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## Challenging the Criminalization of Undocumented Drivers Through a Health-Justice Framework

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# CHALLENGING THE CRIMINALIZATION OF UNDOCUMENTED DRIVERS THROUGH A HEALTH JUSTICE FRAMEWORK

JASON A. CADE\*

## ABSTRACT

States increasingly use driver’s license laws to further policy objectives unrelated to road safety. This symposium contribution employs a health justice lens to focus on one manifestation of this trend—state schemes that prohibit noncitizen residents from accessing driver’s licenses and then impose criminal sanctions for driving without authorization. Status-based no-license laws not only facilitate legally questionable enforcement of local immigration priorities but also impose structural inequities with long-term health consequences for immigrants and their family members, including US citizen children. Safe, reliable transportation is a significant social determinant of health for individuals, families, and communities. Applying a health justice lens to the weaponization of no-license laws against noncitizens will both catalyze new legal challenges and create momentum for coalition building and policy reforms.

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## INTRODUCTION

Dalila, a single mother of two children who have U.S. citizenship . . . says the hardest part of not having a driver’s license is not being able to take her children to the emergency room when they need immediate care. She has a son with special needs and five to eight medical appointments a month that are difficult to get to without driving. Making matters more difficult is the fact that her daughter’s school is a few miles away, and it takes her three buses to get there without driving.<sup>1</sup>

“The last time I got stopped, [my children] were crying really bad. [Now] they see the cops, and they are like ‘Mommy, you got to hide, you got to hide!’ . . . My five-year old wakes me up at night, saying ‘I had a bad dream they deported you.’ And my ten-year-old told me he can’t concentrate at school, because he’s thinking about . . . if I will come home from work.”<sup>2</sup>

Merriam-Webster defines a driver’s license as “a license issued under governmental authority that permits the holder to operate a motor vehicle.”<sup>3</sup> That simple dictionary definition belies the massive, real-life significance that attends the grant or denial of the right to drive. In all but a few parts of the United States where public transportation is serviceable, driving is a life-sustaining activity for individuals and families. The license itself represents the primary form of accepted identification in this country for most economic and civil activities; even more importantly, freedom to drive—or lack thereof—is tightly connected to key social determinants of health.<sup>4</sup>

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<sup>1</sup> Zach Ahmad & Naomi Dann, *Driving Could Get Some New Yorkers Deported. Here’s What We Can Do to Protect Them*, AM. C.L. UNION OF N.Y. (Mar. 11, 2019, 11:00 AM), <https://www.nyclu.org/en/news/driving-could-get-some-new-yorkers-deported-heres-what-we-can-do-protect-them> [https://perma.cc/8K8F-K7NX].

<sup>2</sup> Robert Courtney Smith et al., *Disrupting the Traffic Stop-to-Deportation Pipeline: The New York State Greenlight Law’s Intent and Implementation*, 9 J. MIGRATION & HUM. SEC. 95, 95 (2021).

<sup>3</sup> *Driver’s License*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

<sup>4</sup> See *infra* Part II.B.

Increasingly, states use driver's licensing to achieve objectives unrelated to road safety. For example, many states now suspend driver's licenses to compel court appearances and to recoup debt or unpaid tickets.<sup>5</sup> States also employ regulatory and criminal laws concerning driver's licenses to achieve immigrant enforcement objectives that cannot be pursued directly.<sup>6</sup> Although state governments cannot lawfully prohibit migrants from entering or remaining in a state,<sup>7</sup> licensure prohibitions coupled with criminal penalties provide a facially neutral means of policing and punishing noncitizens who lack status. In this way, no-license laws have been weaponized against migrant residents, facilitating a proxy form of state immigration regulation.<sup>8</sup>

The weaponization of no-license laws against immigrants and their families has received scant attention in academic literature. In articles now two decades old, Kevin Johnson and María Pabón López both recognized the primacy of driver's licenses for immigrant communities and framed access as a civil rights issue.<sup>9</sup> More recently, Annie Lai explained how driver's license schemes work to effectuate state or local immigration policies that cannot be pursued directly.<sup>10</sup> But even among the few articles to have problematized the criminalization of undocumented drivers, identification of viable legal interventions to push back against proliferating license restrictions has remained challenging.<sup>11</sup>

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<sup>5</sup> William E. Crozier & Brandon L. Garrett, *Driven To Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585, 1587, 1631 (2020) (arguing that the implementation of driver's license suspensions for non-driving-related reasons "exacerbate poverty and impose negative economic consequences on individuals and communities").

<sup>6</sup> See, e.g., GA. CODE ANN. § 40-5-21.1 (2020) (requiring proof of lawful presence in order to be eligible to receive a driver's license); GA. CODE ANN. § 40-5-121 (2016) (establishing criminal penalties for driving without a license offenses); IDAHO CODE § 49-301 (2018) (establishing criminal penalties for driving without a license offense in Idaho).

<sup>7</sup> See *infra* Part III.B.

<sup>8</sup> Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 881 (2015).

<sup>9</sup> See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 216 (2004); María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver's License by Noncitizens*, 29 S. ILL. U. L.J. 91, 126 (2004) ("There is no doubt these driver's license restrictions are a civil rights issue among noncitizens.").

<sup>10</sup> Lai, *supra* note 8; see generally *Arizona v. United States*, 367 U.S. 387 (2010) (finding various state immigration laws unconstitutional because the federal government has preempted the field).

<sup>11</sup> See, e.g., Lai, *supra* note 8, at 897-904 (discussing how the jurisprudential status/conduct distinction plagues Eighth Amendment challenges to driver's license schemes as proxy criminalization and analogizing to case law concerning homelessness ordinances); López, *supra* note 9, at 118 (discussing uncertainty regarding the level of scrutiny that should apply when courts examine the constitutionality of driver's license schemes pursuant to the Fourteenth Amendment's Equal Protection Clause); Johnson, *supra* note 9, at 231-32 (discussing *Alexander v. Sandoval*, 532 U.S. 275 (2001), which found no private right of action implied by Title VI of the Civil Rights

In this symposium contribution, I employ a health justice lens to refocus the conversation about the use of safety regulations and criminal laws to punish residents on the basis of immigration status. Health justice is a nascent but already robust framework for both scholarly discourse and movement building around the “role of laws, policies, and institutions in creating, perpetuating, and (potentially) dismantling subordination . . . as the root cause of health inequities.”<sup>12</sup> Disparities in health, in other words, are influenced by social determinants, which include laws that enact discriminatory barriers to health-promoting resources and opportunities.<sup>13</sup> The health justice movement recognizes how law can be employed as a tool to either erect or dismantle the macro-level conditions that structure conditions of wellbeing, especially for less privileged groups.<sup>14</sup> For example, health justice interventions have taken aim at disparate enforcement of safety codes<sup>15</sup> and racially disproportionate housing inequities.<sup>16</sup> In these and other ways, the health justice movement seeks a society in which all people have a fair opportunity to attain their full health potential without being disadvantaged by their social circumstances.<sup>17</sup>

Motor vehicle licensure prohibitions, especially when coupled with severe criminal penalties for those who drive without authorization, implement a set of discriminatory structural conditions that lead to and exacerbate health inequity.<sup>18</sup> Driving is an essential gateway for employment opportunities, food security, and medical care. The automobile provides the means to access community gatherings, religious ceremonies, places for exercise, and many other sites of interaction that affect short- and long-term wellbeing and that nurture mental and spiritual

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Act of 1964 in the context a challenge to an Alabama law making English the official state language, including for driver’s testing).

<sup>12</sup> Lindsay F. Wiley et al., *Introduction: What is Health Justice?*, 50 J.L. MED. & ETHICS 636, 636 (2022).

<sup>13</sup> Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 762 (2020).

<sup>14</sup> Ruqaiyah Yearby, *The Social Determinants of Health, Health Disparities, and Health Justice*, 50 J.L. MED. & ETHICS 641, 642 (2022).

<sup>15</sup> Elizabeth Tobin-Tyler & Joel B. Teitelbaum, *Medical-Legal Partnership: A Powerful Tool for Public Health and Health Justice*, 134 PUB. HEALTH REPS. 201, 202 (2019).

<sup>16</sup> Yael Cannon, *Keynote, Unmet Legal Needs as Health Injustice*, 56 U. RICH. L. REV. 801, 804, 812 (2022).

<sup>17</sup> *What is Health Equity?*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchhstp/healthequity/index.html> [<https://perma.cc/H84F-Y8Z6>]; see also Cannon, *supra* note 16, at 810.

<sup>18</sup> See *infra* Part II.B.

health.<sup>19</sup> And it is not only adult undocumented individuals who are affected, as the deprivation of a parent's license implicates the wellbeing of their family members, including children who often are US citizens.<sup>20</sup> Unlike their peers whose parents are authorized to drive, the children of undocumented parents experience diminished access to preventative healthcare, educational opportunities, and a host of extracurricular and wellness activities, all of which compound and coinfluence health outcomes over a lifetime.<sup>21</sup> Simultaneously, the children and family members of undocumented residents experience increased stress whenever their relative gets behind the wheel without authorization.<sup>22</sup>

Nevertheless, most people who live in the United States must regularly drive, by necessity, even if they are denied access to a license.<sup>23</sup> In so doing, however, they risk arrest and severe criminal penalties, often including mandatory jail time and hefty fines.<sup>24</sup> Police interactions also increase the likelihood of immigrant detention, as law enforcement officers funnel presumably deportable noncitizens to federal immigration authorities.<sup>25</sup> Chronic stressors, such as fear of separation—or actual separation—from a parent, also contribute to negative health outcomes.<sup>26</sup>

Armed with these insights, I outline how a health justice framework might guide future advocacy regarding driver's license laws. While litigation has failed to gain traction thus far, understanding the health consequences of subordination through driver's license schemes should bolster potential legal interventions. The underlying proportionality, equal protection, and due process concerns all stand to

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<sup>19</sup> See *infra* Part II.B.

<sup>20</sup> See *infra* Parts II.B, III.B, III.C.

<sup>21</sup> See, e.g., Susan Hazeldean, *Anchoring More than Babies: Children's Rights After Obergefell v. Hodges*, 38 CARDOZO L. REV. 1397, 1422 (2017) (noting that nearly 40 percent of children of undocumented parents did not see a doctor in the past year, compared to 25 percent of the children of documented parents).

<sup>22</sup> Natalie Slopen et al., *State-Level Anti-Immigrant Sentiment and Policies and Health Risks in U.S. Latino Children*, 152 PEDIATRICS 1, 2 (2023).

<sup>23</sup> Crozier & Garrett, *supra* note 5, at 1629.

<sup>24</sup> See, e.g., GA. CODE ANN. § 40–5–121 (2016).

<sup>25</sup> See, e.g., PRIYA SREENIVASAN, JASON A. CADE & AZADEH SHAHSHAHANI, ESCALATING JAILHOUSE IMMIGRATION ENFORCEMENT: A REPORT ON DETAINERS ISSUED BY ICE AGAINST PERSONS HELD BY LOCAL LAW ENFORCEMENT AGENCIES IN GEORGIA, NORTH CAROLINA, AND SOUTH CAROLINA FROM 2016–2018, at 9 (2021) (“[I]n Gwinnett County, Georgia, between 2009 and mid-2016, 6,788 of the 13,346 individuals with ICE detainers placed against them were detained solely due to traffic violations.”); see also Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1819 (2011).

<sup>26</sup> Slopen et al., *supra* note 22, at 1.

gain heft when the health-harming nature of no-license laws is foregrounded, particularly with respect to the implications for children in families with undocumented drivers.

Additionally, by widening the frame to view the structural inequities that no-license schemes impose on undocumented drivers and their children as a public health issue, broader coalitions interested in pursuing reform become possible. As a strategic matter, recasting the debate as a matter of public health (particularly concerning the health of communities and children) is not only more accurate but also represents a more viable strategy for reform in light of perennial political hostility towards immigrants. New coalitions—including child welfare advocates, school officials, medical professionals, and frontline community advocates—can advance narratives that cast the question of driver authority as a community health concern, rather than as a matter of immigration control.

Some lawmakers and government officials—if made aware of the breadth of community harm implicated by the criminalization of undocumented driving, and the discriminatory subordination that such laws impart on children in particular—may endeavor to change the law. And in those states where legislatures remain unpersuaded, police and prosecutors might nevertheless consider whether the proper exercise of prosecutorial discretion is necessary to avoid unjust harms in no-license cases on either categorical or individual levels.<sup>27</sup>

The remainder of this Article unfolds in three parts. Part I provides background on the weaponization of no-license laws against noncitizens and their families. Part II introduces the health justice framework and then explains how the creation and criminalization of undocumented drivers implements a system of structural subordination with significant health consequences. Part III then outlines how viewing no-license laws through a health justice lens can help guide future legal challenges and legal reform efforts.

## I. THE CRIMINALIZATION OF UNDOCUMENTED DRIVING

Driver's license laws originated, unsurprisingly, out of road-safety concerns that arose with the advent of widespread personal automobile ownership in the early 1900s.<sup>28</sup> The notion was that any person

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<sup>27</sup> See *infra* Part III.B.

