

IMMIGRATION LAW AS A SOCIAL DETERMINANT OF HEALTH

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ABSTRACT

Public health research demonstrates that population health is shaped in large measure by numerous social factors, widely known as the social determinants of health. This Essay argues that immigration law acts as a social determinant that affects the health of both noncitizens and citizens. Looking at several of the Trump administration's regulatory initiatives, this Essay explores three different pathways through which immigration law may influence population health: creating fear and trauma; restricting access to critical social goods, including health care, food, and housing; and influencing social understandings of health. The Essay concludes by examining the legal mobilization that has arisen in response to the initiatives discussed and arguing that legal mobilization may serve as an additional pathway through which immigration law can affect population health for good or ill.

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INTRODUCTION

Over the last several decades, public health research has demonstrated that population health is shaped in large measure by a host of social factors, widely known as the social determinants of health (SDOH). According to the World Health Organization, the SDOH are the “conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life.”¹ These social factors include “socioeconomic status, education, neighborhood and physical environment, employment, and social support networks, as well as access to health care.”² Racism is another widely recognized social determinant that works through multiple pathways to create health inequities.³

Immigration status acts in a similar fashion. A 2018 report from the Roundtable on the Promotion of Health Equity explained, “Like gender or race, immigration status represents another form of everyday inequality that may be pervasive and inescapable.”⁴ Law creates much of this inequality.

In this Essay, I sketch some of the direct and indirect ways that immigration law affects the health of immigrants, their families, and the broader community. Focusing on three different sets of recent initiatives of the Trump administration, I argue that these measures harm health by creating fear and trauma and impeding access to critical social goods, including health care, which can reduce health inequities.⁵ The measures

1. *Social Determinants of Health*, WORLD HEALTH ORG., http://www.who.int/social_determinants/en/ [<https://perma.cc/7AEA-C7CW>] (last visited May 1, 2020). The research on social determinants is vast. *See, e.g.*, WORLD HEALTH ORG. & COMM’N ON SOC. DETERMINANTS OF HEALTH, CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINANTS OF HEALTH (2008), http://apps.who.int/iris/bitstream/handle/10665/43943/9789241563703_eng.pdf;jsessionid=3D0C2371D178CB46489FB7A2395CECEA?sequence=1 [<https://perma.cc/S4DU-99L3>]; Paula A. Braveman et al., *Broadening the Focus: The Need to Address the Social Determinants of Health*, 40 AM. J. PREVENTIVE MED. S4 (2011); Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649 (2011). While this Essay was in publication, the COVID-19 outbreak reached the United States, further exposing the importance of the SDOH. *E.g.*, Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies To Combat COVID-19: Protecting Vulnerable Communities During a Pandemic*, HEALTH AFF. BLOG (Mar. 19, 2020), <http://www.healthaffairs.org/doi/10.1377/hblog20200319.757883/full/> [<https://perma.cc/78TJ-F9T5>]; *see also infra* note 5.

2. SAMANTHA ARTIGA & ELIZABETH HINTON, KAISER FAMILY FOUND., BEYOND HEALTH CARE: THE ROLE OF SOCIAL DETERMINANTS IN PROMOTING HEALTH AND HEALTH EQUITY 1 (2018), <http://files.kff.org/attachment/issue-brief-beyond-health-care> [<https://perma.cc/WCK6-7JD7>].

3. Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, PLOS ONE, Sept. 23, 2015, at 1, 2 (containing a meta-analysis review of the literature on race and health).

4. STEVE OLSON & KAREN M. ANDERSON, NAT’L ACADS. OF SCIS., ENG’G & MED., IMMIGRATION AS A SOCIAL DETERMINANT OF HEALTH: PROCEEDINGS OF A WORKSHOP 21 (2018). For a discussion of the relationship between immigration policies and racism, see Eli J. Kay-Oliphant, Comment, *Considering Race in American Immigration Jurisprudence*, 54 EMORY L.J. 681, 699–708 (2005).

5. *See infra* Parts II.A and II.B. This Essay was in publication before the COVID-19 pandemic spread widely within the United States. As a result, the paper does not discuss the many ways in which the immigration laws discussed below may exacerbate the pandemic’s impact. For a discussion of these issues, see Wendy E. Parmet, *Trump’s Immigration Policies Will Make the Coronavirus Pandemic Worse*, STAT (Mar. 4, 2020), <http://www.statnews.com/2020/03/04/immigration-policies-weaken-ability-to-fight-coronavirus/> [<https://perma.cc/8WYP-KKN2>]. The Essay also does not discuss the litigation that has occurred in response to the pandemic’s toll in immigration detention facilities. *See, e.g.*, *Xochihua-Jaimes v. Barr*, No. 18-71460, 2020

also jeopardize health by offering the powerful message that individuals are responsible for their own ill health.⁶ Yet while these measures seem poised to undermine health and exacerbate health disparities, the legal mobilization that has taken place in response offers the potential of a very different outcome: one in which law provides a vehicle for protecting health by promoting health justice.⁷ Whether that potential is realized or whether legal mobilization reinforces immigration law's harmful impact on health remains to be determined.

Section I explains why immigration law should be viewed as a social determinant of health and outlines some of the pathways through which it may influence health. Section II introduces several Trump administration initiatives, including family separation and detention, the public charge rules, the President's health insurance proclamation, and the abolition of medical deferred action. In each case, I focus on a different pathway through which the initiatives may harm the health of immigrants and the broader community. Section III discusses the legal mobilization that has developed in response to these initiatives, arguing that it offers yet another pathway through which immigration law may affect health, for good or ill.

I. IMMIGRATION LAW AS A SOCIAL DETERMINANT

Immigrants to the United States tend to live longer than native-born citizens, a phenomenon that is widely known as the healthy immigrant effect.⁸ This advantage, however, dissipates the longer immigrants live within the United States.⁹ Traditionally, this convergence has been attributed to the process of acculturation, the theory being that as immigrants settle into their lives in the United States, they begin to adopt many of the unhealthy habits of the native-born population.¹⁰ More recently, researchers have focused on the myriad structural factors, including laws, which may adversely affect the health of migrants once they are in this country. For example, in a 2015 review article, Heide Castañeda and colleagues called attention to the ways through which a wide range of social structural factors may influence the health of immigrants, as well as nonimmigrant members of their families.¹¹ In a more recent paper, Steven Wallace and colleagues explained that laws and policies can "create differential rights and opportunities based on an immigrant's legal status or citizenship. . . . They can work by shaping the broad social and economic conditions that immigrants are most exposed to, conditions that are generally recognized as social determinants of health."¹²

WL 1429877 (9th Cir. Mar. 24, 2020) (mem.); *Flores v. Barr*, No. CV 2:85-04544-DMG-AGR, 2020 WL 2128663 (C.D. Cal. Mar. 28, 2020).

6. *See infra* Part II.C.

7. *See infra* Section III.

8. Kyriakos S. Markides & Sunshine Rote, *The Healthy Immigrant Effect and Aging in the United States and Other Western Countries*, 59 GERONTOLOGIST 205, 206–07 (2018).

9. *See id.* at 211.

10. *Id.*

11. Heide Castañeda et al., *Immigration as a Social Determinant of Health*, 36 ANN. REV. PUB. HEALTH 375, 377–78 (2015); *see also* Steven P. Wallace et al., *A Social Determinants Framework Identifying State-Level Immigrant Policies and Their Influence on Health*, 7 SSM-POPULATION HEALTH 1, 7 (2019).

12. Wallace et al., *supra* note 11, at 2 (citation omitted).

To date, much of the research on immigration law's impact on the health of immigrants and the broader population has focused on the barriers that immigration law creates to health care, which is itself a well-recognized SDOH.¹³ As discussed below, these barriers to health care are formidable and likely help to explain why noncitizens of every immigration status are less likely than citizens to have health insurance.

Immigration law's impact on health, however, is almost certainly far more diffuse. Professor Scott Burris has explained that law "helps structure and perpetuate the social conditions that we describe as 'social determinants,' and . . . acts as a mechanism or mediator through which social structures are transformed into levels and distributions of health."¹⁴ In that sense, law is one of the "[c]auses of the [c]auses."¹⁵ As such, it can affect health both through formal mechanisms, "law on the books," as well as through mechanisms of enforcement, "law on the streets."¹⁶ For example, in a 2017 perspective in the *American Journal of Public Health*, Sirry Alang and colleagues explored the different pathways through which police brutality, an exercise of legal enforcement, may be "linked to excess morbidity among Blacks at both the individual and the community level."¹⁷ Other researchers have discussed the role of racially disparate policing and mass incarceration in creating health inequities.¹⁸

Law may also affect health through the assumptions it embodies and the messages it delivers. For example, in his study of the politics and policymaking of gun regulation following the U.S. Supreme Court's decision in *District of Columbia v. Heller*,¹⁹ Patrick J. Charles found that *Heller* "has altered the manner in which society, guns, and the Second Amendment coexist. The Supreme Court's opinion now serves as a moral affirmation or multiplier to gun rights advocates."²⁰ Through this process of affirmation (or conversely delegitimation), legal rules can alter social norms and political outcomes, which in turn can affect other SDOH.

