

Reversing Immigration Law's Adverse Impact on Health

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SUMMARY. Immigration laws and policies have long served to magnify the social vulnerability of immigrants and members of their communities. These vulnerabilities have worked alongside the punitive, anti-immigration policies that the Trump administration pursued both before and during the pandemic to place immigrants and their communities at disproportionate risk for COVID-19. In addition, anti-immigrant policies during the pandemic helped to distort and undermine the nation's response to the pandemic. In order to prevent an equally dismal response to the next public health crisis, we need to more fully understand the mechanisms through which immigration laws intersect with the social determinants of health to enhance vulnerability to pandemics. We also cannot simply repeal the Trump administration's policies. Rather, we need to comprehensively reform immigration laws to end the punitive policies that heighten vulnerability to disease.

Introduction

COVID-19 struck the United States just as the Trump administration's restrictive and punitive approach to immigration reached its apex. Far from protecting the nation's health, these policies combined with pre-existing immigration laws and policies to heighten the pandemic's toll. They did so by 1) increasing social vulnerability in communities with large numbers of immigrants, 2) detaining immigrants in prisons and detention camps that served as "tinder boxes" for infection, and 3) distorting and undermining science-based public health policies.

As the Biden administration begins to develop and implement its own immigration policies, it is important to reassess how immigration laws and policies affect our capacity to prepare for and respond to public health crises. Building upon Chapter 33 in *Assessing Legal Responses to COVID-19: Volume I*, this Chapter begins that task (Parmet, 2020). The conclusion is plain: rolling back the most egregious Trump policies will not suffice. To avoid repeating our failed response to the pandemic, we must end the punitive approach to immigration.

This Chapter starts by providing a brief overview of what is known about the pandemic's impact on immigrants and their communities. It then reviews how U.S. law increased immigrants' social vulnerability before and during the Trump administration. The Chapter concludes by discussing the reforms that are needed moving forward to remedy immigration law's negative impact on our capacity to protect public health during a pandemic.

COVID-19's Impact on Immigrants and Their Communities

Documenting the pandemic's impact on immigrants is challenging. Neither the Centers for Disease Control and Prevention (CDC) nor

states report cases or deaths by immigration status. Further, the more than 46 million immigrants living in the United States, 22 million of whom are noncitizens, form a highly heterogeneous population, differentiated by immigration, citizenship and socioeconomic status, as well as race and ethnicity (Artiga & Rae, 2020). In addition, any discussion of the pandemic's toll on immigrants needs to note that many immigrants live in mixed-status families. More than two-thirds of noncitizens live in a household with a citizen, and around 13% of U.S. citizen children have a noncitizen parent (Artiga & Rae, 2020). Thus policies that increase immigrants' vulnerability to infectious diseases invariably affect native-born and naturalized citizens.

Although it is impossible to know the full extent of the pandemic's toll on immigrants, communities with high numbers of noncitizens were especially hard hit. In Massachusetts, "the proportion of foreign-born noncitizens was the strongest predictor of the burden of COVID-19 cases within a community" (Figueroa et al, 2020). Hispanic and Latino populations, in which approximately 50% of individuals are immigrants, have faced an especially high toll (Poulson et al, 2020).

Social determinants, including housing (living in larger households) and employment as "essential workers" have helped to enhance Hispanic vulnerability to COVID-19 (Figueroa et al., 2020). Noncitizens are also more likely than citizens (33% compared to 9%) to lack health insurance (Artiga & Rae, 2020). Structural racism constitutes another critical compounding factor. Poulson and colleagues, for example, found that Black Hispanics living in the United States have experienced worse outcomes from COVID-19 than other Hispanic people (Poulson et al, 2020). Despite these divergent and intersectional effects, immigration laws are implicated because of the multiple ways they heighten socio-

economic vulnerability. Reforming these laws is essential to improving our capacity to withstand the next pandemic.

Immigration Law's Impact on Social Vulnerability

The legal roots of the problem. Even before the Trump administration, scholars had identified immigration as a social determinant of health (Castañeda et al., 2015). Throughout American history, immigrants have been viewed as “less deserving” and have faced a wide range of social barriers to health care, housing, higher education, and employment security. Federal and state laws relating to the status of immigrants within the country reinforce these barriers.

In 1996, during a period of intense xenophobia, Congress extended barriers to noncitizen immigrants living in the United States through the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).

IIRIRA aimed to enhance immigration enforcement. It increased resources for the Border Patrol, appropriated funds for construction of a fence on the southern border, and authorized expedited removal for certain undocumented immigrants. IIRIRA thus ushered in an era of heightened immigration enforcement and increased deportations that has increased fear and stress among noncitizens and members of their families. These stresses have been associated with a range of adverse health conditions (Castañeda et al., 2015).

PRWORA endorsed the widely-held misimpression that immigrants come to the United States in large numbers to access public benefits. Proclaiming that immigrants should be “self-sufficient,” the Act barred undocumented immigrants from accessing most federally-funded benefits, including Medicaid. It also imposed a five-year ban during which most classes of lawfully present noncitizens remain ineligible for most federally-funded benefits (Parmet, 2020). The Act, however, exempted expenses related to testing, treating, and immunizations for communicable diseases, and allowed states to cover emergency medical treatment for ineligible noncitizens through what is known as the “emergency Medicaid” program.