<sup>28</sup> López, *supra* note 9, at 108.

of age who could demonstrate competency to drive would be licensed, which incentivized drivers to learn traffic rules, helping reduce the dangers inherent in motor vehicle operation.<sup>29</sup> This safety-focused approach to motor vehicle licensure continued for nearly the entire twentieth century.<sup>30</sup>

Over that time period, the license itself eventually became recognized as the principal identification document in the United States.<sup>31</sup> As Kevin Johnson has observed, the government-issued documentation that a driver's license represents came to be seen as a "benefit"—one that some believed should be denied to residents lacking immigration status.<sup>32</sup> Riding a swelling wave of anti-immigrant fervor, in 1993, California inaugurated a more restrictive approach to licensing, and soon, other states also began conditioning eligibility for driver's licenses on proof of lawful presence.<sup>33</sup> Additional states closed off undocumented drivers' access to motor vehicle licenses after Congress passed the federal REAL ID Act in 2005. This act, enacted in the wake of the September 11, 2001, terror attacks, obligates states to demand proof of lawful immigration status before issuing unrestricted identification cards required to enter federal buildings or board commercial flights.<sup>34</sup> Currently, nineteen states, plus Washington, DC and Puerto Rico, allow undocumented drivers to obtain some form of driver's license.<sup>35</sup>

Many states also link immigrant licensure prohibitions with criminal penalties, generally ratcheting up the severity with each successive violation. The approach in Georgia, where I teach and practice law, is stringent but not unique, with repeated violations quickly leading

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<sup>29</sup> Johnson, *supra* note 9, at 220; López, *supra* note 9.

<sup>30</sup> See Johnson, *supra* note 9, at 215 ("As anti-immigrant sentiment hit a fever pitch in the early 1990s, states began limiting undocumented immigrant eligibility for driver's licenses.").

<sup>31</sup> *Id.* at 220.

<sup>32</sup> *Id.* at 221.

<sup>33</sup> Lai, *supra* note 8, at 889–90.

<sup>34</sup> REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231 (2005) (asserting that States are not prohibited from issuing driver's licenses to residents lacking lawful immigration status, but if they do so the license must be marked to indicate it is not compliant with the REAL ID Act); *id.* § 202(d)(11).

<sup>35</sup> *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEGIS. (Mar. 13, 2023), <https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> [<https://perma.cc/6VG7-5JRR>]; see also *State Laws Providing Access to Driver's Licenses or Cards, Regardless of Immigration Status*, NAT'L IMMIGR. L. CTR. (Sept. 2021), <https://www.nilc.org/wp-content/uploads/2015/11/drivers-license-access-table.pdf> [<https://perma.cc/JN49-8HX3>] (including Puerto Rico as a state that provides access to driver's licenses).



to felony-level punishments.<sup>36</sup> The legal structure subordinating undocumented drivers in Georgia is straightforward. While one statutory provision mandates that everyone who drives on any highway in the state must have a valid license,<sup>37</sup> another provision requires proof of lawful presence within the United States to obtain a license.<sup>38</sup> Thus, even long-term residents with US citizen children have no route available to comply with the licensing requirement if they cannot demonstrate a qualifying immigration status. Under Georgia law, a first offense is a misdemeanor requiring fingerprinting, confinement for up to twelve months, and a possible fine of up to \$1,000.<sup>39</sup> Second or third offenses (within five years) are “aggravated misdemeanors” punishable by up to twelve months incarceration and a fine of up to \$2,500. A fourth or subsequent offense (within five years) is a felony—punishable by confinement for as much as five years and a mandatory fine of \$2,500 to \$5,000.<sup>40</sup>

Because road safety concerns (as well as insurance costs) clearly point in the direction of incentivizing more—not fewer—would-be drivers to be licensed, rules limiting licensure eligibility must be motivated by other concerns. Although no-license schemes generally do not directly invoke immigration status in the relevant code provisions, it is generally understood that their primary objectives include deterring further unlawful migration into the state and punishing (or at least limiting the opportunities of) undocumented individuals who have already taken up residence. Ample literature supports the proposition that the legal system continues to reflect bias towards Latinx people (along with others racialized as non-white),<sup>41</sup> and driver’s license schemes present an acute instance of how

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<sup>36</sup> See S.B. 488, 149th Gen. Assemb., Reg. Sess. (Ga. 2008) (barring persons without lawful presence from obtaining license); S.B. 350, 149th Gen. Assemb., Reg. Sess. (Ga. 2008) (imposing significant and escalating penalties for violations).

<sup>37</sup> GA. CODE ANN. § 40–5–20 (2023).

<sup>38</sup> GA. CODE ANN. § 40–5–21 (2023).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* This felony enhancement was added in 2008 after a fatal accident involving an undocumented driver. In the Statement of the bill’s sponsor, Senator John Wiles of the 37<sup>th</sup> District stated: “SB 350 closes a loophole in our current code, which allows unlicensed drivers a certain amount of leniency. . . . The urgent need for these tougher penalties is exemplified by the tragic death of Cobb County Sheriff’s Deputy Loren Lilly, who was killed by an unlicensed driver in my district on New Year’s Eve 2006.” Tracie Klinke & Kendra Wallace, *Drivers’ Licenses; Requirement; Driving While License Suspended/Revoked*, 25 GA. ST. U. L. REV. 185, 190 (2008).

<sup>41</sup> See, e.g., Cynthia Willis-Esqueda, *Bad Characters and Desperados: Latinxs and Causal Explanations for Legal System Bias*, 67 UCLA L. REV. 1204 (2020); John F. Dovidio et al., *Understanding Bias Toward Latinos: Discrimination, Dimensions of Difference, and Experience of Exclusion*, 66 J. SOC. ISSUES 59 (2010); Justin D. Levinson et al., *Deadly ‘Toxins’: A National*

legislation can be designed to target a state's Latinx residents through enforcement.<sup>42</sup>

When Georgia passed the statutory provisions that weaponized no-license laws, for example, "legislators knew the Act targeted undocumented immigrants."<sup>43</sup> In legislative debates, the bill's sponsor, Senator John Wiles, frequently invoked the story of a road accident involving an undocumented driver, which tragically resulted in the death of a sheriff's deputy.<sup>44</sup> Moreover, another section of the Georgia code, amended through the same bill that criminalized undocumented driving, explicitly requires that "all reasonable efforts" be made to ascertain the nationality of individuals confined or convicted, making the connection with immigration enforcement objectives apparent.<sup>45</sup> As Professor Lai observed, more generally, "driver's license schemes became an immigration enforcement tool of choice for police agencies and sheriff's offices around the country interested in exacting retribution from undocumented immigrants."<sup>46</sup>

No-license laws create a pernicious feedback loop. When laws incentivize police officers to believe that Latinx drivers likely lack authorization to operate a vehicle, strong conditions for racial profiling emerge. Numerous studies document how the convergence of criminal and immigration enforcement has become racialized, particularly at the local level, including the targeting of specific ethnic and racial communities by police.<sup>47</sup> Further, in many jurisdictions, once an unauthorized immigrant

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*Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 GA. L. REV. 225 (2021).

<sup>42</sup> Lai, *supra* note 8, at 889 (explaining that California was one of the first states to disallow undocumented persons from obtaining a driver's license, "as a deterrent to illegal immigration") (quoting sponsors of the bill). See generally Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 31 (2018) ("Racial bias in criminal sub-federal law enforcement impacts noncitizens racialized as non-white because of arresting officers' discretion to arrest, and sub-federal racially-biased abuse of discretion can occur in the context of using arrests to 'control' people in public, and sometimes private, spaces.").

<sup>43</sup> Klinke & Wallace, *supra* note 40, at 196; see also *id.* at 196 (When reporters asked State Representative Chuck Sims (R-169th) about the bill's connection with immigrant residents, he replied, "[t]hat's what it's about.").

<sup>44</sup> *Id.*

<sup>45</sup> GA. CODE ANN. § 42-4-14. See generally Klinke & Wallace, *supra* note 40, at 196 ("The Act also amends Code section 42-4-14 by requiring that when a person is convicted of driving without a license, the nationality of such individual should be ascertained by all reasonable efforts.") (citing GA. CODE ANN. § 42-2-20 (Supp. 2008)).

<sup>46</sup> Lai, *supra* note 8, at 892-93 n.77; see also Johnson, *supra* note 9, at 226 ("State and local police have been implicated in serious deprivations of civil rights of Mexican immigrants.").

<sup>47</sup> See, e.g., Nolan Kline, *Policing Race and Performing State Power: Immigration Enforcement and Undocumented Latinx Immigrant Precarity in Central Florida*, 33 CITY & SOC'Y 364 (2021);

encounters a law enforcement officer for any reason, he or she is very likely to be handed over to Immigration and Customs Enforcement (ICE) for detention and removal proceedings, regardless of whether there is ever a prosecution (let alone a conviction) or whether they fall within a high federal priority for removal.<sup>48</sup> Media accounts and investigative reports have documented the connection between robust subfederal involvement in immigration enforcement and a rise in race-based stops for minor traffic violations.<sup>49</sup> The reason is simple. When local law enforcement can count on arrests to trigger desired regulatory consequences, they are incentivized

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Matthew Claire & Asad L. Asad, *Criminal and Immigration Laws Shape Health Outcomes of Racial and Ethnic Minorities*, SOCIO. POL'Y BRIEFS (June 1, 2019) ("Criminal and Immigration laws create . . . 'racialized legal statuses.'"). See generally Thalia Gonzalez et al., *A Health Justice Response to School Discipline and Policing*, 71 AM. U. L. REV. 1927, 1958 (2022).

<sup>48</sup> See generally Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 706–07 (2015) (highlighting that because "arrested noncitizens, if unauthorized, are very likely to be placed in removal proceedings" instead of criminal prosecutions, constitutional rights violations and racial profiling go largely unchecked); Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107, 146 (2014) (explaining that "local law enforcement practices overwhelmingly determine who comes into initial contact with immigration enforcement"); Sreenivasan et al., *supra* note 25, at 9 (detailing how immigration detainers—"a request from ICE to state or local law enforcement to voluntarily hold an individual until ICE can take that person into custody"—do not involve any form of judicial process).

<sup>49</sup> See, e.g., Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, 64 ARIZ. L. REV. 463, 500 (2022) (finding evidence after analyzing 18 million traffic stops in North Carolina and South Carolina that 287(g) agreements led state troopers to engage in racial profiling); FRANK R. BAUMGARTNER ET AL., SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 164 (2018) (finding in a study of 20 million traffic stops that "hundreds of officers search Hispanics at greatly elevated rates compared to whites"); Kline, *supra* note 47; Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOCIO. RACE & ETHNICITY 82 (2017); ACLU OF N. CAL., COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES 16 (2011) (summarizing Ryan Gabrielson's 2010 report stating that in a number of California counties, police more frequently set up sobriety checkpoints to screen traffic in or near Hispanic neighborhoods); EDGAR AGUILASOCHO ET AL., MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 16–18 (2012) (noting increased racial profiling in policing following the implementation of the Secure Communities program); TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009) ("[I]mmediately after Irving, Texas law enforcement had 24-hour access . . . to ICE in the local jail, discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically."); Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 181–82 (2013) (summarizing DOJ investigations and lawsuits against law enforcement agencies in Maricopa County, Arizona, Alamance County, North Carolina, and New Haven, Connecticut, on the basis of unconstitutional police practices targeting suspected noncitizens); Lai, *supra* note 8, at 885–86 ("Left unchecked, state and local immigration enforcement efforts had caused widespread racial profiling, illegal detentions, and other individual rights violations.").

to adopt policing practices that facilitate more arrests of potentially undocumented drivers.<sup>50</sup>

The upshot is that no-license schemes have entrenched a legal structure enabling widespread status- and race-based discrimination with significant stakes for the disfavored community. Because that structure is clothed in facially neutral rules regarding conduct, few viable prospects for legal interventions have emerged. Similarly, policy reforms have failed to gain traction.<sup>51</sup> In Part II, I apply insights from the health justice movement to driver's license restrictions, laying the groundwork for the refocused interventions discussed in Part III.

## II. NO-LICENSE SCHEMES THROUGH A HEALTH JUSTICE LENS

In this part, I briefly explain the health justice framework. I then turn the discussion towards the weaponization of no-license laws against undocumented drivers. As I argue, this weaponization negatively impacts public health by structurally barring residents' access to licensure and insurance, thereby eliminating (or at least drastically curtailing) a critical gateway to multiple positive determinants of health for individuals and communities. No-license schemes subordinate undocumented drivers and their families by criminalizing their only means of reliable transportation, depriving them of the resources and opportunities necessary to reach their full health potentials.

### A. HEALTH JUSTICE DISCOURSE AND ADVOCACY

Health justice scholars recognize the connection between health inequities and “upstream determinants of health that are structured by law and policy.”<sup>52</sup> Such structural determinants include laws that impede access to clean environments, housing, education, and healthcare.<sup>53</sup> Health

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<sup>50</sup> Cade, *supra* note 48, at 707.

<sup>51</sup> See, e.g., Stephanie Angel, *Green-Light Georgia Driver's Licenses for All Immigrants*, GA. BUDGET & POL'Y INST. (Jan. 25, 2021), <https://gbpi.org/green-light-georgia-drivers-licenses-for-all-immigrants/> [https://perma.cc/R5HD-SFP7] (making economic arguments in favor of expanded access to driver's licenses for noncitizens).

<sup>52</sup> Kimberly Libman, Sabrina Adler & Pratima Musburger, *Cooperative Ownership as a Health Justice Intervention: A Promising Strategy to Advance Health Equity Through the U.S. Childcare System*, 50 J.L. MED. & ETHICS 738, 739 (2022).