II. THREE SETS OF INITIATIVES

Immigration law may similarly shape how we understand the health of individuals and communities as well as our social obligations with respect to the health of migrants. It may also affect health more directly, by creating fear and trauma and

13. ARTIGA & HINTON, *supra* note 2. For a discussion of the barriers to access immigrants face, see *Health Coverage of Immigrants*, KAISER FAM. FOUND. (Mar. 18, 2020), <http://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/> [<https://perma.cc/6G2X-QAQF>].

14. Burris, *supra* note 1, at 1655–56.

15. See Paula Braveman & Laura Gottlieb, *The Social Determinants of Health: It's Time To Consider the Causes of the Causes*, 129 PUB. HEALTH REP. 19, 19, 27–28 (Supp. 2 2014) (discussing the role of socioeconomic and other root causes of health disparities).

16. Burris, *supra* note 1, at 1655–57.

17. Sirry Alang et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 AM. J. PUB. HEALTH 662, 662 (2017).

18. See, e.g., Zinzi D. Bailey et al., *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 LANCET 1453, 1458 (2017).

19. 554 U.S. 570 (2008).

20. Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought*, 23 WM. & MARY BILL RTS. J. 1143, 1170 (2015). For a further discussion of how law constitutes meaning, see *infra* text accompanying notes 90–96.

impeding immigrants' access to important social benefits, including health care. This Section explores these different paths through the prism of three sets of Trump administration initiatives. In doing so, I do not attempt to provide either a comprehensive review of the literature or a conclusive assessment of the impact of each initiative on health. I also do not consider all of the recent measures the Trump administration has undertaken. Rather, I discuss only a few measures including family separation and detention,²¹ the public charge rules,²² the attempted ban on medical deportation, and the President's proclamation on health insurance²³ in an effort to illustrate some of the obvious and not-so-obvious ways that immigration law may affect health.²⁴

A. Family Separation and Detention: The Brutality of Immigration Enforcement

Immigration law determines an individual's entitlement to be in this country and legal status once within it. No doubt, over the course of history, U.S. immigration laws have benefitted the health of millions of immigrants who have been admitted to the country by granting them refuge from violence, persecution, and poverty. But by denying access to many others, and by enforcing that denial through harsh and sometimes brutal policies, immigration laws may also have jeopardized the health of migrants, their families, and the broader community. The Trump administration's family separation and detention policies illustrate how such harsh enforcement of immigration law may threaten health.

Shortly after he took office, President Trump signed an executive order calling for the detention of "individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law," as well as expedited deportation of individuals "whose legal claims to remain in the United States have been lawfully rejected."²⁵ In accordance with that policy, in March 2017, the Trump administration began discussing a proposal to separate children from their parents at the border to deter migration, and in July 2017, it began piloting that approach.²⁶ In the spring of 2018, Secretary of Homeland Security Kirstjen Nielsen approved the so-called zero-tolerance policy, under which all individuals who cross the border without authorization would be referred for prosecution and separated from their children.²⁷ Over the next few weeks, the press began to report on the widespread separation of families and detention of children, some only infants.²⁸ After pictures and videos of

21. See *infra* Part II.A.

22. See *infra* Part II.B.

23. See *infra* Part II.C.

24. See *infra* Part II.D.

25. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

26. STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, 116TH CONG., REP. ON CHILD SEPARATION BY THE TRUMP ADMINISTRATION 10 (Comm. Print 2019).

27. *Id.* at 11.

28. See, e.g., Sasha Ingber, *1-Year-Old Shows Up in Immigration Court*, NPR (July 8, 2018, 5:22 PM), <http://www.npr.org/2018/07/08/627082032/1-year-old-shows-up-in-immigration-court> [<https://perma.cc/5DLJ-VMJP>]; Miriam Jordan, *How and Why 'Zero Tolerance' Is Splitting Up Immigrant Families*, N.Y. TIMES (May 12, 2018), <http://www.nytimes.com/2018/05/12/us/immigrants-family-separation.html> [<https://perma.cc/W7YD-MEEA>]; Miriam Jordan & Ron Nixon, *Trump Administration Threatens Jail and Separating*

crying children, some of them in cage-like conditions,²⁹ were widely disseminated by the media, the President signed a new executive order in June 2018 directing the Department of Homeland Security (DHS) to stop family separation except when the parent represented a risk to the child.³⁰ A few days later, Judge Dana Sabraw of the Southern District of California issued a preliminary injunction requiring immigration authorities to reunite most separated families within thirty days.³¹ Despite the executive and court orders, in July 2018 over two thousand five hundred children still remained separated from their parents.³² In July 2019, the American Civil Liberties Union told the court that at least 911 family separations had taken place since the supposed end of the policy.³³

In addition to separating families, the Trump administration has pursued a policy of prolonged detention for families with children. In the 1997 *Flores* Settlement,³⁴ the federal government agreed that immigrant minors must be released expeditiously to a parent, guardian, relative, or licensed program unless detention was necessary to secure timely appearance before an immigration court or for the protection of the child's safety.³⁵ In addition, the settlement obligated the federal government to comply with state child welfare laws and provide detained minors with food, clothing, medical attention, and an education.³⁶ In August 2019, DHS issued a new rule that modified this settlement agreement by reducing the categories of people to whom children could be released, permitting indefinite detention in some cases, and allowing detention in unlicensed facilities.³⁷ In September 2019, the federal court overseeing the

Children from Parents for Those Who Illegally Cross Southwest Border, N.Y. TIMES (May 7, 2018), <http://www.nytimes.com/2018/05/07/us/politics/homeland-security-prosecute-undocumented-immigrants.html> [https://perma.cc/VS44-5G3K]; Nick Miroff & Sari Horwitz, *Trump Didn't Invent Family Separation, but His Administration Was Willing To Try It*, WASH. POST (June 19, 2018, 8:16 PM), http://www.washingtonpost.com/world/national-security/trump-didnt-invent-family-separation-but-his-administration-was-eager-to-try-it/2018/06/19/f32f11f6-73d6-11e8-b4b7-308400242c2e_story.html [https://perma.cc/8XXZ-PZEX]; Salvador Rizzo, *The Facts About Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), <http://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?arc404=true> [https://perma.cc/V635-ETQJ].

29. *E.g.*, Jordan, *supra* note 28.

30. *See* Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018).

31. *Ms. L. v. U.S. Immigration and Customs Enf't*, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018).

32. *Family Separation Under the Trump Administration – A Timeline*, S. POVERTY L. CTR. (Sept. 24, 2019), <http://www.splcenter.org/news/2019/09/24/family-separation-under-trump-administration-timeline> [https://perma.cc/XLR5-WRD9].

33. *Id.*

34. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

35. *Id.* ¶¶ 12, 14; *see also Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017) (discussing the 1997 settlement).

36. Stipulated Settlement Agreement, *supra* note 34, at exhibit 1; *see also Flores*, 862 F.3d at 866 (describing the settlement).

37. *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44,392, 44,531–35 (Aug. 23, 2019) (codified at 45 C.F.R. pt. 410).

implementation of the settlement blocked the new rule as inconsistent with the settlement's terms.³⁸

Although we do not yet know the health impact of these policies, they have undoubtedly been adverse to health (and would likely have been far more severe had the courts not intervened).³⁹ According to press reports, at least seven children have died in immigration custody since 2017.⁴⁰ Many more have been traumatized and have not had their mental or physical health-care needs met.⁴¹ A September 2019 report by the Office of Inspector General of the Department of Health and Human Services (OIG), which houses children after they have been released from DHS custody, stated that “[i]ntense trauma was common among children who entered care provider facilities.”⁴² While many children had experienced trauma in their home countries and during their journeys to the United States, OIG found that children faced additional trauma in the United States, especially due to family separation.⁴³ OIG further reported that clinicians and care providers had expressed concerns about their ability to address the “unique experiences” of separated children and that longer stays resulted in “deteriorating mental health for some children.”⁴⁴ This deterioration should not have been surprising. In 2018 the American Academy of Pediatrics issued a warning:

Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder. Conditions in U.S. detention facilities, which include forcing children to sleep on cement floors, open toilets, constant light exposure, insufficient food and water, no bathing facilities, and extremely cold temperatures, are traumatizing for children.⁴⁵

Detained children are not the only ones who are experiencing trauma due to the brutality of immigration enforcement. For example, one recent study found that fear and worry about the consequences of immigration policy were associated with higher levels of anxiety, sleep problems, and blood pressure changes among U.S.-born (and

38. See *Flores v. Barr*, 407 F. Supp. 3d 909, 914 (C.D. Cal. 2019) (denying defendants' motion to terminate the settlement agreement and granting plaintiffs' motion to enforce the settlement).

