court’s injunction of the public charge rule. Amy Howe, *Cases Testing Trump’s “Public Charge” Immigration Rule are Dismissed*, SCOTUSBLOG (Mar. 9, 2021), <https://www.scotusblog.com/2021/03/cases-testing-trumps-public-charge-immigration-rule-are-dismissed/>. This left the injunction in

Many non-citizens were also barred from accessing some of the relief provided in the spring of 2020 by the Coronavirus Aid, Relief, and Economic Security (CARES) Act.⁴³ For example, the \$1,200 cash assistance was limited to citizens and immigrants with Social Security numbers.⁴⁴ This barred citizens and legal permanent residents who are married to undocumented immigrants without a Social Security number from receiving relief—a limitation remedied by the Coronavirus Response and Relief Supplemental Appropriations Act, which was enacted in December 2020.⁴⁵ Undocumented workers were also unable to access unemployment compensation provided by the CARES Act.⁴⁶ And while the CARES Act provided funds for COVID testing and treatment regardless of insurance or immigration status, immigrants without insurance can face unanticipated bills if they are diagnosed with another condition.⁴⁷

All of these factors—and there are many more—enhanced immigrants' vulnerability to COVID-19, causing them to avoid the health care system, and to keep working, even when they were sick, exposed, or in dangerous conditions. Further, there is a very real possibility that many non-citizens may fear interacting with the health care system and getting vaccinated. If that is the case, herd immunity will be elusive, even if we can overcome vaccine resistance among citizens.

So how do we move forward?

I have been heartened that President Biden is prioritizing immigration reform.⁴⁸ The more I have worked on this issue, the more it has become evident that comprehensive immigration reform that removes the fear and legal disabilities that create social vulnerabilities is absolutely critical not only to improving the well-being of immigrants but to protecting the public's health. As long as

place and the rule vacated. The Administration has since stopped applying the rule and has removed it from relevant forms. *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge> (last visited April 15, 2021).

⁴³ Parmet, *supra* note 8, at 242.

⁴⁴ Camilo Montoya-Galvez, *Mixed-Status Immigrant Families to Receive Stimulus Checks Under COVID Relief Package*, CBS NEWS (Dec. 28, 2020, 12:18 PM), <https://www.cbsnews.com/news/stimulus-check-mixed-status-family-immigrant-eligible/>.

⁴⁵ *Id.*

⁴⁶ ABIGAIL F. KOLKER, CONG. RSCH. SERV., R46339, UNAUTHORIZED IMMIGRANTS' ELIGIBILITY FOR COVID-19 RELIEF BENEFITS: IN BRIEF 4 (2020), <https://crsreports.congress.gov/product/pdf/R/R46339>.

⁴⁷ Karyn Schwartz & Jennifer Tolbert, *Limitations of the Program for Uninsured COVID-19 Patients Raise Concerns*, KAISER FAM. FOUND. (Oct. 8, 2020), <https://www.kff.org/policy-watch/limitations-of-the-program-for-uninsured-covid-19-patients-raise-concerns/>.

⁴⁸ *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of his Commitment to Modernize our Immigration System*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

more than 11 million of our neighbors, co-workers, and caregivers live in fear of using health care or engaging with health officials, their health and the health of all of us are endangered.

Yet, while essential, creating a path to citizenship is not sufficient. We need also to repeal PRWORA and similar punitive measures that keep immigrants—even those who are on the path to citizenship—from accessing critical benefits when they need them. In addition, although the Biden Administration has taken important steps to roll back the public charge rule,⁴⁹ Congress should amend the INA to make clear that the receipt of health benefits or health care is not relevant to the public charge determination. As long as the public charge provision remains in the INA, it will continue to create fear and barriers to millions of non-citizens, perhaps especially those who are on the path to citizenship.⁵⁰

COVID, it has often been said, has shone a light on all of our strengths and weaknesses. One thing it has shown is that our unwelcoming immigration laws have harmed not only the health of immigrants, but the health of the nation as a whole. We will not be prepared for the next pandemic unless and until we permit all residents access to our already limited social safety net.

⁴⁹ See *supra* note 42.

⁵⁰ Several states are challenging the Biden Administration's refusal to defend and enforce the Public Charge Rule. In April 2021, the Supreme Court dismissed their request for emergency relief, but the litigation continues. See Amy Howe, *Justices Rebuff States' Request to Reinstate Public-Charge Rule, But Leave Door Open to Further Litigation*, SCOTUSBLOG (Apr. 26, 2021), <https://www.scotusblog.com/2021/04/justices-rebuff-states-request-to-reinstate-public-charge-rule-but-leave-door-open-for-further-litigation/>.