<sup>53</sup> Emily A. Benfer et al., *Setting the Health Justice Agenda: Addressing Health Inequity & Injustice in the Post-Pandemic Clinic*, 28 CLINICAL L. REV. 45, 50 (2021).

justice discourse does not shy away from understanding subordination as a central driver of health inequity, exploring how “racism, social control, bias, privilege, as well as the political and legal systems in which they are embedded, influence the social determinants of health.”<sup>54</sup> Health justice scholars have investigated, for example, the connection between health and the embedded discriminatory laws and policies that govern housing security.<sup>55</sup> Access to education,<sup>56</sup> employment,<sup>57</sup> and healthcare,<sup>58</sup> among other determinants of health, have also received invigorated scholarly focus along these lines.

As a movement, health justice advocates seek to eliminate (or at least reduce) social injustices by identifying and reforming these structural drivers of health.<sup>59</sup> By focusing on health disparity concerns at macro levels, the health justice movement aims to achieve not just individual justice but structural reform. Methodologically, the health justice movement involves multidisciplinary collaborations that center the perspectives of frontline communities experiencing discrimination and health injustices.<sup>60</sup> This approach acknowledges the inextricably intertwined intersectionality of public health, civil rights, and legal structures, while also ensuring that reform efforts engage and respect the communities bearing the brunt of discriminatory health effects.

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<sup>54</sup> Gonzalez et al., *supra* note 47, at 1931.

<sup>55</sup> See, e.g., Cannon, *supra* note 16, at 804, 819–20; Emily E. Lynch et al., *The Legacy of Structural Racism: Associations Between Historic Redlining, Current Mortgage Lending, and Health*, 14 SSM POP. HEALTH 1 (2021); A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535 (2021).

<sup>56</sup> See, e.g., Erin M. Carr, *Education Equality and the Dream that Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-Brown America*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 115, 126–34 (2020); Gonzalez et al., *supra* note 47.

<sup>57</sup> See, e.g., Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL’Y L. & ETHICS 122, 162–70 (2020); Courtney L. McCluney et al., *Structural Racism in the Workplace: Does Perception Matter for Health Inequalities?*, 199 SOC. SCI. MED. 106 (2017).

<sup>58</sup> See, e.g., Ruqaiyah Yeraby et al., *Structural Racism in Historical and Modern U.S. Health Care Policy*, 41 HEALTH AFF. 187 (2022); Medha D. Makhlof, *Health Justice for Immigrants*, 4 U. PA. J.L. & PUB. AFF. 235 (2019).

<sup>59</sup> Benfer et al., *supra* note 53, at 47.

<sup>60</sup> Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 338, 346 (2015); Libman, Adler & Musburger, *supra* note 52, at 739; see also Charlene Galarneau & Patrick T. Smith, *Respect for Communities in Health Justice*, 50 J. L. MED. & ETHICS 650, 651–53 (2022) (explaining health and healthcare as “community goods” and arguing that “respect for communities be recognized, developed, and codified as an ethical principle for health justice”).

The health justice movement thus brings together researchers, scholars, and advocates from formerly distinct domains, recognizing and reframing antisubordination efforts as health intervention.<sup>61</sup> Ultimately, the goal of health justice is “a world in which your wealth, social status, access to power, and zip code are irrelevant to your life expectancy or vulnerability to illness.”<sup>62</sup>

## B. THE LINK BETWEEN NO-LICENSE LAWS AND HEALTH

Driver’s licenses are key to the economic survival of nearly all individuals and families in the United States. The Supreme Court has acknowledged that driver’s licenses “may be[] essential in the pursuit of a livelihood,”<sup>63</sup> and that deprivation of a license causes “economic hardship.”<sup>64</sup> The Ninth Circuit Court of Appeals similarly recognized that “as a practical matter, the ability to drive may be a virtual necessity.”<sup>65</sup> The link between driving and gainful employment, while vital, comprises only part of the story. The ability to travel is a particularly salient social determinant of health because transportation typically is necessary for employment-based wealth accumulation while also providing an essential gateway to many other factors that influence both short- and long-term wellbeing.<sup>66</sup>

The Centers for Disease Control and Prevention define social determinants of health (SDOH) as “life-enhancing resources, such as food supply, housing, economic and social relationships, transportation, education, and healthcare, whose distribution across populations effectively determines length and quality of life.”<sup>67</sup> SDOH are not

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<sup>61</sup> Harris & Pamukcu, *supra* note 13, at 766.

<sup>62</sup> *Id.*

<sup>63</sup> Bell v. Burson, 402 U.S. 535, 539 (1971).

<sup>64</sup> Mackey v. Montrym, 443 U.S. 1, 10–11 (1979).

<sup>65</sup> Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1062 (9th Cir. 2014).

<sup>66</sup> *Transportation + Social Determinants of Health*, NAT’L CTR. FOR MOBILITY MGMT. [hereinafter NCMM], <https://nationalcenterformobilitymanagement.org/transportation-and-social-determinants-of-health-destinations> [https://perma.cc/39TD-2UF9].

<sup>67</sup> L.K. BRENNAN RAMIREZ, ET AL., PROMOTING HEALTH EQUITY: A RESOURCE TO HELP COMMUNITIES ADDRESS SOCIAL DETERMINANTS OF HEALTH 6 (2008), <https://www.cdc.gov/nccdphp/dch/programs/healthycommunitiesprogram/tools/pdf/sdoh-workbook.pdf> [https://perma.cc/56FN-2ZFW]; see also *Social Determinants of Health*, WORLD HEALTH ORG., [https://www.who.int/health-topics/social-determinants-of-health#tab=tab\\_1](https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1) [https://perma.cc/7UDB-9P8A] (Defining social determinants of health (SDOH) as the “non-medical factors that influence health outcomes. They are the conditions in which people are born,

biological health factors; rather, they are structural or environmental circumstances that impact health.<sup>68</sup> Often, it is these structural or social conditions—such as employment, education, and transportation—that comprise the most important variables for health outcomes.<sup>69</sup> In fact, some studies have shown SDOH to be at least 80 percent responsible for one’s health.<sup>70</sup> Whatever the precise range, it is now incontestable that health outcomes are heavily influenced by race,<sup>71</sup> income,<sup>72</sup> built and natural living environment,<sup>73</sup> family ties, and other social factors unrelated to individual choice.<sup>74</sup> SDOH serve as reliable predictors for an individual’s mental and physical health, and, unsurprisingly, the presence of negative SDOH correlates to worse overall health.<sup>75</sup>

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grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life.”).

<sup>68</sup> *Social Determinants of Health*, U.S. DEPT. OF HEALTH & HUM. SERV. [hereinafter SDOH DHHS], <https://health.gov/healthypeople/objectives-and-data/social-determinants-health> [<https://perma.cc/LWZ6-4H46>].

<sup>69</sup> See, e.g., Lawrence O. Gostin & Eric A. Friedman, *Health Inequalities*, 50 HASTINGS CTR. REP. 6, 7 (2020) (“If you ask any epidemiologist what the single biggest predictor of health outcomes is, she would point to social determinants outside the health sector, including employment, education, housing, and transportation.”).

<sup>70</sup> Sannermat Magnan, *Social Determinants of Health 101 for Health Care: Five Plus Five*, NAT’L ACAD. OF MED. 1 (Oct. 9, 2017).

<sup>71</sup> See, e.g., NAT’L ACADS. OF SCI., ENG. & MED., COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY 58–64 (James N. Weinstein et al. eds., 2017), See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

<sup>72</sup> See, e.g., Santiago Lago et al., *Socioeconomic Status, Health Inequalities, and Non-Communicable Diseases: A Systematic Review*, 26 J. PUB. HEALTH 1, 8 (2018) (“Among the studies that conduct their analysis on individual data . . . [t]he results show a strong positive effect of income on health.”); CTR. ON SOC. DISPARITIES IN HEALTH ET AL., *Income, Wealth and Health*, 3–5 (2011), [https://www.rwjf.org/content/dam/farm/reports/issue\\_briefs/2011/rwjf70448](https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2011/rwjf70448) [<https://perma.cc/Y7PH-UZDR>].

<sup>73</sup> See, e.g., Anthony Iton & Bina Patel Shrimali, *Power, Politics, and Health: A New Public Health Practice Targeting the Root Causes of Health Equity*, 20 MATERNAL & CHILD HEALTH J. 1753, 1754 (2016) (“This history includes segregationist policies such as discriminatory zoning rules, redlining, and regressive taxation . . . [t]he result of these policies and practices is the current reality of poor people and people of color living in disinvested communities where residents lack access to health-promoting resources, including good schools, healthy food, safety, and strong social networks that allow for collective efficacy and voice in political decision-making.”); Katherine P. Theall et al., *Association Between Neighborhood Violence and Biological Stress in Children*, 171 JAMA PEDIATRICS 53 (2017); *Mapping Life Expectancy*, VA. COMMONWEALTH UNIV. CTR. ON SOC’Y & HEALTH (Sept. 26, 2016), <https://societyhealth.vcu.edu/work/the-projects/mapping-life-expectancy.html> [<https://perma.cc/6CXH-R5RK>].

<sup>74</sup> See generally Harris & Pamukcu, *supra* note 13, at 767–69.

<sup>75</sup> NCMM, *supra* note 66 (“Those experiencing unmet social needs were twice as likely to rate their health as fair or poor compared to those who did not.”).

When an individual or family does not have reliable transportation, they face many challenges that negatively impact health. Some of these obstacles are obvious. Adults without access to driver's licenses or other reliable means of transportation will have trouble accessing work opportunities.<sup>76</sup> This reduces their economic stability, which, especially for the uninsured or underinsured, depletes the ability to purchase medical care.<sup>77</sup> Similarly, without consistent nutritional food, the risk of diabetes, obesity, malnourishment, and other conditions affecting life expectancy and quality of life rises considerably.<sup>78</sup> But to have a healthy food supply, a person needs reliable access to both money and grocery stores.<sup>79</sup> SDOH related to reliable transportation are coinfluential and compounding.<sup>80</sup>

Transportation difficulties are the number one cause of patients failing to attend preventative care appointments, which is associated with negative health consequences.<sup>81</sup> Many individuals and families do not have access to the medical care they need in their own neighborhood.<sup>82</sup> This reality is reflected especially in rural areas, as "a remote location can hurt a rural community's ability to attract . . . health professionals," further exacerbating the challenge that a lack of transportation poses.<sup>83</sup> The dearth of services becomes more stark for people who develop serious, chronic medical conditions or disabilities, as they may need consistent care offered

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<sup>76</sup> See *supra* text accompanying notes 64–66. See generally Crozier & Garrett, *supra* note 5; Angel, *supra* note 51.

<sup>77</sup> See *Healthy People 2030: Economic Stability*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://health.gov/healthypeople/objectives-and-data/browse-objectives/economic-stability> [<https://perma.cc/PY26-T8UU>].

<sup>78</sup> SDOH DHHS, *supra* note 68.

<sup>79</sup> Melissa Ahern et al., *A National Study of the Association Between Food Environments and County-Level Health Outcomes*, 27 J. RURAL HEALTH 367 (2011); see also *The Role of Transportation in Social Determinants of Health*, MTM, <https://www.mtm-inc.net/sdoh-and-the-impact-of-transportation> [<https://perma.cc/AGR3-RPZJ>].

<sup>80</sup> See, e.g., Levi N. Bonnell et al., *The Relationship Between Social Determinants of Health and Functional Capacity in Adult Primary Care Patients with Multiple Chronic Conditions*, 34 J. AM. BD. FAM. MED. 688, 694 (2021).

<sup>81</sup> STEPHANIE FRANKLIN, TRANSPORTATION ISSUE BRIEF 2–3 (HUMANA 2019), [https://populationhealth.humana.com/wp-content/uploads/2019/08/BG\\_Transportation-Issue-Brief\\_1Q2019\\_EXTERNAL.pdf](https://populationhealth.humana.com/wp-content/uploads/2019/08/BG_Transportation-Issue-Brief_1Q2019_EXTERNAL.pdf) [<https://perma.cc/E656-DBAZ>].

<sup>82</sup> CHARLA SUTTON, GEORGIANS FOR A HEALTHY FUTURE & THE ARC GA., HEALTH TRANSPORTATION SHORTAGES: A BARRIER TO HEALTH CARE FOR GEORGIANS 6 (2021), [https://healthyfuturega.org/ghf\\_resource/health-transportation-shortages-a-barrier-to-health-care-for-georgians](https://healthyfuturega.org/ghf_resource/health-transportation-shortages-a-barrier-to-health-care-for-georgians) [<https://perma.cc/45DY-T3RL>].