39. See *infra* text accompanying notes 108–110.

40. Jess Morales Rocketto, *Opinion: Seven Children Have Died in Immigration Custody. Remember Their Names.*, BUZZFEED NEWS (Sept. 30, 2019, 4:54 PM), <http://www.buzzfeednews.com/article/jessmoralesrocketto/remember-their-names> [https://perma.cc/69NC-3E2K]. Several of these children died from the flu, but the Trump administration stated that it would not provide detainees with flu vaccines. *Id.*; see also Robert Moore & Susan Schmidt, *Inside the Cell Where a Sick 16-Year-Old Boy Died in Border Patrol Care*, PROPUBLICA (Dec. 5, 2019, 1:30 PM), <http://www.propublica.org/article/inside-the-cell-where-a-sick-16-year-old-boy-died-in-border-patrol-care> [https://perma.cc/663B-T6SW].

41. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF INSPECTOR GEN., OEI-09-18-00431, CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 9 (2019).

42. *Id.*

43. *Id.*

44. *Id.* at 11–13.

45. Colleen Kraft, *AAP Statement Opposing the Border Security and Immigration Reform Act*, AM. ACAD. PEDIATRICS (June 15, 2018), <http://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPStatementOpposingBorderSecurityandImmigrationReformAct.aspx> [https://perma.cc/QK9Y-ARK6].

therefore citizen) adolescent children of immigrants in California.⁴⁶ Studies have also shown that immigration enforcement measures are associated with adverse birth outcomes among Latina women in the United States.⁴⁷ The brutality of enforcement may be designed to deter migration, but it is also threatening health.

B. The Public Charge Rules: Erecting Barriers to Social Determinants

Long before the Trump administration took office, immigration law limited noncitizens' access to a range of goods related to the SDOH, including employment, food, income support, housing, and health care. For example, under the Immigration Reform and Control Act of 1986, employers cannot knowingly employ undocumented workers, limiting employment opportunities for many noncitizens.⁴⁸ The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) bars undocumented immigrants as well as many lawfully present noncitizens from enrolling in Medicaid, the Children's Health Insurance Program (CHIP), the Supplemental Nutrition Assistance Program (SNAP), and Temporary Assistance for Needy Families benefits.⁴⁹ In addition, the Affordable Care Act (ACA) prohibits immigrants who are not lawfully present from purchasing insurance on the exchanges.⁵⁰

Since taking office, the Trump administration has attempted to add to these barriers through a series of administrative measures relating to the public charge provisions in the Immigration and Naturalization Act (INA).⁵¹ Under the INA, most noncitizens (excluding refugees, asylees, and certain other classes who are afforded humanitarian relief) who seek admission into the United States or undergo an adjustment of status (usually to become a lawful permanent resident) while in the

46. Brenda Eskenazi et al., *Association of Perceived Immigration Policy Vulnerability with Mental and Physical Health Among US-Born Latino Adolescents in California*, 173 JAMA PEDIATRICS 744, 744 (2019).

47. E.g., Alison Gemmill et al., *Association of Preterm Births Among US Latina Women with the 2016 Presidential Election*, JAMA NETWORK OPEN, July 19, 2019, at 1, 5–7; William D. Lopez et al., *Health Implications of an Immigration Raid: Findings from a Latino Community in the Midwestern United States*, 19 J. IMMIGR. MINORITY HEALTH 702, 705–06 (2017); Nicole L. Novak et al., *Change in Birth Outcomes Among Infants Born to Latina Mothers After a Major Immigration Raid*, 46 INT'L J. EPIDEMIOLOGY 839, 842–46 (2017) (discussing that the largest ICE raid to date may have affected preterm births). For a fuller discussion of the impact of immigration enforcement on reproductive health outcomes, see Paul J. Fleming et al., *'I'm Going To Look for You and Take Your Kids': Reproductive Justice in the Context of Immigration Enforcement*, PLOS ONE, June 4, 2019, at 1.

48. 8 U.S.C. § 1324a(a) (2018). Although such measures are sometimes defended as necessary to preserve employment opportunities for citizens, most economists disagree. See, e.g., Giovanni Peri, *The Economic Benefits of Immigration*, BERKELEY REV. LATIN AM. STUD., Fall 2013, at 14; Binyamin Appelbaum, *Fewer Immigrants Mean More Jobs? Not So, Economists Say*, N.Y. TIMES (Aug. 3, 2017), <http://www.nytimes.com/2017/08/03/us/politics/legal-immigration-jobs-economy.html> [<https://perma.cc/8F6S-VDXX>].

49. 8 U.S.C. §§ 1611–13, 1621–22. Most state laws that discriminate against lawfully present noncitizens are subject to strict scrutiny under the Fourteenth Amendment. *Graham v. Richardson*, 403 U.S. 365, 373–76 (1971). The Supreme Court has made clear that the federal government may discriminate on the basis of immigration status. *Mathews v. Diaz*, 426 U.S. 67, 80–81 (1976).

50. 42 U.S.C. § 18032(f)(3) (2018). For a discussion of the barriers to noncitizens' access to public benefits prior to the Trump administration, see Wendy E. Parmet, *The Worst of Health Law: Law and Policy at the Intersection of Health & Immigration*, 16 IND. HEALTH L. REV. 211, 218–21 (2019).

51. See *infra* text accompanying notes 57–75.

United States must prove that they are not likely “at any time to become a public charge.”⁵² Although the INA does not define the term “public charge,” the statute directs officials to consider the applicant’s age, health, family status, assets, resources and financial status, and education and skills.⁵³ A related provision in the INA states that noncitizens, including lawful permanent residents, can only be deported for being a public charge if they become one within five years of entry and for reasons that existed prior to entry.⁵⁴

Under longstanding practice, as well as a 1999 guidance by the Immigration and Naturalization Services, an individual was deemed to be a public charge only if they were “primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense.”⁵⁵ Receipt of noncash benefits, such as Medicaid, did not make one a public charge unless those benefits were used to support long-term care or institutionalization.⁵⁶ As a result, lawfully present immigrants who utilized benefits that were available to them under PRWORA did not have to worry about being considered a public charge.

Shortly after President Trump took office, his administration began to explore the possibility of treating a noncitizen who receives noncash benefits as a public charge. In January 2017, the press reported on a draft executive order that directed federal agencies to expand the definition of public charge to include one who uses noncash benefits.⁵⁷ Although President Trump never signed this order, the leak along with the Trump administration’s anti-immigrant rhetoric created fear in immigrant communities, leading many to disenroll from public benefits.⁵⁸

In 2018 the Department of State (DOS), without engaging in notice-and-comment rulemaking, revised its Foreign Affairs Manual (FAM) to direct consular offices to consider the receipt of public benefits by applicants, as well as their sponsors and family members (presumably including citizen members of the family), in making the

52. 8 U.S.C. § 1182(a)(4).

53. *Id.* § 1182(a)(4)(B)(i).

54. *Id.* § 1227(a)(5).

55. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (proposed May 26, 1999).

56. *See id.* at 28,677–78.

57. Memorandum from Andrew Bremberg to President Trump (Jan. 23, 2017), http://cdn3.vox-cdn.com/uploads/chorus_asset/file/7872571/Protecting_Taxpayer_Resources_by_Ensuring_Our_Immigration_Laws_Promote_Accountability_and_Responsibility.0.pdf [<https://perma.cc/6HT3-R9D8>]; *see also, e.g.*, Michael Fix & Randy Capps, *Leaked Draft of Possible Trump Executive Order on Public Benefits Would Spell Chilling Effects for Legal Immigrants*, MIGRATION POL’Y INST. (Feb. 2017), <http://www.migrationpolicy.org/news/leaked-draft-possible-trump-executive-order-public-benefits-would-spell-chilling-effects-legal> [<https://perma.cc/748J-85CV>].