<sup>83</sup> Timothy Sweeney, *Struggling Health Care System Just Part of What Ails Rural Georgia*, GA. BUDGET & POL'Y INST. (Nov. 20, 2015), <https://gbpi.org/struggling-health-care-system-just-part-of-what-ails-rural-georgia> [<https://perma.cc/F53L-BUWC>].



in specialty facilities.<sup>84</sup> Even when a person receives a medical intervention, such as an emergency room visit, without reliable transportation, they face ongoing challenges in obtaining medication from pharmacies, maintaining a treatment plan, or attending follow-up care appointments.<sup>85</sup>

The connections between driving (or other reliable means of transportation) and the social factors that impact health manifest in numerous additional ways. These include the potential to exercise and access clean environments and fresh air, the ability to rely on the resources of family and friends, the establishment of other support networks, and the means to attend church services or other activities that nourish the spirit and heart. For these reasons, research has documented that health outcomes vary significantly based on the characteristics of neighborhoods where people live and work.<sup>86</sup>

Especially for children, educational opportunities exert a particularly strong influence on life-long health. Disease, mental health, substance abuse, disability, and premature mortality are among the many negative health outcomes associated with fewer educational opportunities.<sup>87</sup> As the Supreme Court has observed, “education prepares individuals to be self-reliant and self-sufficient participants in society.”<sup>88</sup> Parents who lack authority to drive face more challenges getting their children to school on a consistent basis. Families with school-age children additionally need reliable transportation to help them access sporting events or other extracurricular activities that build strength, teach

<sup>84</sup> Sutton, *supra* note 82, at 3; *see also* Margaret B. Drew, Jason Potter & Caitlin Stover, *Complicated Lives: A Look into the Experiences of Individuals Living with HIV, Legal Impediments, and Other Social Determinants of Health*, 23 QUINNIPIAC HEALTH L.J. 81, 127 (2020) (“[T]ransportation can be a barrier to treatment for many chronic diseases. However, HIV/AIDS can present unique difficulties due to the limited number of physicians specializing in the field, in turn, often requiring frequent, and sometimes lengthy, travel.”).

<sup>85</sup> Drew, Potter & Stover, *supra* note 84.

<sup>86</sup> *See, e.g.*, Harris & Pamukcu, *supra* note 13, at 774 (“Public health researchers have mapped . . . health outcomes across neighborhoods, including life expectancy, rates of chronic disease and infectious disease, and accidental and intentional injury. The results show that where people live—which often is closely related to who they are—can produce a life expectancy differential of as much as twenty years.”).

<sup>87</sup> *See e.g.*, Natalie McGill, *Education Attainment Linked to Health Throughout Lifespan: Exploring Social Determinants of Health*, 46 NATION’S HEALTH 1 (Aug. 2016); *Why Education Matters to Health: Exploring the Causes*, VA. COMMONWEALTH UNIV. CTR. SOC’Y & HEALTH (Feb. 13, 2015), <https://societyhealth.vcu.edu/work/the-projects/why-education-matters-to-health-exploring-the-causes.html#gsc.tab=0> [<https://perma.cc/C2TS-7G3L>].

<sup>88</sup> Plyler v. Doe, 457 U.S. 202, 222 (1982) (internal quote marks omitted) (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

resiliency and social bonding, and provide tools contributing to the development of physical and social advantages that impact wellness over a lifetime.

To be sure, cars are not the only means of transportation. And yet, true transportation alternatives are scarce in the United States. Today, 86 percent of the American workforce drives to work; in contrast, only around 5 percent commute to work with public transportation.<sup>89</sup> Transportation alternatives thus provide little actual redress where access to a vehicle or the authority to drive is prohibited. Transportation need has been described as having two elements: “1) Transportation availability, the presence of transportation resources in a geographic area, and 2) accommodation, the linkage between healthcare and transportation systems.”<sup>90</sup> Even in urban areas, “the existence of a public transportation system does not always equate to sufficient access to regular healthcare treatment.”<sup>91</sup> While intermittent programs and community organizations may endeavor to bridge transportation gaps, they are usually not as effective as desired.<sup>92</sup>

The problem is especially acute in largely rural areas, where both elements of transportation need often fail.<sup>93</sup> Consider my resident state of Georgia, for example. Georgia not only has limited public transportation, but is also largely made up of rural counties, which are difficult to traverse and which lack sufficient healthcare providers in many areas.<sup>94</sup> Rural counties account for forty-four out of the fifty counties in Georgia, and they have the state’s worst lifespan and quality of life outcomes.<sup>95</sup> In fact, one study classified 74 percent of Georgia’s counties as “health transportation shortage areas,” or counties in which there are significant “transportation barriers to healthcare access.”<sup>96</sup> According to the study, only 10 percent of Georgia’s counties qualify as areas with no health

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<sup>89</sup> CHARLES R. EPP, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 18 (2014).

<sup>90</sup> Drew, Potter & Stover, *supra* note 84, at 129–30 (citing Neela D. Goswami et al., *Understanding Local Spatial Variation Along the Care Continuum: The Potential Impact of Transportation Vulnerability on HIV Linkage to Care and Viral Suppression in High-Poverty Areas, Atlanta, Georgia*, 72 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 65, 66 (2016)) (noting that even those with sufficient income to live healthy lifestyles may not be able to own or maintain a vehicle, resulting in the demand for transportation to accommodate patient needs).

<sup>91</sup> *Id.* at 132.

<sup>92</sup> See generally Sutton, *supra* note 82, at 10.

<sup>93</sup> Drew, Potter & Stover, *supra* note 84, at 128–30.

<sup>94</sup> Sutton, *supra* note 82, at 6; Sweeney, *supra* note 83. Georgia has 159 counties, only fifty of which are designated as being non-rural. Sweeney, *supra* note 83.

<sup>95</sup> Sweeney, *supra* note 83.

<sup>96</sup> Sutton, *supra* note 82, at 6.

transportation shortages.<sup>97</sup> The Association of American Medical Colleges has ranked Georgia among the worst US states for the number of active patient care physicians per capita, and rural counties in particular are generally unable to attract skilled medical professionals.<sup>98</sup> Accordingly, individuals who live in rural counties and require more than basic healthcare may have to travel over sixty miles to receive such care.<sup>99</sup> The dearth of quality healthcare across the United States, along with a shortage of transportation resources, means that people living in rural or economically depressed communities often struggle to maintain good health.<sup>100</sup>

Because public transportation alternatives are virtually nonexistent outside of major cities, most adults in the United States will continue to drive to some extent, notwithstanding the criminalization of undocumented driving.<sup>101</sup> This follows from the tight connection between transportation and economic survival. Put simply, people must drive to eat, work, worship, access healthcare, and get their kids to school.<sup>102</sup> On the other hand, because noncitizen drivers risk severe criminal penalties and

<sup>97</sup> *Id.* at 6.

<sup>98</sup> *UGA to Launch New School of Medicine*, UGA TODAY (Feb. 13, 2024), <https://news.uga.edu/uga-to-launch-new-school-of-medicine/> [<https://perma.cc/9JTU-CLC8>] (“Georgia currently ranks No. 40 among U.S. states for the number of active patient care physicians per capita, according to the Association of American Medical Colleges (AAMC), while it ranks No. 41 for the number of primary care physicians and No. 44 for the number of general surgeons per capita. The shortage of medical providers is particularly acute in rural and underserved areas, where access is even more limited.”). *See generally* Sweeney, *supra* note 83, at 2.

<sup>99</sup> *Georgia’s Health Care Transportation Crisis: James and Lamar County*, CMTY. CATALYST (May 5, 2021), <https://www.communitycatalyst.org/blog/georgias-health-care-transportation-crisis-james-and-lamar-county#.YgBSVX3MJhA> [<https://perma.cc/87W2-NJB2>] (providing anecdotal evidence of transportation and healthcare difficulties in Georgia). Even in Georgia’s non-rural counties, public transportation is, on the whole, very limited. In the Atlanta metro area, counties serviced by the Metropolitan Atlanta Rapid Transit Authority (“MARTA”)—the most robust public transportation system in the state of Georgia—still experience massive transportation challenges. Sutton, *supra* note 82, at 8 (“There are great variations across metropolitan counties with respect to residents’ proximity to public transportation and where public transportation travels relative to health care facilities.”).

<sup>100</sup> *See generally About Rural Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 28, 2023), <https://www.cdc.gov/ruralhealth/about.html> [<https://perma.cc/LCK3-NEEB>] (noting that rural residents have less access to healthcare, a factor that can lead to poor health outcomes); *Poverty and Health – The Family Medicine Perspective (Position Paper)*, AM. ACAD. FAM. PHYSICIANS (Jan. 2022), <https://www.aafp.org/about/policies/all/pov-erty-health.html> [<https://perma.cc/92SX-A28K>] (discussing how access to resources such as health care, education, and transportation contributes to disparities in health outcomes between different kinds of communities).

<sup>101</sup> Lai, *supra* note 8, at 892 (“By excluding immigrants from being able to obtain a driver’s license, the government does not deter them from driving.”).

<sup>102</sup> Sylvia R. Lazos Vargas, *Missouri, the War on Terrorism, and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 805 (2002).

the possibility of an encounter with law enforcement that may lead to immigration detention and removal proceedings, a chain of significant consequences follows.

First, undocumented drivers will necessarily reduce driving activities to the bare minimum for survival—thereby reducing their access to beneficial SDOH.<sup>103</sup> Second, and as a direct result, their family members (and particularly their minor children) will experience enhanced and chronic stressors due to the daily fear that their parents could be stopped, arrested, and diverted to immigration detention.<sup>104</sup> This kind of trauma itself amounts to an additional SDOH, especially when experienced by children.<sup>105</sup> Indeed, adverse childhood experiences are a “powerful predictor of later health,” including the potential for obesity, heart disease, and depression.<sup>106</sup> These include parental separation, lack of physical or psychological security, neglect, and other adverse experiences.<sup>107</sup> Chronic stressors of this nature coinfluence a child’s ability to prepare and achieve in school, which becomes another upstream source of later health inequities.<sup>108</sup> When adverse childhood experiences are extensive enough, children’s neurological development may be altered in health-negative ways.<sup>109</sup>

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<sup>103</sup> See Chavez-Dueñas et al., *Healing Ethno-Racial Trauma in Latinx Immigrant Communities: Cultivating Hope, Resistance, and Action*, 74 AM. PSYCH. 49, 53 (2019) (“Fear of detention and deportation is also keeping immigrants from driving, taking their children to school, seeking medical care, and reporting crimes.”).

<sup>104</sup> See *id.* (“Fear of a family member or close friend being deported is common among Latinx, with over half (i.e., 68%) experiencing worries related to immigration.”).

<sup>105</sup> Chavez-Dueñas et al., *supra* note 103, at 54; Asad L. Asad & Matthew Clair, *Racialized Legal Status as a Social Determinant of Health*, 199 SOC. SCI. & MED. 19, 23–25 (2018); Slopen et al., *supra* note 22, at 7–8 (summarizing the study’s findings, which adds to “the empirical literature on the harmful consequences of discriminatory policies and prejudicial social contexts on children’s health”).

<sup>106</sup> Harris & Pamukcu, *supra* note 13, at 779.

<sup>107</sup> See *id.*

<sup>108</sup> See generally Peter W. Cookson, Jr., *A World of Hardship: Deep Poverty and the Struggle for Educational Equity*, LEARNING POL’Y INST. (Oct. 6, 2020), <https://learningpolicyinstitute.org/blog/covid-deep-poverty-struggle-education-equity> [<https://perma.cc/E9ZN-3KX9>]; Elizabeth P. Pungello et al., *Early Educational Intervention, Early Cumulative Risk, and the Early Home Environment as Predictors of Young Adult Outcomes Within a High-Risk Sample*, 81 CHILD DEV. 410, 420, 423 (2010).

<sup>109</sup> See generally ELIZABETH TOBIN-TYLER & JOEL B. TEITELBAUM, *ESSENTIALS OF HEALTH JUSTICE: A PRIMER* 84–85 (2018) (discussing adverse childhood experiences and toxic stress); Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT’L INST. JUST. J., May 2017, at 10 (describing how children of incarcerated parents experience multiple health risk factors including educational attainment, economic disadvantage, and limited parental attachment); Slopen et al., *supra* note 22, at 2 (“Latino adolescents in states with greater systemic

Poverty, discrimination, and other community social factors are also linked with an increased likelihood of experiencing domestic violence.<sup>110</sup> Noncitizen survivors of intimate partner violence face particular challenges in finding safety and stability, including reliable mobility and possession of an accepted form of identification, especially since they may not have the opportunity to collect any belongings from domiciles shared with abusers. State restrictions on access to driver's licenses may render safety and stability all but impossible to achieve in many situations, essentially forcing undocumented immigrants—and, by default, their children—to remain in abusive situations indefinitely, leading to sustained physical and emotional harm and possibly even death.<sup>111</sup>

Finally, the power to control one's destiny is increasingly recognized as a key determinant of health.<sup>112</sup> Research has shown that when individuals or communities are denied self-determination, they are more likely to experience prolonged mental and physical disease.<sup>113</sup> In the United States, freedom of movement is a key aspect of the power required to meet basic needs and exercise self-determination.<sup>114</sup> Status-based restrictions on the authority to drive thus not only curtail access to the many SDOH already discussed but also accumulate over time into feelings of helplessness about whether one's situation will ever improve. The weaponization of no-license laws thus contributes to undocumented and

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inequities . . . had smaller hippocampal volumes, a brain region associated with chronic stress exposure.”).

<sup>110</sup> *Intimate Partner Violence: Risk and Protective Factors for Perpetration*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/riskprotectivefactors.html> [https://perma.cc/3DDL-X3DJ] (listing poverty, education and economic opportunities as factors that contribute to intimate partner violence).

<sup>111</sup> See generally JOHN N. BRIERE & CATHERINE SCOTT, *PRINCIPLES OF TRAUMA THERAPY: A GUIDE TO SYMPTOMS, EVALUATION, AND TREATMENT (DSM-5 Update)* (2014); Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245, 245 (1998).

<sup>112</sup> See, e.g., Margaret Whitehead et al., *How Could Difference in 'Control Over Destiny' Lead to Socio-Economic Inequalities in Health? A Synthesis of Theories and Pathways in the Living Environment*, 39 HEALTH & PLACE 51, 52 (2016).

<sup>113</sup> See, e.g., Jonathan Purtle, *Felon Disenfranchisement in the United States: A Health Equity Perspective*, 103 AM. J. PUB. HEALTH 632 (2013); Glen Laverack, *Improving Health Outcomes through Community Empowerment: A Review of the Literature*, 24 J. HEALTH POP. & NUTRITION 113 (2006); Nina Wallerstein, *Empowerment to Reduce Health Disparities*, 30 SCANDINAVIAN J. PUB. HEALTH 72, 73–74 (2002); Nina Wallerstein, *Empowerment and Health: The Theory and Practice of Community Change*, 28 CMTY. DEV. J. 218, 219 (1993).

<sup>114</sup> See generally EPP, *supra* note 89.

mixed-status families' sense that they lack control over their circumstances, which may lead to additional negative health outcomes.<sup>115</sup> For those experiencing interpersonal violence, this lack of control is especially debilitating and potentially deadly.<sup>116</sup>

Laws promoting or sanctioning subordination based on stigmatic factors such as race, gender, disability, or immigration status represent a paramount instance of how societal structures drive health inequities.<sup>117</sup> When a state makes it impossible for noncitizens to obtain driver's licenses and then prosecutes those who inevitably must drive, the criminal law operates as a tool of social control and relegation. To be sure, the use of criminal laws to manage and harm socially disfavored groups is not without precedent. Indeed, "status offenses historically operated as a targeted form of social control that enabled the state to 'isolate undesirable elements from the general public' and to remove groups who are viewed as dangerous to the prevailing order."<sup>118</sup>

The most egregious historical example of this arose in the post-abolition era, when states employed criminal laws and law enforcement apparatus to exercise continued dominion over formerly enslaved persons.<sup>119</sup> So-called "vagrancy laws" were widely used to manage and punish African Americans, who could be arrested for congregating, being present in public places, or traveling on public roads.<sup>120</sup> These "Black Codes," as they came to be referred to, also ratcheted up punishments for petty offenses if committed by formerly enslaved persons.<sup>121</sup>

The weaponization of driver's license schemes against residents who lack lawful immigration status follows this lineage of using criminal laws to subordinate and punish racially and economically marginalized communities.<sup>122</sup> While nearly everyone considers driving an essential

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<sup>115</sup> Harris & Pamukcu, *supra* note 13, at 780.

<sup>116</sup> See Felitti et al., *supra* note 111; BRIERE, *supra* note 111.

<sup>117</sup> See Harris & Pamukcu, *supra* note 13, at 763.

<sup>118</sup> Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1191 (2017); see also Josh Bowers, *What if Nothing Works? On Crime Licenses, Recidivism, and Quality of Life*, 107 VA. L. REV. 959, 983 (2021) (arguing that "the lineage of order-maintenance policing traces back to efforts to socially control freed former slaves during and after Reconstruction").

<sup>119</sup> Ocen, *supra* note 118, at 1193.

<sup>120</sup> *Id.* at 1194; EPP, *supra* note 89, at 19 ("Long before U.S. governments issued driver's licenses, passports, or visas and decades before emancipation, African Americans, both slave and free, were issued travelling papers to document who was free to travel to what locations.").

<sup>121</sup> Ocen, *supra* note 118, at 1193–94.

<sup>122</sup> *Cf. id.* at 1197 ("Taken together, these historical examples highlight the ways in which status offenses are used to target the conduct of disfavored populations and to regulate performative

freedom, it has a particular salience for “racial minorities who were historically deprived of mobility in various ways.”<sup>123</sup> While states no longer rely upon vague statutes targeting vagrancy, low-level offenses like those concerning traffic or driver’s license violations give law enforcement ample discretion to pick their targets in furtherance of the prevailing vision for status demarcation and social—or even racial—hierarchy.<sup>124</sup>

At bottom, the criminalization of driving by persons who lack immigration status enables the state to construct a system designed to maintain and further social and racial inequality. The legal regime, along with vigorous enforcement by frontline police and prosecutors, labors to keep immigrants and their families off the roads, out of schools, and deprived of the other day-to-day resources and opportunities that allow for human flourishing over the long run. In a very literal sense, no-license schemes control the movements of a disfavored minority and limit their engagement in organized society. When undocumented residents dare drive, as they must, they risk a racially profiled stop followed by both direct and collateral sanctions—namely, criminal incarceration, immigration detention, and, ultimately, deportation—all of which are intended to further erase their physical presence from the jurisdiction.

Because the criminalization of undocumented driving “brands immigrants as deviant for conduct that is not deviant,” it stigmatizes entire communities, marking them as outsiders.<sup>125</sup> Potential violators engaged in “everyday activities” are subjected to increased surveillance and scrutiny through law enforcement tactics like strategically located checkpoints and racial profiling, which then fortify the general public’s associations and assumptions of criminality.<sup>126</sup> Research supports the conclusion that

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actions associated with marginalized identities.”); EPP, *supra* note 89, at 16 (“The notorious pass laws in South Africa under apartheid, which allowed black people into white areas only if carrying a pass authorizing entry, worked a similar evil . . .”).

<sup>123</sup> Lai, *supra* note 8, at 895.

<sup>124</sup> Bowers, *supra* note 118, at 978 (“Now, statutes are comparatively precise, but public-order offenses are so plentiful—and so widely flouted—that police and prosecutors retain ample discretion to select from ‘menus.’”).

<sup>125</sup> Lai, *supra* note 8, at 894.

<sup>126</sup> *Id.* at 895 (“When immigrants are reimagined as criminals for engaging in everyday activities, this—together with enforcement of the laws through arrests, citation, and incarceration—generates a feedback loop and validates the public’s fears.”). See generally Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONT. ETHNOGRAPHY 425, 431 (2011) (“[Y]oung black and Latino males are more likely to report being stopped by the police, and stopped repeatedly, than white youth, minority females, and older blacks and Latinos.”).

people who regularly experience societal discrimination suffer negative health outcomes as a result.<sup>127</sup> Chronic stress exposure from “societal problems such as segregation, poverty, racism, homophobia, and transphobia” leads to elevated allostatic load, which amounts to “cumulative dysregulation across multiple physiologic systems.”<sup>128</sup> Thus, the protracted exposure to stress caused by the criminalization of undocumented driving exerts literal wear and tear on the body.<sup>129</sup>

In sum, the criminalization of undocumented driving imposes lasting burdens on wide swaths of state residents by curtailing their access to positive SDOH while also imposing negative externalities. The weaponization of no-license laws allows states to mete out retribution while cementing the image of immigrants as lawbreakers, even though the act of driving is not inherently blameworthy.<sup>130</sup> By design or effect, the scheme also cements the outsider status of children growing up in undocumented or mixed-status families—even if the children themselves are US citizens—as well as for lawfully present residents (or citizens) who are perceived as undocumented because of the color of their skin or the

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<sup>127</sup> See, e.g., Martha E. Lang & Chloe E. Bird, *Understanding and Addressing the Common Roots of Racial Health Disparities: The Case of Cardiovascular Disease & HIV/AIDS in African Americans*, 25 HEALTH MATRIX 109, 115 (2015) (explaining that discrimination on the basis of race or sexual orientation, for example, “can cause emotional and physical stress to the body and these stressors have been demonstrated to have a direct negative impact on health”); O. Kenrik Duru et al., *Allostatic Load Burden and Racial Disparities in Mortality*, 104 NAT’L MED. ASS’N 89 (2012).

<sup>128</sup> Lang & Bird, *supra* note 127, at 115.

<sup>129</sup> It also bears observing that the direct targets of no-license laws, as well as others in their families and communities, also experience negative health outcomes as a direct result of being stopped, charged, prosecuted, and subjected to criminal punishment including incarceration. Punitive processes are well understood by public health experts to impart negative health consequences. See, e.g., Maria-Elena De Trinidad Young et al., *States with Fewer Criminalizing Immigrant Policies Have Smaller Health Care Inequities Between Citizens and Noncitizens*, 20 BMC PUB. HEALTH, No. 1460 (Oct. 15, 2020); Lisa Bowleg, *Reframing Mass Incarceration as a Social-Structural Driver of Health Inequity*, 110 AM. J. PUB. HEALTH 11 (2020); ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 15 (The Sent’g Project ed., 2021) (explaining that incarceration “creates obstacles to building stable lives” and “cause[s] high crime rates and neighborhood deterioration, thus fueling greater disparities”). And if police interactions with noncitizen drivers suspected to be deportable leads to immigration detention, the health inequities rise yet further. See, e.g., Kathryn Hampton et al., *Clinicians’ Perceptions of the Health Status of Formerly Detained Immigrants*, 22 BMC PUB. HEALTH, No. 525 (Mar. 23, 2022).

<sup>130</sup> Lai, *supra* note 8, at 896 (“In the case of driver’s license laws, internalized associations have taken on a racialized image—the prototypical traffic misdemeanant becomes a Latino/a immigrant who is driving without a license.”); see also López, *supra* note 9, at 111 (“In the form of the driver’s license, the force of the state is used to dominate the noncitizen.”).



language they speak.<sup>131</sup> Thus, writ large, the criminalization of undocumented driving preserves and reinforces the racial hierarchies that persistently contribute to discriminatory health inequities in this country, regardless of citizenship or immigration status.<sup>132</sup>

### III. A HEALTH JUSTICE APPROACH TO LEGAL AND POLITICAL ADVOCACY

As the previous Part explained, driver's licenses should be viewed as a public health resource. Individuals and families denied access to licenses are thus deprived of a critical tool to affect the conditions of their lives. While healthy environments, educational and economic opportunities, and other resources are already distributed unequally across society, the lack of access to driver's licenses further compounds the resulting health disparities. Mobility is integral to survival on a day-to-day basis, and, accordingly, most adult undocumented residents have no choice but to drive at least for economic subsistence. But engaging in this necessary risk creates daily conditions of trauma for their children and other family members, in light of the very real possibility that a racially influenced traffic stop will occur, possibly leading to incarceration and/or immigration detention.

All told, the criminalization of undocumented driving has engineered a health-harming ecosystem. The policy decisions animating no-license laws have created a class of state residents, including children and US citizens, who must navigate nearly every aspect of life at a structural disadvantage. But the health harms caused by the criminalization of undocumented driving reach even further than the families containing undocumented drivers. Entire communities are

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<sup>131</sup> Cf. López, *supra* note 9, at 114 (“The net is cast wide, in that legal immigrants and the undocumented are both affected . . . further showing this phenomenon as another example of the Foucauldian binary mode of the insider/outsider.”).

<sup>132</sup> Rosenbaum, *supra* note 42, at 15–16 (“According to the authors of an International Migration Review report . . . studying economic and educational attainment amongst immigrants relative to U.S. citizens, citizenship status may play less of a role in integration, as compared to what the authors describe as ‘skin color discrimination.’”); EPP, *supra* note 89, at 2–3 (“When people [of color] . . . are subjected to [police stops] and other people—white people—are largely free of these inquiries, police stops actively re-create and enforce the country’s racial divide.”); Gonzalez et al., *supra* note 47, at 1974–75 (discussing racism in the criminal legal system as pervasive source of health inequity); Lai, *supra* note 8, at 883 (discussing how subfederal immigration policies can “impose burdens on immigrants . . . out of antipathy or majoritarian disfavor towards immigrants, particularly immigrants of color”).

stigmatized. Citizens and lawfully present noncitizens are subjected to racial profiling and negative identity perceptions.

The weaponization of no-license laws thus must be understood as a form of intentional state harm. In a literal sense, no-license schemes cause injury, even lasting injury, to the bodies and minds of noncitizens and their families, including US citizen children. Driving, an activity that is both fundamental to daily existence and morally blameless, has now been legally constructed as a criminal act in a significant majority of states. The criminalization of undocumented driving is motivated by legally inappropriate objectives and causes legally inappropriate harm.<sup>133</sup> Like other groups subordinated by law, undocumented drivers and their families have been intentionally “wounded by social forces placing them at a disadvantage for their health.”<sup>134</sup> This represents a paramount instance in which “crime is not merely a legal construct but a violation of people and relationships,” and, as such, obligates our society “to make things right.”<sup>135</sup>

Healing these wounds and preventing further harm in the future requires a holistic and structural health intervention, one that focuses on enabling human flourishing and that strengthens family, social, and community relationships.<sup>136</sup> Understanding the critical gateway to health that driver’s licenses represent bolsters potential legal challenges as well as the possibility of new coalitions to drive policy reforms. Supported by scientific research and academic literature on the social determinants of health, arguments about access to driver’s licenses can be reframed as arguments about health—of individuals, families, and society more broadly.<sup>137</sup>

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<sup>133</sup> Cf. Bowers, *supra* note 118, at 1050 & n.448 (“The fact is that what we are doing is not working—at least, not for appropriate ends.” Rather, “criminal legalism is working quite effectively as a system of subordination.”).