58. *See, e.g.*, Emily Baumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Services*, N.Y. TIMES (Mar. 6, 2018), <http://www.nytimes.com/2018/03/06/us/politics/trump-immigrants-public-nutrition-services.html> [<https://perma.cc/W55R-2STE>]; Annie Lowrey, *Trump’s Anti-Immigrant Policies Are Scaring Eligible Families Away from the Safety Net*, ATLANTIC (Mar. 24, 2017), <http://www.theatlantic.com/business/archive/2017/03/trump-safety-net-latino-families/520779/> [<https://perma.cc/ENQ3-A9FF>].

public charge determination.⁵⁹ Then in August 2019, DHS issued new regulations that defined a public charge as “an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”⁶⁰ Among the benefits that this public charge rule designated were Medicaid (excluding emergency Medicaid or Medicaid for children or pregnant women), SNAP, Section 8 Housing Assistance, and other forms of subsidized housing.⁶¹ The comments to the regulations also explained that the public charge determination is forward facing.⁶² The inquiry attempts to determine based on the totality of circumstances whether the noncitizen is “likely to become a public charge” at any point in the future, including, presumably, following naturalization.⁶³ Past use of the designated public benefits for twelve out of thirty-six months, as well as having a serious medical condition without having private insurance, constitutes a heavily weighted negative factor; conversely, having private (unsubsidized) health insurance constitutes a heavily weighted positive factor.⁶⁴

Although PRWORA already bars many noncitizens from accessing most federally funded public benefits, DHS’s public charge rule is widely expected to cause many noncitizens, including legal permanent residents (who are not subject to the DHS rule but nevertheless may fear it), to forgo Medicaid, SNAP, housing assistance, and other public benefits (including state benefits that are not included within the definition of public charge). The Migration Policy Institute estimated that up to ten million noncitizens, many who have citizen children, will disenroll from public benefits.⁶⁵ The Kaiser Family Foundation warned that “[t]he rule will likely lead to declines in participation in Medicaid and other programs broadly across immigrant families,

59. See U.S. DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 302.8-2(B)(2) (2020), <http://fam.state.gov/fam/09fam/09fam030208.html> [<https://perma.cc/BMT5-CDYB>]; *Changes to “Public Charge” Instructions in the U.S. State Department’s Manual*, NAT’L IMMIGR. L. CTR. (Feb. 8, 2018), <http://www.nilc.org/issues/economic-support/public-charge-changes-to-fam/> [<https://perma.cc/LU3R-VMS3>]. Since the adoption of the revisions to the FAM, public charge denials at consular offices have increased dramatically. Ted Hesson, *Exclusive: Visa Denials to Poor Mexicans Skyrocket Under Trump’s State Department*, POLITICO (Aug. 6, 2019, 6:09 PM), <http://www.politico.com/story/2019/08/06/visa-denials-poor-mexicans-trump-1637094> [<https://perma.cc/8648-WFDD>]. For a discussion of litigation related to the FAM revision, see *infra* text accompanying notes 129–130.

60. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,295 (Aug. 14, 2019) (codified at 8 C.F.R. § 212.21 (2019)). The regulations follow the statute in exempting refugees, asylees, and other specified classes of noncitizens. *Id.* at 41,292. For a discussion of the litigation relating to the DHS public charge rule, see *infra* text accompanying notes 107–125.

61. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,295.

62. See *id.*

63. *Id.*

64. 8 C.F.R. § 212.22(c). Other factors include English language proficiency, credit score, income, and whether or not the noncitizen applied for any benefits (regardless of having received them). *Id.* § 212.22(b).

65. Jeanne Batalova et al., *Millions Will Feel Chilling Effects of U.S. Public-Charge Rule That Is Also Likely To Reshape Legal Immigration*, MIGRATION POL’Y INST. (Aug. 2019), <http://www.migrationpolicy.org/news/chilling-effects-us-public-charge-rule-commentary> [<https://perma.cc/N8GW-TD5H>]. For a further discussion of the public charge rule and its likely impact on health, see Medha D. Makhlof, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 197–209 (2019); Wendy E. Parmet, *The Plenary Power Meets the Police Power: Federalism at the Intersection of Health & Immigration*, 45 AM. J.L. & MED. 224, 235–42 (2019); and Parmet, *supra* note 50, at 225–31.

including their U.S.-born children” and that more than 13.5 million Medicaid/CHIP enrollees, including 7.6 million children, lived in a home that might be at risk of forgoing benefits due to the rule.⁶⁶

The noncash benefits from which immigrants (and citizen members of their family) may disenroll are associated with positive health outcomes.⁶⁷ Indeed, the Trump administration has not denied that the rule may undermine public health. In a jarringly candid assessment of the potential effects of the draft version of the rule (which, unlike the final rule, did not exempt the use of Medicaid by pregnant women and children), DHS conceded that the rule might have adverse public health effects.⁶⁸ In the comments to the proposed regulations, DHS noted that over five million people would likely disenroll or forgo enrollment in Medicaid and that the rule might cause “[w]orse health outcomes,” an “[i]ncreased prevalence of communicable diseases,” “[i]ncreases in uncompensated care,” an “increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children,” and “[i]ncreased rates of poverty and housing instability.”⁶⁹ Likewise, in its comments accompanying the final rule, DHS conceded that individuals might choose to forgo benefits and that a range of adverse outcomes was possible.⁷⁰ Nevertheless, in the comments to the final rule, DHS argued that it was not

sound policy to ignore the longstanding self-sufficiency goals set forth by Congress or to admit or grant adjustment of status applications of aliens who are likely to receive public benefits designated in this rule to meet their basic living needs in an [sic] the hope that doing so might alleviate food and housing insecurity, improve public health, decrease costs to states and localities, or better guarantee health care provider reimbursements.⁷¹

In short, DHS determined that the furtherance of self-sufficiency was worth jeopardizing the public’s health.

Other federal agencies seem to agree. After DHS published its public charge rule, but before it was scheduled to take effect, DOS published its own interim final public

66. KAISER FAMILY FOUND., CHANGES TO “PUBLIC CHARGE” INADMISSIBILITY RULE: IMPLICATIONS FOR HEALTH AND HEALTH COVERAGE 4–5 (2019), <http://www.kff.org/disparities-policy/fact-sheet/public-charge-policies-for-immigrants-implications-for-health-coverage/> [<https://perma.cc/7YSB-CQSQ>].

67. See, e.g., STEVEN CARLSON & BRYNNE KEITH-JENNINGS, CTR. ON BUDGET AND POLICY PRIORITIES, SNAP IS LINKED WITH IMPROVED NUTRITIONAL OUTCOMES AND LOWER HEALTH CARE COSTS (2018), <https://www.cbpp.org/sites/default/files/atoms/files/1-17-18fa.pdf> [<https://perma.cc/2T6Q-7DDD>] (discussing the health benefits of SNAP); HANNAH KATCH, CTR. ON BUDGET & POLICY PRIORITIES, MEDICAID WORKS: MILLIONS BENEFIT FROM MEDICAID’S EFFECTIVE, EFFICIENT COVERAGE (2017), <https://www.cbpp.org/sites/default/files/atoms/files/6-2-17health.pdf> [<https://perma.cc/L96A-Z35K>] (discussing the health benefits of Medicaid); NABIHAH MAQBOOL ET AL., CTR. FOR HOUS. POLICY, THE IMPACTS OF AFFORDABLE HOUSING ON HEALTH: A RESEARCH SUMMARY 2–8 (2015) (discussing the health benefits of access to quality, affordable housing); Craig Gunderson & James P. Ziliak, *Food Insecurity and Health Outcomes*, 34 HEALTH AFF. 1830, 1836–37 (2015) (stating that SNAP is associated with improved health outcomes).

68. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,267, 51,270 (proposed Oct. 10, 2018).

69. *Id.* at 51,270.

70. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,312–13, 41,463 (Aug. 14, 2019).

71. *Id.* at 41,314.

charge rules, granting the public less than two months to comment.⁷² These rules, which were designed to align DOS practices with the DHS rule, will replace the 2018 FAM revisions. Although the DOS rules would only apply at consular offices overseas, they could affect noncitizens who live in the United States but have to travel overseas to seek an adjustment of status. Hence, they too are likely to deter immigrants from accessing a range of noncash benefits that are related to the SDOH, thereby adding to the DHS rule's adverse impact on public health.

Also in the planning stage are potential Department of Justice (DOJ) public charge deportability rules.⁷³ Although, as of March 2020, the contents of these regulations have not been made public,⁷⁴ they too are likely to borrow the definition of public charge contained in the DHS rule.⁷⁵ Whether they will attempt to move beyond that and broaden the category of cases in which deportation is available on public charge grounds is not yet clear. But without doubt, any effort to expand those categories and/or apply the public charge rule to deportation would heighten the risks associated with the public charge determination and thus increase noncitizens' fear of accessing public programs that may protect their health.