<sup>134</sup> Kevin Grumbach et al., *Vulnerable Populations and Health Disparities: An Overview*, in *MEDICAL MANAGEMENT OF VULNERABLE AND UNDERSERVED POPULATIONS: PRINCIPLES, PRACTICE, AND POPULATIONS* 3, 3 (Talmadge E. King & Margaret B. Wheeler eds., 2016); see also Harris & Pamukcu, *supra* note 13, at 773–74 (“Population vulnerability is made, not born.”).

<sup>135</sup> Shannon M. Silva et al., *Fulfilling the Aspirations of Restorative Justice in the Criminal Justice System? The Case of Colorado*, 28 *KAN. J.L. & PUB. POL’Y* 456, 460 (2019); see also Bowers, *supra* note 118, at 1050 & n.448 (“[C]riminal legalism is working quite effectively as a system of subordination.”).

<sup>136</sup> See, e.g., *How Families Can Support Student Health and Emotional Well-being*, *CTRS. FOR DISEASE CONTROL & PREVENTION: CDC HEALTHY SCHS.* (July 6, 2022), [https://www.cdc.gov/healthyschools/families\\_tip\\_sheet.htm](https://www.cdc.gov/healthyschools/families_tip_sheet.htm) [https://perma.cc/5JDV-25H9] (explaining how family relationships and bonds function as protective health factors for children).

<sup>137</sup> Cf. Harris & Pamukcu, *supra* note 13, at 765.

## A. NEW COLLABORATIONS AND POLICY REFORMS

A distinct advantage of a health justice framework for reexamining status-based restrictions on driver's licenses is the facilitation of expanded advocacy partnerships. Public health researchers, pediatric medical providers, educators, community advocates, lawyers, therapists, social workers, and economists all work in domains impacted by the weaponization of no-license laws against immigrant communities.<sup>138</sup> By joining forces to address the problem comprehensively, a more accurate picture of the full range of consequences for communities will emerge.

To motivate government officials to reform license laws, especially in states where anti-immigrant legislation is prevalent, this holistic approach should be driven by any available public health data but also seek to elevate narratives from within the affected communities that illustrate the significant health impacts of current policies. Narratives about the role that driver's license access plays in the potential for human flourishing—particularly for children, domestic violence survivors, and other vulnerable groups—may be particularly influential. A focus on the connections between driver's license access, educational opportunities, and lifelong health outcomes, for example, may garner bipartisan support.<sup>139</sup> Children, lacking access to the power to change circumstances, are “uniquely vulnerable to trauma and the health harms of disempowerment.”<sup>140</sup> Moreover, the “various harms that befall children often build cumulative momentum into poor adult health outcomes that then can ripple out into families and communities.”<sup>141</sup> There is no general quarantine for those who experience health inequities. Poor health does not occur in a vacuum, and “the more unequal a society is, the worse its members' health becomes overall.”<sup>142</sup>

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<sup>138</sup> See, e.g., Angel, *supra* note 51 (“During the first three years of implementation, the state could gain almost \$17 million in revenue from driver's card fees, motor fuel taxes, vehicle registration, vehicle title and standard license plate fees.”).

<sup>139</sup> See, e.g., Viju Raghupathi & Wullianallur Raghupathi, *The Influence of Education on Health: An Empirical Assessment of OECD Countries for the Period 1995–2015*, 78 ARCHIVES PUB. HEALTH 1, 3 (2020).

<sup>140</sup> Harris & Pamukcu, *supra* note 13, at 824.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 768. See generally RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (2009) (arguing that inequality exacerbates societal problems, like increased obesity in society as a whole, and decreased life expectancy and happiness).

Some state governments, made aware of the problems through these strategic coalitions, might be persuaded to reorient driver's license laws around values like harm reduction and health equity. They might be persuaded that no-license laws are perpetuating subordination and the creation of an underclass.<sup>143</sup> They might grapple with the reality that vulnerable populations not contemplated as targets—such as US citizen children and women fleeing interpersonal violence—are inordinately harmed, and that the current system is bad for public health as a general matter.<sup>144</sup> To be sure, not all legislatures will be equally receptive. In some states, strategic coalitions may need to directly confront the question of deterrence along with the health equity concerns. Undocumented individuals in most states generally are long-term US residents. Even if some of these residents voluntarily came to the United States in violation of immigration law, they likely did that over a decade ago.<sup>145</sup> While it is highly questionable whether no-license laws have any demonstrable connection with migration deterrence, such laws do exert abundant harm reaching far beyond the individual migrants themselves.<sup>146</sup>

As suggested earlier in this Article, it does not appear that no-license schemes are motivated by highway safety goals. Indeed, roads are clearly made less safe by the criminalization of undocumented driving because that approach reduces incentives to learn and be tested on road safety rules, prevents drivers from purchasing insurance, and increases fear of law enforcement interactions (which leads drivers not to report road safety violations), among other consequences. Nevertheless, advocates should endeavor to persuade lawmakers that if states wish to improve

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<sup>143</sup> Jessica Lusamba, *Oregon Starts Issuing Driver Licenses to Undocumented Immigrants*, JURIST (Jan. 21, 2021, 9:10 AM), <https://www.jurist.org/news/2021/01/oregon-starts-issuing-driver-licenses-to-undocumented-immigrants/> [<https://perma.cc/ZQ3G-HSWH>] (reporting on the “Equal Access to Roads Act” in Oregon, which as of January 2021 removed legal status barriers to accessing driver’s licenses).

<sup>144</sup> *Id.* (reporting that Oregon’s decision to expand driver’s license would significantly impact “Oregon’s undocumented population, seniors, homeless/houseless folks, domestic violence victims, and other Oregonians who have difficulty accessing their birth certificate and other paperwork necessary to prove their citizenship status”); *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982) (“Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”).

<sup>145</sup> *See, e.g.*, Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RSCH. CTR. (2019), <https://www.pewresearch.org/hispanic/2018/11/27/unauthorized-immigrants-are-more-likely-to-be-long-term-residents> [<https://perma.cc/G5WJ-P3DV>] (“In 2016, about two-thirds of unauthorized immigrant adults had lived in the U.S. for more than a decade . . .”).

<sup>146</sup> *See supra* Part II.B.

highway safety, that goal is better reached by allowing licensure than by denying access and imposing recidivist premiums.<sup>147</sup>

Finally, in states where statewide policy reform is not possible, other more localized interventions might still be pursued. Police who make traffic stops of undocumented drivers, prosecutors considering charges against them, and judges imposing sentences all retain the general authority to exercise equitable discretion when considering the application of laws that impose particularly stringent penalties for relatively blameless conduct.<sup>148</sup> It is not at all unusual for a criminal statute's administrators to take equity or proportionality principles into account.<sup>149</sup> Put more pointedly, "discretion is a tool, indispensable for the individuation of justice."<sup>150</sup> For example, armed with the knowledge of just how problematic these schemes are, prosecutors may decline to pursue no-license cases, especially where there are no aggravating factors whatsoever.<sup>151</sup> Similarly, some law enforcement agencies (or individual traffic officers) might employ discretion to decide not to arrest or hold drivers suspected to be undocumented, at least in routine cases, and some judges may choose to impose the most lenient sentences permitted by law for driving offenses premised solely on undocumented status, especially where mitigating equities are present.

## B. POTENTIAL LEGAL INTERVENTIONS

Where policy reform remains elusive, a health justice focus has the potential to amplify litigation efforts that challenge the criminalization

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<sup>147</sup> Hans Lueders et al., *Providing Driver's Licenses to Unauthorized Immigrants in California Improves Traffic Safety*, 114 PROC. NAT'L ACAD. SCI. 4111, 4111 (2017).

<sup>148</sup> As Roscoe Pound observed many decades ago, when law enforcement officers rigidly apply overly stringent laws, they "do not merely fail to do justice, they may do positive injustice." Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 928 (1960); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 25 (Illini Books ed. 1971) (1969) ("Rules alone, untampered by discretion, cannot cope with the complexities of modern government and of modern justice.").

<sup>149</sup> DAVIS, *supra* note 148, at 87 (explaining that "legislation has long been written in reliance on the expectation that law enforcement officers will correct its excesses through administration"); Lawrence B. Solum, *Equity and the Rule of Law*, 36 NOMOS 120, 145 (1994) (arguing that consideration of equity is essential to the just application of the law in individual cases).

<sup>150</sup> DAVIS, *supra* note 148, at 25.

<sup>151</sup> Cf. Bowers, *supra* note 118, at 1051 ("[F]orebearance . . . may be a sign that the system has committed itself to health, not destruction."); see also *id.* at 1040 ("[I]nappropriate harshness is far inferior to inappropriate leniency.").

of undocumented driving. In the pages that follow, I will outline some initial considerations.

### 1. *Criminalization of Status*

Driver's license schemes present states with a way to punish residents who lack immigration status by first prohibiting their access to licenses and then criminalizing the act of driving without a license (DWOL). Nominally focusing on conduct—conduct that undocumented residents must engage in, to at least some extent, for their family's survival—obscures the fact that the conduct at issue is illegal only because states deliberately condition it directly on status. Although no-license laws do not typically make immigration status an explicit element of the offense, status is the predicate aspect of the offenders' inability to avoid culpability.<sup>152</sup> Within the pool of individuals of driving age and ability, these schemes single out a specific group for ineligibility based entirely on a status aspect of their identity. And when they inevitably drive, it is their status (and their status alone) that precludes access to the only available defense to prosecution or imposition of a recidivist punishment—obtaining a valid license.

Although states generally enjoy broad leeway over the administration of their criminal laws, they step onto shakier constitutional ground when they penalize individuals based on their identity or their inclusion in a class.<sup>153</sup> In a high-water mark for this doctrine, the Supreme Court observed in *Robinson v. California* that a statute criminalizing the status of being a drug addict was “designed to stigmatize and incapacitate classes of people who have been deemed social pariahs.”<sup>154</sup> Accordingly, the court found the statute unconstitutional on Eighth Amendment grounds.<sup>155</sup> Similarly, when states have tried to criminalize individuals with felony records who fail to register upon entering the jurisdiction, or when states have tried to sanction persons who appear in public with visible physical disabilities, courts have also found violations of

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<sup>152</sup> Jonathan Petts, *Can Undocumented Immigrants Get a Driver's License?*, IMMIGRATIONHELP.ORG, <https://www.immigrationhelp.org/learning-center/drivers-licenses-for-immigrants> [<https://perma.cc/XLB6-KUXJ>].

<sup>153</sup> See generally Ocen, *supra* note 118, at 1182 (citing Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 724–25 (2005)).

<sup>154</sup> Ocen, *supra* note 118, at 1182; see also *Robinson v. California*, 370 U.S. 660, 666 (1962).

<sup>155</sup> 370 U.S. at 667 (finding that the State violated the Fourteenth Amendment's due process clause, which incorporates the Eighth Amendment's prohibition of cruel and unusual punishments).

constitutional protections against penalization on the basis of status.<sup>156</sup> The problem with these kinds of offenses is that they punish conditions that are not a result of moral fault.<sup>157</sup>

It is well established that the federal government possesses ample authority to regulate persons in the United States based on their immigration status.<sup>158</sup> But that plenary federal power provides no support for state authority to punish status. Pursuant to a constitutional doctrine known as field preemption, states cannot directly criminalize immigration status or immigration law violations, even if they mirror federal law.<sup>159</sup> That is because the federal government enjoys preemptive supremacy to establish and enforce immigration policy. As the Supreme Court has long explained, immigration rules interact with foreign policy concerns, necessitating that the nation speak with one voice, and, accordingly, the federal government has long occupied the field.<sup>160</sup> In *Arizona v. United States*, Justice Kennedy explained the key role that federal immigration priorities (including nonenforcement decisions) play in the administration of immigration law, which would be undercut if states could carry out their own immigration policies.<sup>161</sup> For that reason, even where they align with federal rules, state laws criminalizing immigration status or immigration violations are usually preempted.<sup>162</sup>

While these lines of precedent suggest independent (but complimentary) limits on the criminalization of individuals based on immigration *status*, later rulings by the Supreme Court adopted a gloss that allows states significant leeway to punish *conduct*—even where that

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<sup>156</sup> See *Ocen*, *supra* note 118, at 1185; 370 U.S. at 668–76 (Douglas, J., concurring) (tracing the common law history of punishment for disease, culminating in the ratification of the Eighth Amendment).

<sup>157</sup> 370 U.S. at 666–67; *Ocen*, *supra* note 118, at 1182.

<sup>158</sup> See generally *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

<sup>159</sup> *Arizona v. United States*, 567 U.S. 387, 416 (2012).

<sup>160</sup> *Id.* at 409; *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 348 (2005) (“Removal decisions, including the selection of a removed alien’s destination, may implicate [the Nation’s] relations with foreign powers and require consideration of changing political and economic circumstances.”); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[T]he formulation of [immigration] policies is entrusted exclusively to Congress.”); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.”).

<sup>161</sup> *Arizona*, 567 U.S. at 408; see also *Lai*, *supra* note 8, at 884.

<sup>162</sup> *Arizona*, 567 U.S. at 408. Furthermore, unlawful presence (i.e., being physical present in the United States without status or other authorization) is not currently and never has been a crime pursuant to federal law, and well-established precedent makes clear that states cannot criminalize immigrant status where the federal government elected not to. See generally *id.* at 411–14.

conduct is intimately tied to status-based circumstances. In *Powell v. Texas*, the court considered a statute criminalizing public intoxication, which was applied in that case to a chronic alcoholic.<sup>163</sup> Retreating somewhat from *Robinson*, a plurality of the court found that the “appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion.”<sup>164</sup> Accordingly, four justices concluded, “the State of Texas thus has not sought to punish a mere status,” but “rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards.”<sup>165</sup> The statute, therefore, did not violate the Eighth Amendment, according to the court’s controlling opinion.

A different majority of the court in *Powell*—comprised of Justice White’s concurrence and Justice Fortas’s opinion for the dissenters—opined that where the conduct being criminalized inevitably results from the individual’s status, the constitutional analysis would come out the other way.<sup>166</sup> Justice White concurred with the result in *Powell* because the defendant had not proven that his conduct resulted from compulsive addiction. However, Justice White also made clear that if that fact were otherwise, his vote would have come out differently, because “punishing an addict for using drugs convicts for addiction under a different name.”<sup>167</sup> These five opinions, read together, preserve some space to continue to argue that state penal laws are invalid if they nominally punish conduct but actually punish status.

The challenge for advocacy in this area, however, is that the status/conduct distinction announced in *Powell* has persisted allowing states and cities ample leeway to criminalize a variety of conduct that arguably arises only as a consequence of status.<sup>168</sup> In the immigration context, these developments have afforded states the latitude to engage in what Annie Lai terms “proxy criminalization,” a concept that “refers to state and local governments’ use of their police powers to punish undocumented communities for activities linked to their social and economic survival rather than directly based on status.”<sup>169</sup> Through laws

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<sup>163</sup> 392 U.S. 514 (1968).

<sup>164</sup> *Id.* at 532.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 548 (White, J., concurring); *id.* at 554 (Fortas, J., dissenting).

<sup>167</sup> *Id.* at 548 (White, J., concurring).

<sup>168</sup> See generally Ocen, *supra* note 118, at 1190 (discussing recidivist penalties for habitual offenders and criminalization of various activities that unavoidably result from being homeless or unhoused).

<sup>169</sup> Lai, *supra* note 8, at 882.



that on their face appear to be generally applicable and aim only at conduct, states have found ways to punish residents who lack durable immigration status. “Proxy criminalization works by punishing conduct that—whether by operation of law or other circumstances—an identifiable group of individuals must regularly engage in for social or economic survival.”<sup>170</sup>

Nevertheless, a health justice framework may reinvigorate Eighth Amendment challenges premised on status-based criminality. As I have argued, no-license laws criminalize and punish individuals based on conduct that, operationally, turns on and reflects status. Because unlawful presence and unauthorized employment are not criminal offenses, and because states are preempted from criminally punishing migration, proxy criminalization of status through no-license schemes should be closely scrutinized. The health justice framework I explored in Part II shows that the variety and degree of status-based harms flowing from the criminalization of undocumented driving is far more expansive than previous courts and commentators have acknowledged, and further work can continue to expand upon these insights.

## 2. *Proportionality*

The Eighth Amendment bans “cruel and unusual punishments” as well as “excessive fines.”<sup>171</sup> It applies to the states via incorporation through the Fourteenth Amendment, which guarantees “due process of law.”<sup>172</sup> As a general matter, “proportionality” refers to the fit between the severity of a sanction and the gravity of the underlying offense, tempered by any mitigating or exacerbating factors.<sup>173</sup> Thus, the constitutional guarantee does not only prohibit conscience-shocking punishments, as “the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.”<sup>174</sup>

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<sup>170</sup> *Id.* at 892 (e.g., laws that criminalize sleeping in public by homeless persons).

<sup>171</sup> U.S. CONST. amend. VIII.

<sup>172</sup> See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 465 (1947).

<sup>173</sup> Austin Lovegrove, *Proportionality Theory, Personal Mitigation, and the People’s Sense of Justice*, 69 CAMBRIDGE L.J. 321, 330 (2010) (“[T]he severity of the punishment should be proportionate to the seriousness of the offence in question; but it should also be appropriate, having regard to the offender’s personal mitigation.”).

<sup>174</sup> *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

In the case of criminalization of driving without a license, there is an essential incongruity between the inherent moral nature of the conduct at issue and the punishment of that conduct. The basic act of driving—to work, school, the grocery store, the doctor, church, the movies, or *anywhere*—does not violate any social norms or moral codes. Indeed, the health justice framework shows that driving may be morally necessary—to obtain the means of supporting one’s family, getting kids to school, and accessing medical care. So long as the person drives safely and does not cause an accident, the act of driving cannot be said to cause direct harm.<sup>175</sup> It is an act that is made criminal only because state governments condition licensure access upon a status that has no intrinsic relevance to the ability to drive safely and then impose a recidivist penalty scheme for the violations that inevitably follow.

The legal positivist’s response might be that the government’s codes define what conduct is criminal and its subjects remain “vulnerable to coercive sanctions” whenever they transgress those definitions.<sup>176</sup> But when this “positional duty” to obey expresses nothing more than pure power, it rests on exceptionally weak footing.<sup>177</sup> The criminalization of DWOL, especially when applied to a class of otherwise eligible adults whom the state prohibits from access solely due to their status, lacks any of the typical justifications for punishment. The act of driving neither

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<sup>175</sup> As a relevant aside, licensing would help ensure that undocumented drivers are able to avoid accidents. Regarding marginal contribution to general wear and tear on the highway, that is more than offset by tolls and payroll, sales, and property taxes already paid by undocumented residents. Lisa Christensen Gee et al., *Undocumented Immigrants’ State and Local Tax Contributions*, INST. ON TAX’N & ECON. POL’Y 2 (Mar. 2017), <https://itep.sfo2.digitaloceanspaces.com/ITEP-2017-Undocumented-Immigrants-State-and-Local-Contributions.pdf> [<https://perma.cc/H9HK-AC3T>]. Similarly, while a few states have asserted that issuing driver’s licenses to any additional residents (whether legally present or not) implicates sufficient fiscal considerations to establish standing to challenge various immigration initiatives by the federal government, the standing analysis purposefully ignores evidence of the cumulative economic benefits that follow from increasing immigrant access. *See generally* Jennifer L. Koh, *The Rise of the ‘Immigrant-as-Injury’ Theory of State Standing*, 72 AM. U. L. REV. 885, 916–17, 931–32, 936, 938 (2023) (“Texas (DAPA) early on rejected the government’s ‘offset theory,’ which would have enabled the courts to consider the cumulative benefits of immigrant presence.”); Jennifer M. Chacón, *Recounting: An Optimistic Account of Migration*, 110 CALIF. L. REV. 1041, 1042 (2022) (“In analyses of the economic impacts of migration, economists generally view migration as economically beneficial for those who move and for the places to which they move.”).

<sup>176</sup> A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 17 (1981); *see also* Bowers, *supra* note 118, at 975–76.

<sup>177</sup> SIMMONS, *supra* note 176, at 17 (“[W]hile the President of the United States, the manager of the Yankees, and the dishwasher at Joe’s all have positional duties, the Spanish Inquisitors, a leader of the Gestapo, and a member of the Ku Klux Klan all have positional duties in precisely the same sense.”).

results in harm to persons or property nor represents any transgression of moral turpitude. Nor is there ostensible interference with others' quality of life—setting aside the fact that quality of life offenses supply weak justification for serious punishment in any event<sup>178</sup>—except perhaps marginally adding to the amount of traffic on the road. The fact that a great deal of human conduct, producing far more obvious external harms, remains completely untargeted by criminal laws underscores the arbitrary exercise of power represented by the criminalization of undocumented driving.<sup>179</sup>

In sum, any criminal punishment for the basic act of unlicensed motor vehicle operation raises proportionality questions, particularly in light of the connections between mobility and health. Moreover, the penalties imposed on undocumented residents who drive without a license tend to be disproportionately harsh.<sup>180</sup> Generally, “punishment should produce the least devastating and chronic consequences possible.”<sup>181</sup> Punishments that produce severe and/or lengthy consequences, rather than temporally limited effects, are on particularly weak footing.<sup>182</sup> A deeply held tenet of our legal traditions is that it is far more problematic to overpunish than to allow the occasional underpunishment windfall.<sup>183</sup>

No-license penalty schemes also do not allow for any consideration of individual culpability or mitigation. To the extent there is any “badness” to discern in a particular act of DWOL, actual moral culpability would have to turn on consideration of individual circumstances.<sup>184</sup> For example, drivers who lost their licenses due to prior serious driving infractions or even those who merely failed to pass the road

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<sup>178</sup> BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6 (2001) (“[O]rder-maintenance crackdowns are not an alternative but rather an addition to the severe penalties that dominate criminal justice. The broken windows theory . . . [has] become not a substitute but a supplement—a supplement that feeds into and itself produces a dramatic increase in detentions, arrests, and criminal records.”); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere”*, 94 CALIF. L. REV. 617, 631 (2006) (“Policing that targets those . . . crimes that disproportionately affect urban minority neighborhoods devastates the communities it is supposed to protect.”).

<sup>179</sup> Cf. Bowers, *supra* note 118, at 977 & n.83 (explaining that “only . . . some forms of conduct that potentially produce disorder or diminish qualities of life are conventional subjects of criminal-legal punishment” and providing examples that are not, such as racial discrimination, sexual harassment, insider trading, insurance misrepresentation, and police corruption).

<sup>180</sup> See *supra* Part I (discussing state codes that impose mandatory incarceration and fines).

<sup>181</sup> Terry Skolnik, *Rethinking Homeless People’s Punishments*, 22 NEW CRIM. L. REV. 73, 87 (2019).

<sup>182</sup> See JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 64 (Meir Dan-Cohen ed., 2012).

<sup>183</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*358; Bowers, *supra* note 118, at 966.

<sup>184</sup> Cf. *Lockett v. Ohio*, 438 US 586, 608 (1978) (holding that the Constitution requires consideration of mitigating evidence in death penalty cases).

safety test, are more morally culpable violators of driving laws than those who lack a license for wholly unrelated reasons, such as immigration status.<sup>185</sup> The law requires some showing of wrongdoing—i.e., unlicensed operation of a motor vehicle—but not a blameworthy enough level of activity to justify the severity of penalties imposed for failure to obtain a license where the state categorically will not issue one.<sup>186</sup> As Terry Skolnik has argued in the context of punishments for activities associated with homelessness, “By not specifying a more demanding culpability standard, the severity of punishment may misrepresent or inflate how blameworthy the offender’s conduct truly was.”<sup>187</sup>

The lack of fit between the inherent nature of the underlying offense and the severity of the sanctions—particularly since there is no opportunity for mitigating circumstances to provide variance from the harshness of the law—is even more clear when one considers both the general lack of parity across driving offenses in the code and then the imposition of recidivist premiums for DWOL, both of which are more clearly revealed to be raw tools of subjugation when viewed through a health justice lens.

No-license schemes tend to lack parity. The benchmark of parity is that within a particular criminal code, the stringency of punishments should be similar across morally comparable offenses.<sup>188</sup> The corollary is also revealing: where some code offenses reflect a lesser level of reprobation than others, those offenses should be punished less severely.<sup>189</sup> Many states’ no-license schemes violate this norm, in that the relative severity—both across driving offenses and between DWOL and other low-level offenses—does not comport with logical parity.

Recall Georgia’s stringent and escalating penalty scheme for unlicensed driving offenses, discussed in Part I.<sup>190</sup> Other driving offenses

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<sup>185</sup> This claim also holds for persons whose licenses are suspended for factors like unrelated debt. *See generally* Crozier & Garrett, *supra* note 5.

<sup>186</sup> Cf. U.S. SENT’G COMM’N, *Policy Views About Mandatory Minimum Penalties*, in 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 90 (2011) (“But when the offenders subject to a mandatory minimum are *not* similarly situated, the elimination of disparity creates a form of unfairness that often is even more troubling—*excessive uniformity*.”).

<sup>187</sup> Skolnik, *supra* note 181, at 86.

<sup>188</sup> *See generally* ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (1993).

<sup>189</sup> Skolnik, *supra* note 181, at 84.

<sup>190</sup> *See, e.g.*, GA. CODE ANN. § 40–5121 (2023). The first offense triggers fine of \$500 to \$1,000 and confinement of 2 to 365 days; second or third offenses within five years requires confinement of 10 to 365 days and a fine of \$1,000 to \$2,000; and fourth or subsequent offense (within five years)

in Georgia, however, including those that are more obviously destructive or dangerous than simply DWOL, are punished equally or even more leniently. The penalty scheme for driving under the influence (DUI), for example, is similar to that of DWOL, only some DUI violations are more leniently punished.<sup>191</sup> Most would consider DUI to be a morally blameworthy and inherently dangerous activity, in contrast to DWOL.

Yet, further comparisons also demonstrate how unlicensed driving punishments violate the proportionality parity norm. Reckless driving violations—no matter how many one racks up—are punishable by a fine of up to \$1,000 or confinement for up to twelve months.<sup>192</sup> A hit-and-run, which involves injury to another person or damage to property, is punished in a relatively less severe manner than DWOL, even though DWOL does not require an injury.<sup>193</sup> Hit-and-run only reaches the felony level if the accident is the proximate cause of death or serious injury, in which case, the punishment is confinement for one to five years.<sup>194</sup> Thus, even the maximum penalty for hit-and-run is less severe than the penalty for a fourth or subsequent offense of DWOL, as it does not provide for the possibility of a fine in addition to incarceration.