Underlying these public charge rules is the view that individuals are responsible for their own health. This was made evident on August 13, 2019, when Acting Director of U.S. Citizenship and Immigration Services (USCIS) Ken Cuccinelli defended the public charge rule by reframing Emma Lazarus's famous poem engraved on the Statue of Liberty to state, "[G]ive me your tired and your poor who can stand on their own two feet and who will not become a public charge."⁷⁶ To Cuccinelli, the DHS public charge rule was necessary to defend the view that, at least when it comes to immigrants, illness and ill health are matters of individual responsibility, rather than public concern.⁷⁷ In his view, people should "stand on their own two feet."⁷⁸ If they cannot, they should not be here.⁷⁹

That starkly individualistic vision of the human condition is pervasive throughout the DHS public charge rule. For example, in addition to treating past use of public

72. See *Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54,996, 54,996–55,000 (Oct. 11, 2019). The DOS interim rule was published on October 11, 2019. *Id.* at 54,996. The DHS public charge rule was scheduled to take effect on October 15, 2019. *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. at 41,292.

73. Yeganeh Torbati, *Exclusive: Trump Administration Proposal Would Make It Easier To Deport Immigrants Who Use Public Benefits*, REUTERS (May 3, 2019, 2:47 PM), <http://www.reuters.com/article/us-usa-immigration-benefits-exclusive/exclusive-trump-administration-proposal-would-make-it-easier-to-deport-immigrants-who-use-public-benefits-idUSKCN1S91UR> [<https://perma.cc/9A2T-W29W>]; *Featured Issue: Public Charge Changes at USCIS, DOJ, and DOS*, AILA Doc. No. 19050634, AM. IMMIGR. LAW. ASS'N (Apr. 2, 2020), <http://www.aila.org/advo-media/issues/all/public-charge-changes-at-uscis-doj-and-dos#doj> [<https://perma.cc/46J4-VEGX>].

74. See *Featured Issue: Public Charge Changes at USCIS, DOJ, and DOS*, *supra* note 73.

75. See Torbati, *supra* note 73.

76. *Rule Would Penalize Immigrants to U.S. for Needing Benefits*, NPR (Aug. 13, 2019, 7:23 AM), <http://www.npr.org/2019/08/13/750727515/rule-would-penalize-immigrants-to-u-s-for-needing-benefits> [<https://perma.cc/LH6X-2XQ3>].

77. See *id.*

78. *Id.*

79. See *id.*

benefits as a highly weighted negative factor, the rule disfavors immigrants sixty-two years of age and older who have a serious medical condition (and lack private insurance), a low income, or a poor credit score.⁸⁰ More fundamentally, by defining an individual who uses public benefits as an inadmissible, unwanted public charge, the rule treats ill health and poverty as individual failings; the solution to which is not changing the social environment but exclusion. In this way, the DHS public charge rule (like earlier immigration exclusion laws)⁸¹ challenges the most fundamental teaching of the research relating to the SDOH: social factors outside of individual control largely determine the health of individuals.

C. Medical Deferred Action and the Health Insurance Mandate: Blaming the Sick

The disregard of the impact of social determinants and the assertion that immigrants who are not fully self-sufficient are undesirable and unworthy of entering the United States were also evident in two additional administrative actions the Trump administration took in the summer and fall of 2019. First, in August, without any public administrative process, USCIS began notifying noncitizens who were in the United States for medical treatment that it would no longer grant “medical deferred action” and that, unless U.S. Immigration and Customs Enforcement granted them a reprieve (through a process that did not exist), they had thirty-three days to leave the country.⁸² As Lakshmi Ganapathi and colleagues wrote in the *New England Journal of Medicine*, the elimination of medical deferred action constituted a “death sentence” for many patients with life-threatening conditions, some of whom came to the United States precisely for treatment.⁸³ Fortunately for these patients, when word of the letters became public, the administration backed down and announced that it would process pending applications, though the long-term future of the program remains in doubt.⁸⁴

80. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,402, 41,408–09, 41,413–14, 41,425–28 (Aug. 14, 2019).

81. See PATRICIA ILLINGWORTH & WENDY E. PARMET, *THE HEALTH OF NEWCOMERS: IMMIGRATION, HEALTH POLICY, AND THE CASE FOR GLOBAL SOLIDARITY* 27–51 (2017) (discussing the history of health-related immigration exclusion laws). Many of these exclusionary laws were also racially motivated. See *id.* at 33–41. The message that those who are sick or poor are responsible for their own condition is not unique to immigration law. It is a chord that runs through many public benefits laws, which also reflects deeply racist assumptions of deservedness. See, e.g., Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1091–1100 (2017) (discussing the role of race and conceptions of deservedness in state decisions regarding the Medicaid expansion). See generally Tomiko Brown-Nagin, *Two Americas in Healthcare: Federalism and Wars over Poverty from the New Deal-Great Society to Obamacare*, 62 DRAKE L. REV. 981 (2014) (tracing how concepts of the “deserving” and “undeserving poor” that are deeply influenced by race have shaped health policy since the New Deal). A full discussion of race, immigration, and conceptions of deservedness is beyond the scope of this Essay.

82. *Trump Administration Ends Protection for Migrants’ Medical Care*, NPR (Aug. 27, 2019, 7:39 AM), <http://www.npr.org/2019/08/27/754634022/trump-administration-ends-protection-for-migrants-medical-care> [https://perma.cc/AT26-8W6P].

83. Lakshmi Ganapathi et al., *Medical Deferred Action—Living on Borrowed Time*, 381 NEW ENG. J. MED. 1601, 1601–02 (2019).

84. See Ted Hesson, *DHS Walks Back Decision to Halt Medical Deportation Relief*, POLITICO (Sept. 19, 2019, 6:51 PM), <http://www.politico.com/story/2019/09/19/dhs-halt-medical-deportation-relief-1755951> [https://perma.cc/3FB7-JRLJ]. In later hearings before the Subcommittee on Civil Rights & Civil Liberties of the House Oversight and Reform Committee, Acting Director of USCIS Ken Cuccinelli defended his

Second, on October 4, 2019, shortly after the medical deferred action fiasco and immediately before the DHS public charge rule was due to take effect, President Trump issued a proclamation directing DOS to bar visa applicants who lacked “approved health insurance” or the “demonstrated ability to pay” for their health care.⁸⁵ According to the proclamation, only certain types of health insurance qualify as “approved health insurance.”⁸⁶ These include Medicare (which would almost never be available to new visa applicants), employer-sponsored plans, Tricare, unsubsidized private plans, catastrophic plans, short-term plans, and visitor plans.⁸⁷ ACA-subsidized plans and state-funded plans do not qualify.

In some ways, the proclamation was duplicative of DHS’s and DOS’s public charge rules. Yet, while lack of private insurance can be a heavily weighted negative factor under the public charge rules when an individual also has a serious medical condition, it is not automatically dispositive.⁸⁸ Under the proclamation, however, it is dispositive, at least for immigrants who seek visas or adjustment of status abroad.⁸⁹

Taken together, the attempted cessation of medical deferred action and the October 4 proclamation amplify Cuccinelli’s assertion that immigrants who are poor or sick are not welcome in the United States. Moreover, like the public charge rules, by treating ill health or lack of insurance as an individual deficiency that merits exclusion, these measures overlook, indeed deny, the importance of the SDOH. To the extent that law and legal discourse help to construct social meaning,⁹⁰ these laws appear to teach that health (at least for noncitizens) is individually determined and that the problems of illness or poverty lie within the individual, rather than social and legal structures.

This rejection of the SDOH was especially evident in the October 4 proclamation. There, the President correctly noted that uncompensated care is costly to the United States and that noncitizens are more likely than citizens to lack insurance.⁹¹ Yet the proclamation neither considered why so many immigrants are uninsured nor pointed to the laws and policies, including the administration’s own public charge rules, that help to create those disparities in rates of coverage. Instead, the proclamation treated immigrants’ lack of insurance as personal failings that make them unworthy of entry.

department’s actions stating that there never was an established program of medical deferred action and that it was up to Congress to create such a program. *The Administration’s Decision To Deport Critically Ill Children and Their Families, Hearing Before the Subcomm. on Civil Rights & Civil Liberties of the H. Comm. on Oversight & Reform*, 116th Cong. 6–17 (Oct. 17, 2019) (statement of Ken Cuccinelli, Acting Director of USCIS).

85. Proclamation No. 9945, 84 Fed. Reg. 53,991, 53,991–92 (Oct. 4, 2019).

86. *Id.* at 53,992.

87. *Id.*

88. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,298–99, 41,408–09 (Aug. 14, 2019).