Additionally, Georgia's statutes include non-driving-related offenses for which injury to another person is an element, but which nevertheless provide for less severe punishments than unlicensed driving. Battery, for example, requires "visible bodily harm," but is punished more leniently than DWOL.<sup>195</sup> Moreover, the battery statute provides that any sentence imposed may be served during non-working hours.<sup>196</sup> The fact that DWOL offenses do not receive a similar sentencing accommodation is highly ironic in light of the fact that such convictions often result directly from the need for undocumented residents to drive in order to obtain or maintain employment. Even cruelty to children in the third degree, which

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is treated as a felony, requiring mandatory confinement for one to five years, and a fine of between \$2,500 and \$5,000. *Id.*

<sup>191</sup> GA. CODE ANN. § 40–6–391 (2023). DUI does not become an aggravated misdemeanor until the third offense, and a felony offense of DUI carries the same confinement range but the possibility of a lower fine than DWOL, *id.* Note, however, that in the DUI context, subsequent offenses ratchet up the penalties if committed within ten years. *Id.*

<sup>192</sup> GA. CODE ANN. § 40–6–390 (2023).

<sup>193</sup> A first such offense is punishable by confinement up to twelve months or a fine of \$300 to \$1000. A second offense triggers the same penalty except that the fine, if imposed instead of confinement, must be at least \$600, and all subsequent offenses are also the same consequence but with a \$1000 fine. GA. CODE ANN. § 40–6–270 (2023).

<sup>194</sup> *Id.*

<sup>195</sup> GA. CODE ANN. § 16–5–23.1 (2023).

<sup>196</sup> *Id.*

entails allowing a child to witness the commission of a felony, is less severely punished than DWOL in Georgia.<sup>197</sup> And many other crimes that implicate more socially harmful behavior than DWOL, such as stalking, simple assault, and sexual battery, are punished equally or less severely, at least in some states.

In short, proportionality alarm bells should start to ring when a state's driving offenses trigger a similar maximum punishment for a first offense, despite disparate levels of moral culpability associated with each offense. Likewise, when repeated violations for DWOL are punished more harshly than conduct (both driving and non-driving offenses) that is unambiguously more socially harmful than DWOL, the lack of parity calls out for a more searching scrutiny. Put more directly, the escalating penalty enhancements that attach to multiple violations of these no-license schemes foreground the disproportionality problems already discussed. The usual justifications for ratcheting up punishment for repeat offenders are deterrence, and, in particular, retribution.<sup>198</sup> To be sure, the notion that recidivists should be treated more harshly than first-time offenders is deeply coded in the criminal justice systems of every jurisdiction.<sup>199</sup> Recidivist premiums are accepted as appropriate legal measures to coerce the noncompliant into obedience, or, when actors fail to "live up to the court's demands," to punish and incapacitate.<sup>200</sup>

These prevention and retributivism rationales find little purchase in the context of state no-license rules for undocumented residents. In general, the conditions for any criminal provision to actually deter are rarely met.<sup>201</sup> Instead, "people often use their own moral intuitions to guess at legal rules," and they also "assign exponentially greater weight to the likelihood of getting caught than they do to the severity of potential

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<sup>197</sup> Further, in order to be charged with felony cruelty to children in the third degree, it must be the person's third such offense. GA. CODE ANN. § 16-5-70 (2023).

<sup>198</sup> See generally Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209, 1215-39 (2021).

<sup>199</sup> See generally NEAL B. KAUDER & BRIAN J. OSTROM, NATIONAL CENTER FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008); U.S. SENT'G COMM'N, GUIDELINES MANUAL 392 (2016) ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.").

<sup>200</sup> Bowers, *supra* note 118, at 989.

<sup>201</sup> Lewis, *supra* note 198, at 1223 ("In order for a rule or penalty to have a deterrent effect, it must be well known to the public; it must carry a meaningful penalty, the perceived threat of which must exceed the perceived benefit of breaking the law; the chance of being caught must be seen as non-trivial; and those potentially subject to it must be willing and able to bring that information to bear on their decision-making.").

penalties in deciding whether to commit a crime.”<sup>202</sup> In the case of DWOL, few would claim that the conduct violates their moral compass. Similarly, because the act of driving does not by itself raise any level of suspicion—and because full enforcement against drivers who commit any number of infractions is completely infeasible from a law-enforcement resource perspective—anyone who drives without a license may reasonably assume that on any particular day, he or she will not be caught. Thus, the deterrence rationale holds very little water in this context.

More pointedly, there is simply no way for undocumented resident drivers to live up to the law’s demands. Driving, to at least some significant extent, is an essential, life-sustaining activity for immigrants and their families.<sup>203</sup> With or without a license, life requires that some money be made, that food be acquired, and that children get to and from school. When a family member is sick or injured, medical care must be obtained. While residents with status can avoid recidivist penalties simply by obtaining a valid license, the undocumented do not have this compliance measure available to them. This remains true after a first violation, a second violation, and a third violation, even though each carries escalating punishments that eventually reach felony levels.

A health justice approach allows litigants to argue for a fresh look at the use of escalating criminal penalties—such as incarceration and hefty fines—to punish licensing transgressions that individuals literally cannot avoid without seriously jeopardizing their health or that of their families. State laws that obstruct a critical gateway to health may eventually be found to amount to “cruel and unusual” punishment as prohibited by the Constitution. In at least some states, the disparity between a driving infraction and the resulting penal sanction can be egregious—certainly this is the case in Georgia. For the reasons described above, criminalization of undocumented driving exerts more severe, long-term, health-altering consequences upon immigrants and their family members than courts have previously considered. The disproportionality concerns, even independent of the status-based nature of these schemes, call for a close reexamination of harms caused by the criminalization of undocumented driving.

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<sup>202</sup> *Id.* at 1224–25.

<sup>203</sup> See Passel & Cohn, *supra* note 145 (describing statistics on how the majority of undocumented persons in the U.S. are very long-term residents).

### 3. Equal Protection and Due Process Rights

María Pabón López has argued that “to the extent these driver’s license laws classify noncitizens as unequal, at least in a symbolic way, the laws create a class of outsiders in violation of the equality principle at the core of the Equal Protection Clause.”<sup>204</sup> Equal protection concerns arise when legislatures or law enforcement officers target residents for punishment based on alienage, national origin, or race. When noncitizens are prosecuted for license violations following race-based traffic stops or similarly questionable policing practices, the justifiability of their convictions is further undermined.<sup>205</sup> Similarly, due process concerns are implicated where licensing laws are intended to (or recklessly allowed to) interfere with fundamental rights, such as the right to work or the parental right to ensure adequate educational opportunities and healthcare for their children.<sup>206</sup>

In *Plyler v. Doe*,<sup>207</sup> the Supreme Court held that Texas violated the equal protection clause of the Constitution when it denied undocumented children access to public education.<sup>208</sup> The court found that the question of whether Texas violated equal protection when it discriminated on the basis of immigration status was properly answered, in part, by considering the importance of education to the impacted children.<sup>209</sup> Requiring the state to demonstrate a substantial state interest in treating these children differently, the court found that this burden was not met by the state’s desire to punish or deter undocumented persons from residing in the state and to save on educational resources going to undocumented children.<sup>210</sup> The court expressed concern that denial of public education would lead to “a permanent caste of undocumented resident aliens,” exploited as a source of cheap labor but deprived of basic necessities like education.<sup>211</sup>

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<sup>204</sup> López, *supra* note 9, at 119–20.

<sup>205</sup> Cade, *supra* note 48, at 707 (“Suspected immigrants may thus be particularly likely to have been arrested for illegitimate reasons.”).

<sup>206</sup> See generally *id.*

<sup>207</sup> 457 U.S. 202 (1982).

<sup>208</sup> *Id.* at 230.

<sup>209</sup> *Id.* at 216–17 (“The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’”).

<sup>210</sup> *Id.* at 220.

<sup>211</sup> *Id.* at 218–19.



A health justice approach widens the frame for legal challenges to no-license laws, allowing for the rationale used in *Plyler* to support an equal protection challenge. For example, children—both US citizens and those without status—may be able to articulate a right to parental access to driver’s licenses on the same terms as other families. This access, the argument would go, is necessary for those children to access public education, healthcare, extracurricular opportunities, and so forth, as well as to avoid chronic stressors related to the criminalization of their parents for engaging in everyday activities such as driving.<sup>212</sup> The above analysis of driving (and thus driver’s licenses) as a gateway to social determinants of health bolsters the persuasiveness of this framing.

The *Plyler*-based argument rests on the understanding that once a state offers a benefit, it must make it available on an equal basis, or at least in a nondiscriminatory fashion, especially where the health and education of children is concerned. States are discriminating between children with undocumented resident parents and those whose parents meet the status criteria to be eligible for driver’s licenses, which in turn deprives the former group of access to life-impacting social determinants of health. And it bears repeating: the group of children who experience discriminatory treatment in this fashion includes not only the undocumented, but also US citizens and those who are legally present.

Undocumented parents denied access to driver’s licenses are in a double bind. They are subjected to punishment (and possible collateral penalties like detention and deportation) if they use their cars to help keep their kids healthy through access to school, medical care, exercise, and more. But they are also blamed—and potentially punished through truancy and parental neglect laws—if they don’t help their children engage in these things.<sup>213</sup>

Ultimately, the court in *Plyler* resolved the question of whether the state met its burden in justifying disparate treatment of undocumented children by considering the substantive due process concerns that result

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<sup>212</sup> Lai, *supra* note 8, at 905. Moreover, “[a]s for equal protection norms, the lack of articulable state interest can be circumstantial evidence of invidious intent and invalidate a law. With regard to driver’s licenses, there can be no serious public safety rationale for not allowing immigrants to learn the driving rules and be tested on their driving ability.” *Id.*

<sup>213</sup> See, e.g., *In the Interest of B.B.*, 599 S.E.2d 304, 306 (Ga. Ct. App. 2004) (holding that “a child is deprived if he or she ‘is without proper parental care or control, subsistence, [or] education as required by law, or [lacks] other care or control necessary for the child’s physical, mental, or emotional health or morals” and explaining that the law “focuses upon the needs of the child regardless of parental fault” because “it is the child’s welfare and not who is responsible for the conditions which amount to deprivation that is the issue”); GA. CODE ANN. § 15-11-2(8)(A).

when children in this country grow up deprived of an education.<sup>214</sup> The reach of the equal protection clause, informed by the substantive due process right, led the court to invalidate the law.<sup>215</sup> The result in *Plyler* was predicated on Texas's use of status to deny access to an important public educational benefit. The children of parents who are denied licenses because of status, and then targeted and criminalized for engaging in an everyday act of necessity, experience both stigma and denial of access to educational opportunities and other social determinants of health that in many cases may have lifelong impacts.<sup>216</sup> This set of concerns, properly considered, provides another basis for challenging no-license laws through various constitutional lenses.

State criminalization of undocumented driving reduces access to an everyday activity that most Americans consider to be a basic freedom<sup>217</sup> with powerful connections to economic survival and health.<sup>218</sup> When states apply severe penalties grossly out of proportion to the gravity of the underlying conduct,<sup>219</sup> and especially when they do so on the basis of status or race,<sup>220</sup> no-license laws implicate multiple constitutional guarantees: due process, equal protection, and freedom from cruel and unusual punishment. Alone, each of these constitutional claims might not carry the day, but when the due process and equal protection concerns are brought in to inform the Eighth Amendment analysis, they reveal the fuller scope of the government's oppressive exercise of power against a marginalized group.<sup>221</sup> The underlying history of state control over who

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<sup>214</sup> *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (noting that “the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status” is one that “carries only minimal force in the circumstances of these cases”); *id.* at 223–24 (“By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.”).

<sup>215</sup> *Id.* at 223–24 (applying intermediate scrutiny and finding that the state could not meet its burden).

<sup>216</sup> *See id.* at 223; *see also supra* text accompanying notes 103–09.

<sup>217</sup> EPP, *supra* note 89.

<sup>218</sup> *See Lazos supra* note 102, at 805.

<sup>219</sup> *See supra* Part III.B.2; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 465 (1947). *See generally Robinson v. California*, 370 U.S. 660, 666 (1962).

<sup>220</sup> *See supra* text accompanying notes 118–25.

<sup>221</sup> *Cf. Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause . . . may converge in the identification and definition of the right.”).

has access to the roads—and, specifically, the history of denying this basic mobility to disfavored groups on the basis of race and/or status<sup>222</sup>—should not be ignored, justifying more searching judicial vigilance in this context.

#### IV. CONCLUSION

In this symposium Article, I reexamined the criminalization of undocumented driving through a health justice framework. Drivers who lack lawful status, as well as their children (including those who are US citizens), experience health disparities caused by denials of driver's licenses, criminalization of DWOL, and the negative social determinants of health that accompany lack of access to other means of reliable and effective transportation. Lawmakers and law enforcement officials will continue to underappreciate the high stakes of no-license regimes until the frame is widened enough to confront the community health consequences. Strategically reframing the driver's license issue through a health justice lens may yield benefits in light of ongoing political hostility toward immigrants. Viewed as a public health issue, the weaponization of no-license laws can be addressed by new legal interventions, broader coalitions, and policy reforms.

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<sup>222</sup> See Ocen, *supra* note 118, at 1194 (discussing the Black Codes).