89. *See* Proclamation No. 9945, 84 Fed. Reg. at 53,992–93.

90. *E.g.*, Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 21 (2006).

91. *See* Proclamation No. 9945, 84 Fed. Reg. at 53,991.

D. The Initiatives' Impact on Health

How might this rejection of the social determination of health affect health? On their face, the public charge rules, the October 4 proclamation, and the abolition of medical deferred action apply only to noncitizens.⁹² As Bridget Anderson explained, “The exclusion of migrants helps define the privileges and the limitations of citizenship”⁹³ Likewise, laws that hold migrants responsible for their own ill health may suggest that the recognition of the role of the SDOH is a privilege that is accorded solely to citizens.

It seems unlikely, however, that immigration law’s insistence that health is individually determined can be cabined to noncitizens.⁹⁴ For one thing, millions of citizens, including nearly one-quarter of children in the United States, live in mixed-status families.⁹⁵ In addition, if we accept that law and legal discourse help to shape public meaning, the message about the etiology of health that these immigration measures send may resonate more broadly, especially as it reflects widely held notions that individuals are largely responsible for the misfortunes that befall them.

In this way, immigration law reflects and reaffirms an understanding of health that is inconsistent with the research on the SDOH and incompatible with the establishment of policies that aim to redress the social conditions that lead to health disparities. To be sure, immigration law may, at least theoretically, pull in the other direction. By excluding those who are deemed unworthy of living in the country, immigration law may signal that native-born citizens are worthy of having *their* needs met. Indeed, there is at least some reason to believe that support for social programs that benefit health has, at least historically, been the strongest in relatively homogeneous countries that have not been very welcoming to immigrants.⁹⁶ Thus, it is plausible that, by limiting heterogeneity, these immigration policies may pave the way for greater acceptance of measures that aim to protect the SDOH, at least as they apply to native-born citizens.

In the current historical moment in the United States, however, this seems unlikely, especially given the close ties between the administration’s anti-immigration policies and the politics of racial division.⁹⁷ Given the strong (often explicit) racial

92. See *supra* notes 60, 72, 82, 85 and accompanying text.

93. BRIDGET ANDERSON, *US AND THEM? THE DANGEROUS POLITICS OF IMMIGRATION CONTROL* 2 (2013).

94. Although this Essay focuses on recent initiatives of the Trump administration, this view has long been embedded in immigration law, as the INA’s public charge provision illustrates. For a further discussion, see ILLINGWORTH & PARMET, *supra* note 81, at 166–89.

95. Press Release, Migration Policy Inst., With More U.S. Children Having Immigrant Parents and Amid Rising Immigration Enforcement, Child Welfare Systems Are Adapting Policies (Apr. 23, 2019), <http://www.migrationpolicy.org/news/more-us-children-have-immigrant-parents-intersection-child-welfare-systems> [<https://perma.cc/7VZT-5MUT>].

96. ILLINGWORTH & PARMET, *supra* note 81, at 176; see also ANDERSON, *supra* note 93, at 35 (“[M]odern states—particularly those in Europe—were built on notions of shared identity and values” (citation omitted)).

97. E.g., Thomas B. Edsall, *White Identity Politics Aren’t Going Anywhere*, N.Y. TIMES (Dec. 20, 2018), <http://www.nytimes.com/2018/12/20/opinion/trump-race-immigration-democrats.html> [<https://perma.cc/VF9P-9ANM>]; Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <http://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/> [<https://perma.cc/UDT4-36NC>].

undertones of the administration's anti-immigration policies, it is hard to believe that its message—those who are ill or need help paying for their medical bills are unworthy—is either intended to be or can be limited to noncitizens. Certainly, minority citizens are already hearing these messages and feeling their effects.⁹⁸

There is also reason to believe, although far more research is needed, that anti-immigration rhetoric, including the messaging that migrants do not “deserve” access to public benefits, is helping to drive a type of wedge politics that may undermine broader efforts to redress health inequities. Certainly, through much of U.S. history, racially focused politics helped to undermine support for social programs that may have benefitted low-income whites as much as people of color.⁹⁹ More recently, it is notable that anti-immigrant rhetoric played a significant role in rallying opposition to the ACA.¹⁰⁰ In effect, many Americans concluded that they would not support a law that might have provided them with health benefits if it also provided benefits to some classes of noncitizens.¹⁰¹

The Trump administration's domestic policy agenda adds support for the conclusion that its messages of individual responsibility is not meant only for migrants. For example, in its first year, the administration did not attempt to exclude only noncitizens from the ACA, rather it tried (and failed) to repeal the law as a whole.¹⁰² It also continues to support litigation challenging the law's constitutionality.¹⁰³ In addition, the administration has adopted regulations to cut SNAP benefits for hundreds

98. See GRACE KIM ET AL., PUBLIC CHARGE: REDUCING THE CHILLING EFFECTS ON MEDI-CAL PARTICIPATION DUE TO THE 2018 PROPOSED PUBLIC CHARGE RULE 7, 20 (2019).

99. See, e.g., Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217, 218 (1997) (discussing sociologist Jill Quadagno's understanding that “race has played a crucial role in undermining federal social policy agendas for over sixty years”); Carly Hayden Foster, *The Welfare Queen: Race, Gender, Class, and Public Opinion*, 15 RACE GENDER & CLASS 162, 166 (2008) (“American antipathy to welfare is largely a reaction to the perception that welfare has become a ‘black program.’”); Jeff Manza, *Race and the Underdevelopment of the American Welfare State*, 29 THEORY & SOC. 819, 824–32 (2000) (reviewing literature discussing the role that race has played in limiting the reach of the welfare state in the United States).

100. See ILLINGWORTH & PARMET, *supra* note 81, at 74, 96 (discussing literature of the role of anti-immigration sentiment in rallying opposition to the ACA); Antoine J. Banks, *The Public's Anger: White Racial Attitudes and Opinions Toward Health Reform*, 36 POL. BEHAV. 493, 505–08 (2014) (discussing the role of white racial anger in forming opposition to the ACA).

101. See Banks, *supra* note 100, at 495, 509 (noting strong opposition to ACA provisions that have a greater benefit for minorities).

102. See, e.g., Julie Rovner, *Timeline: Despite GOP's Failure To Repeal Obamacare, the ACA Has Changed*, WASH. POST (Apr. 5, 2018, 5:15 AM), http://www.washingtonpost.com/national/health-science/timeline-despite-gops-failure-to-repeal-obamacare-the-aca-has-changed/2018/04/05/dba36240-38b1-11e8-af3c-2123715f78df_story.html [<https://perma.cc/F5A2-3Q6N>].

103. E.g., Jan Hoffman & Abby Goodnough, *Trump Administration Files Formal Request To Strike Down All of Obamacare*, N.Y. TIMES (May 1, 2019), <http://www.nytimes.com/2019/05/01/health/unconstitutional-trump-aca.html> [<https://perma.cc/A4L9-ZJNL>]; Selena Simmons-Duffin, *Trump Is Trying Hard To Thwart Obamacare. How's That Going?*, NPR (Oct. 14, 2019, 3:54 PM), <http://www.npr.org/sections/health-shots/2019/10/14/768731628/trump-is-trying-hard-to-thwart-obamacare-hows-that-going> [<https://perma.cc/XP8G-2DMS>].

of thousands of citizens.¹⁰⁴ Such measures are consistent with the conclusion that Cuccinelli's demand for self-sufficiency is not limited to noncitizens.

More research is needed to measure and untangle the complex relationships and multiple directions of causality between immigration laws that treat those who are poor or ill as unworthy and domestic policies that redress or exacerbate adverse SDOH. Certainly, there is no simple relationship between the two and it would be facile to assume that immigration policies that question the SDOH may result in policies that weaken public health across the board. Nevertheless, as we attempt to understand the impact of laws and regulations that are undertaken in the name of self-sufficiency, and which evince a devaluation of the human dignity of some people in need, we should ask whether these policies are compatible with a society that promotes laws and policies that support the conditions in which people can be healthy. By expounding and perhaps legitimating the view that people can and ought to be self-sufficient when it comes to their health, immigration law questions the existence of SDOH and the recognition that health is *public*.

III. RESISTANCE & LITIGATION: THE HEALTH IMPACT OF LEGAL MOBILIZATION

Thus far this Essay has argued that immigration law may harm health through at least three different pathways: the brutality of enforcement, denying access to social goods, and messaging that health is individually determined. In sketching these different pathways, this Essay has focused on the regulatory and enforcement actions the Trump administration has undertaken.

Any complete discussion of these measures' impact on health, however, needs to look further. Law is not simply a set of formal rules plus the enforcement practices through which those rules are applied. As socio-legal scholars have shown, law is also "a constitutive convention of social life" plus a "resource that citizens utilize to structure relations with others, to advance goals in social life, to formulate rightful claims, and to negotiate disputes where interests, wants, or principles collide."¹⁰⁵ Such "legal mobilization," which can include litigation as well as other forms of advocacy centered around law, can work with and influence social movements. Through them, legal mobilization can help to shape public meaning and influence public policy.¹⁰⁶

Once we think about immigration law through the lens of legal mobilization, its impact on health becomes more diffuse and challenging to measure. From this perspective it is possible, at least theoretically, to imagine that the initiatives discussed above may, in the long run, have a positive impact on public health due to the resistance and mobilization they have incited. That resistance may result in (and to some extent has already resulted in) victories in court that reverse all or some of the adverse impacts discussed. The resistance may also lead to greater public recognition

104. Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 66,782, 66,782–83 (Dec. 5, 2019) (codified at 7 C.F.R. § 273.24 (2019)); Maggie Dickinson, *The Ripple Effects of Taking SNAP Benefits from One Person*, ATLANTIC (Dec. 10, 2019), <http://www.theatlantic.com/family/archive/2019/12/trump-snap-food-stamps-cuts/603367/> [https://perma.cc/5BW8-7QSQ].

105. McCann, *supra* note 90, at 21–22.

106. *See id.* at 22.

of the interconnectedness of human health and a greater willingness to support policies that reduce health inequities. Conversely, the legal mobilization of the Trump administration's health-focused immigration policies may lead to judicial re-affirmation of those policies and reinforcement of their messages of self-sufficiency.

Although the final chapter is not yet written, and far more research is required, a few points are worth noting. First, and perhaps most importantly, many of the "laws" that may adversely affect health have been temporarily or permanently enjoined by the courts. For example, as discussed above, courts have ordered the administration to cease family separation and undertake efforts to reunite families.¹⁰⁷ Likewise, the federal district court overseeing the *Flores* Settlement has rejected the administration's attempt to replace it.¹⁰⁸

These judicial decisions have not wholly prevented either family separation or the detention of children.¹⁰⁹ Still, it is likely that these court orders have reduced the reach of these policies, thereby mitigating (to some extent) the number of individuals subjected to the harm and trauma they can cause. In addition, and more subtly, the litigation and the evidence uncovered during the litigation process, including, for example, information regarding the number of families separated or the conditions of children facing detention, may well have helped to arouse public opposition to the policies at issue, thereby reducing their impact. Thus, as in other areas, the litigation surrounding family separation and detention may be viewed as, in part, a political mobilization strategy that may affect health by altering public opinion.¹¹⁰

Similar processes may have taken place with respect to the public charge rules. Even before DHS published a notice of proposed rulemaking in October 2018, a large coalition of advocacy groups had formed to contest the rule at the administrative, judicial, and political levels.¹¹¹ Once DHS published the proposed rule in the Federal Register, over two hundred and sixty thousand comments, most of them in opposition, were submitted.¹¹² Then, after DHS published the final rule, over twenty-two states and

107. See *supra* notes 31–38; see also, e.g., *Ms. J.P. v. Sessions*, No. LA CV18-06081 JAK (SKx), 2019 WL 6723686, at *40–41 (C.D. Cal. Nov. 5, 2019) (ordering mental health services to address the trauma of family separation); *Jacinto-Castanon de Nolasco v. U.S. Immigration and Customs Enf't*, 319 F. Supp. 3d 491, 505 (D.D.C. 2018) (granting preliminary injunction requiring reunification of family and enjoining removal until further order); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018) (granting preliminary injunction reunification of plaintiff mother and child); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1134 (N.D. Ill. 2018) (granting preliminary injunction requiring reunification of plaintiff child and father); *Ms. L. v. U.S. Immigration and Customs Enf't*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (certifying class and granting class-wide preliminary injunction requiring reunification of families). For a further discussion of litigation relating to other immigration policies of the Trump administration, see Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump*, 53 U.C. DAVIS L. REV. ONLINE 121 (2019).

108. *Flores v. Barr*, 407 F. Supp. 3d 909, 931 (C.D. Cal. 2019).

109. See *supra* text accompanying notes 32–33 for recent statistics on family separation.

110. For a discussion of the role of litigation in political mobilization, see, for example, Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 370–91 (2018); McCann, *supra* note 90, at 31; Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 680–87 (2012); and W. E. Parmet & R. A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 441–43 (2000).

111. See *The PIF Campaign*, PROTECTING IMMIGRANT FAMS., <http://protectingimmigrantfamilies.org/about-us/> [<https://perma.cc/T9K4-2XVB>] (last visited May 1, 2020).

112. *Id.*

localities, as well as numerous advocacy organizations, filed lawsuits in five separate federal courts, claiming that the regulations violated the INA, the Administrative Procedure Act (by deviating from long-standing construction of the public charge provision), the Rehabilitation Act (by discriminating against persons with disabilities), and the Equal Protection Clause (on the theory that the regulations were animated by the President's racial animus).¹¹³

In October 2019, shortly before DHS's public charge rule was set to take effect, each of those five courts issued preliminary injunctions (three of which were nationwide in scope), finding that DHS's definition of public charge violated the INA.¹¹⁴ Tellingly, several of the courts pointed to the rule's potential adverse effects on public health and health-care systems to find that the plaintiffs had standing.¹¹⁵ Two of the courts also ruled that DHS acted arbitrarily and capriciously by failing to consider all of the health effects and costs that would result from the rule.¹¹⁶

The preliminary injunctions halted the rule at least temporarily. However, in December 2019, the U.S. Courts of Appeals for the Ninth and Fourth Circuits lifted the preliminary injunctions that district courts in their circuits had issued; the Ninth Circuit found that DHS had acted within its discretion, and the Fourth Circuit did not issue an opinion.¹¹⁷

113. Wendy E. Parmet, *Five Victories for Public Health: Courts Enjoin the Public Charge Rule*, HEALTH AFF. BLOG (Oct. 18, 2019), <http://www.healthaffairs.org/doi/10.1377/hblog20191018.747447/full> [<https://perma.cc/E4EC-6BBQ>]. I should note that I participated in writing amicus briefs that were filed in both district and circuit courts in opposition to DHS's public charge rule.

114. See *CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 788 (D. Md. 2019) (granting plaintiffs' motion for preliminary injunction), *stay pending appeal granted*, No. 19-2222 (4th Cir. Dec. 9, 2019); *Cook Cty. v. McAleenan*, 417 F. Supp. 3d 1008, 1031 (N.D. Ill. 2019) (granting plaintiffs' motion for preliminary injunction), *appeal filed sub nom.*, *Cook Cty. v. Wolf*, No. 19-3169 (7th Cir. 2019); *City and Cty. of S.F. v. U.S. Citizenship and Immigration Servs.*, 408 F. Supp. 3d 1057, 1130 (N.D. Cal. 2019) (issuing a preliminary injunction in three separate cases), *stay pending appeal granted*, 944 F.3d 773 (9th Cir. 2019); *Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 668 (S.D.N.Y. 2019) (granting plaintiffs' motion for preliminary injunction), *stay pending appeal denied sub nom.*, *New York v. U.S. Dep't of Homeland Sec.*, Nos. 19-3591, 19-3595, 2020 WL 95815 (Jan. 8, 2020); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019) (granting plaintiffs' motion for preliminary injunction), *stay pending appeal denied*, Nos. 19-3591, 19-3595, 2020 WL 95815 (Jan. 8, 2020); *Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1223-24 (E.D. Wash. 2019) (granting plaintiff states' motion for section 705 stay pending judicial review and preliminary injunction), *stay pending appeal granted sub nom.*, *City and Cty. of S.F.*, 944 F.3d 773. Several courts also found that DHS violated the APA by not considering the health and other costs that the rule would cause. See *City and Cty. of S.F.*, 408 F. Supp. 3d at 1079-1118; *Washington*, 408 F. Supp. 3d at 1213-21. Two courts also found that the rule likely violated the Rehabilitation Act by discriminating against noncitizens with disabilities. *Make the Road*, 419 F. Supp. 3d at 664; *New York*, 408 F. Supp. 3d at 350; *Washington*, 408 F. Supp. 3d at 1219.

115. E.g., *Cook Cty.*, 417 F. Supp. 3d at 1017; *New York*, 408 F. Supp. 3d at 343-44; *Washington*, 408 F. Supp. 3d at 1204-10.

116. E.g., *City and Cty. of S.F.*, 408 F. Supp. 3d at 1105, 1109-12; *Washington*, 408 F. Supp. 3d at 1220.

117. *City and Cty. of S.F.*, 944 F.3d at 807 (granting the motion to stay preliminary injunction in three cases finding that DHS likely acted within the scope of its authority); Order at 1-2, *CASA de Md.*, No. 19-2222, http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/CA4_Stay_Decision.pdf [<https://perma.cc/52LZ-YGKA>] (granting motion to stay preliminary injunction without opinion).

In January 2020, pending an expedited appeal, the Second Circuit declined to stay the injunction that the Southern District of New York had issued.¹¹⁸ Rather than wait for that appeal, the DOJ petitioned the U.S. Supreme Court to lift the injunction.¹¹⁹ On January 27, 2020, the Supreme Court by a five to four vote stayed the nationwide injunction.¹²⁰ The majority did not publish an opinion, but Justice Gorsuch, in a concurring opinion that was joined by Justice Thomas, condemned the issuance of nationwide injunctions.¹²¹ The concurrence did not discuss the merits of the case. On February 21, over a pointed dissent from Justice Sotomayor,¹²² the Supreme Court stayed the remaining injunction that had been in place solely in Illinois.¹²³ At the time of this writing, litigation on the merits continues.¹²⁴

Whatever the ultimate legal fate of the DHS public charge rule, legally contesting the rule, both through the administrative process and in the courts, has served as a mechanism for mobilization and organization, much of which has focused on delivering the message about the positive public health value of policies that support immigrants' access to social goods. Thus, the legal mobilization in opposition to the rule has offered a very different narrative about the roots of ill health than the one that the DHS public charge rule pushes.¹²⁵

A similar story can be told about the other initiatives discussed above. For example, shortly after the President issued the October 4 proclamation, advocates went to court and obtained a temporary restraining order that was followed by a preliminary injunction.¹²⁶ In rejecting a motion to stay the order, the court notably questioned the constitutionality under the nondelegation doctrine of the President relying on a provision of the INA to effectuate domestic health policy.¹²⁷ In December 2019, a divided panel of the Ninth Circuit refused to stay the injunction.¹²⁸

In another pending lawsuit, a group of nonprofit organizations, challenged DOS's public charge rules, the 2018 FAM revisions, and the President's October 4 health

118. *New York v. U.S. Dep't of Homeland Sec.*, 2020 WL 95815, at *1; *see also* Wendy E. Parmet, *Supreme Court Allows Public Charge Rule To Take Effect While Appeals Continue*, HEALTH AFF. BLOG (Feb. 3, 2020), <http://www.healthaffairs.org/doi/10.1377/hblog20200131.845894/full/> [<https://perma.cc/M888-3NL5>].

119. Application for a Stay of the Injunctions Issued by the United States District Court for the Southern District of New York, *U.S. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.) (No. 19A-785), http://www.supremecourt.gov/DocketPDF/19/19A785/128460/20200117170243633_20200117-170053-95749791-00000337.pdf [<https://perma.cc/Y4VT-T7KX>].

120. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. at 599.

121. *Id.* at 599–601 (Gorsuch, J., concurring).

122. *Wolf v. Cook County*, 140 S. Ct. 681, 681–84 (2020) (mem.) (Sotomayor, J., dissenting).

123. *Id.* at 681 (majority opinion).

124. *See Public Charge*, NAT'L IMMIGR. L. CTR. (Mar. 3, 2020), <http://www.nilc.org/issues/economic-support/pubcharge/> [<https://perma.cc/RLV2-NJWC>].

125. *See* Parmet, *supra* note 113.

126. *Doe v. Trump*, 414 F. Supp. 3d 1307, 1311 (D. Or. 2019) (granting plaintiffs' motion for a temporary restraining order).

127. *See Doe v. Trump*, 418 F. Supp. 3d 573, 589–93 (D. Or. 2019) (relying on *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019), for the proposition that the government's interpretation of presidential authority would raise constitutional concerns under the nondelegation doctrine).

128. *Doe v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019) (refusing to stay the trial court's injunction pending appeal).

insurance proclamation, claiming that these “interrelated” executive branch actions violate the Administrative Procedure Act, the INA, and the Fifth Amendment.¹²⁹ Advocates have also filed separate lawsuits against the 2018 FAM revisions and the abolition of medical deferred action.¹³⁰

The impact of all of this litigation cannot yet be fully known (or measured).¹³¹ In part, this is because the litigation is ongoing. Hence, we do not yet know whether all or some of the administration’s various initiatives relating to health will take or remain in effect. Nor do we know the predominant message that appellate courts and potentially the Supreme Court will deliver. As noted above, the Supreme Court’s decisions in January and February 2020 lifting the injunction on DHS’s public charge rule did not speak to the merits,¹³² and the Court could well affirm or reject the rule on a number of grounds should it decide the case on the merits. Thus, at the time of this writing, it is too early to know what message, if any, the Court will deliver as to Cuccinelli’s vision of health and self-sufficiency.

It is likewise too early to assess the full *political* impact of the legal mobilization that relates to the administration’s health-related immigration initiatives. The mobilization may help to unearth new information that might sway public opinion to more broadly oppose these initiatives. The mobilization may also amplify a strong counter-narrative, one that rejects the administration’s attempt to “other” noncitizens and recognizes the role that social forces play in determining population health. Were that counter-narrative to take hold, it could well lead to greater support for a wide range of laws and policies that seek to reduce health inequities, among noncitizens and citizens, even if appellate courts ultimately uphold the administration’s initiatives.¹³³

The litigation, however, may also undermine health through various other pathways. As Scott L. Cummings reminded us, “[L]egal mobilization—like all system-challenging political action—is inherently risky.”¹³⁴ In some cases it can divert

129. Complaint for Injunctive and Declaratory Relief, *Make the Road N.Y. v. Pompeo*, No.1:19-cv-11633, 2019 WL 5484638 (S.D.N.Y. Dec. 19, 2019), 2019 WL 7020680.

130. See *Mayor and City Council of Balt. v. Trump*, 416 F. Supp. 3d 452, 517 (D. Md. 2019) (rejecting defendants’ motion to dismiss); Joint Motion to Stay at 7–8, *Irish Int’l Immigration Ctr., Inc. v. Cuccinelli*, No. 19-CV-11880-IT (D. Mass. Oct. 29, 2019), http://www.aclum.org/sites/default/files/20191029_jnt_mtn_exhibit_a_prop_odr.pdf [<https://perma.cc/WP63-4QCK>] (requesting stay of proceedings regarding the abolition of medical deferred action).

131. See Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WIS. L. REV. 171, 177–78, 186–90 (discussing the different ways that legal mobilization can affect outcomes and the complexity and challenge of assessing its impact).

132. *Wolf v. Cook County*, 140 S. Ct. 681 (2020) (mem.); *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020) (mem.).

133. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 1002–11 (2011) (discussing how social movements can benefit from litigation by changing public perceptions even when they lose in court).

134. Cummings, *supra* note 131, at 190 (reviewing literature discussing whether litigation campaigns have helped or harmed political movements). *But see* Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 2005–15 (2017) (reviewing and critiquing the literature against legal mobilization); Richard S. Price & Thomas M. Keck, *Movement Litigation and Unilateral Disarmament: Abortion and the Right To Die*, 40 L. & SOC. INQUIRY 880, 881 (2015) (arguing that the backlash critique of legal mobilization by social movements overlooks the fact that groups in

energy and resources away from political efforts that may offer a more secure foundation for health-promoting public policies.¹³⁵ Moreover, judicial “wins” can lead to political losses if a backlash develops against judicial intervention. Likewise, an explicit affirmation by the Supreme Court of the administration’s policies may enhance mobilization against those policies leading to political reforms. Thus, wins can lead to losses, and losses can lead to wins. Either way, the health of immigrants and the broader community will be affected.

CONCLUSION

This brief Essay suggests that immigration law acts through multiple mechanisms as a SDOH. Some of these mechanisms, such as separating children from their parents, are relatively clear, and the ways they impact health are all too apparent to discern. Others, including the legal mobilization that has developed in response to the administration’s initiatives, are far more indirect and challenging to measure.

Still, in this historic moment, when a federal administration appears determined to use all of the legal tools at its disposal to restrict immigration and devalue the health of immigrants—and an equally committed resistance has vowed to fight it largely through the courts—immigration law’s impact on the health of immigrants, their families, and the broader community has never been more apparent or more consequential. The outcomes of these laws and the legal struggles over them may determine not only the health of immigrants but that of the public as a whole.

opposition to a social movement’s positions will also rely on litigation and will frame the terms of that litigation if the social movement does not include a litigation strategy).

135. See Cummings, *supra* note 131, at 190.