Since PRWORA's enactment, Congress has softened its impact by granting states the option to enroll lawfully present children and pregnant people with or without documentation in Medicaid and the Children's Health Insurance Program. Many states, however, have not taken advantage of these provisions (Parmet, 2020). Further, although the Affordable Care Act permits lawfully present noncitizens to purchase insurance on the exchanges, it maintained PRWORA's restrictions on undocumented immigrants, as well as the five-year ban applicable to lawfully present immigrants. Hence even before President Trump took office, many noncitizens were excluded from large portions of the social safety net, leaving them and their families less likely to have health insurance or a regular source of health care (Parmet, 2020).

The Trump administration's restrictionist policies meet the pandemic. As discussed more fully in Chapter 33 of Volume I,

several Trump administration regulatory actions increased noncitizens' vulnerability to COVID-19 and helped to spread the disease throughout the general population. In addition to pushing for a wall on the southern border, the Trump administration adopted a draconian approach to immigration enforcement, including through the use of family separation. It also sought repeal the Deferred Action for Childhood Arrivals (DACA) program, end temporary protective status (TPS) for hundreds of thousands of immigrants, add a citizenship question to the census, and require asylum seekers crossing the southern border to “remain in Mexico” while their petitions were heard. Although some of these policies were overturned by the courts or reversed due to political blowback, they exacerbated fear and insecurity, leaving an already socially vulnerable population even more vulnerable.

The public charge rule played a particularly important role in augmenting immigrants' fear. The rule, which went into effect in February 2020, requires immigration officials to consider an immigrants receipt of non-cash benefits, including supplemental nutrition assistance (SNAP), housing subsidies, and federally-funded health insurance, as well health insurance status and income in determining whether the immigrant is likely to become at any point a public charge, and hence ineligible to enter the U.S. or receive permanent residency status (Parmet, 2020). Due to PRWORA, few immigrants who are subject to the rule are actually eligible for most of the listed benefits. Nevertheless, the rule created great fear among immigrants — even among those who are not subject to it — and has led many to refrain from interacting with the health care system or accessing vital benefits (Capps et al., 2020).

Access to benefits during the pandemic. In response to the pandemic, on March 13, 2020, United States Citizenship and Immigration Services (USCIS) announced that it would not consider public support for “testing, treatment, nor preventive care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of the public charge inadmissibility determination” (Parmet, 2020). USCIS further stated that immigrants who lost their job due to the pandemic could submit evidence to that effect for their public charge determination. USCIS did not, however, suspend the rule during the pandemic. Nor did it embark on a campaign to inform noncitizens that COVID-related treatment would not be considered in the public charge determination. Instead, it continued to defend the rule against legal challenges, obtaining stays from injunctions imposed by lower courts even as the pandemic ravaged immigrant communities (Parmet, 2020).

Adding to these vulnerabilities was the fact that many noncitizens were denied access to some of the support that Congress provided in the pandemic relief legislation. For example, the \$1,200 cash assistance provided under the Coronavirus Aid, Relief and Economic Security (CARES Act) was limited to citizens and immigrants with Social Security numbers. This barred citizens and legal permanent residents who are married to undocumented immigrants without a Social Security number from receiving relief. The Coronavirus Response and Relief Supplemental Appropriations Act, signed by President Trump in December 2020, remedied this by making citizens and legal permanent residents who file jointly

with an undocumented taxpayer retroactively eligible for \$1,200 per household (plus \$500 per child), as well as the additional \$600 for adults, and \$600 per child made available to all taxpayers under the Act (Montoya-Galvez, 2020).

Undocumented workers were also unable to access the unemployment compensation provided by the Families First Coronavirus Response Act. Hence, they often had little choice but to work in unsafe conditions, and to continue doing so even if they or someone in their household was ill (Arango et al, 2020). In addition, although the funding provided by the CARES Act for no-cost testing, treatment, and vaccinations for uninsured individuals did not require providers to confirm patients' immigration status, funding was limited for COVID-19 treatment and prevention, meaning that patients who seek care uncertain about their diagnosis faced the risk of receiving medical bills they cannot afford.

Nebraska Governor Pete Ricketts decided to be even more punitive, putting undocumented workers at the back of the line for vaccination (Armus, 2020). Although such punitive measures may appear to be limited to undocumented residents, their impact will be felt more widely. Noncitizens do not live or work apart from the rest of the population. Indeed, because so many noncitizens work in health care and other essential services, such policies threaten the health of the entire population.

The dangers of detention. Throughout the pandemic, noncitizens in detention faced enhanced risks. A September 2020 report of the House Committee on Homeland Security found that even before the pandemic, Immigration & Customs Enforcement (ICE) "ignor[ed] medical issues raised by detainees, offer[ed] poor mental health care services, and in one case, allow[ed] medical care to deteriorate to the point that it became necessary to transfer detainees to different facilities" (House Committee, 2020).

These problems continued throughout the pandemic. Although ICE reduced the population in some detention facilities, it has continued to conduct enforcement proceedings and tens of thousands of immigrants remained in custody throughout the pandemic. According to the American Bar Association, more than 7,600 individuals in ICE custody had tested positive as December 3, 2020 (American Bar Association, 2020). As of September 2020, six detainees had died in ICE custody due to COVID-19 (House Homeland Security, 2020). The full extent of the pandemic's toll on detainees, however, remains unknown.

Dozens of lawsuits have challenged the conditions of confinement during the pandemic (Parmet 2020). In one notable case, *Angel de Jesus Zepeda Rivas v. Jennings*, a federal judge from the Northern District of California found on December 3, 2020, that a privately-run detention facility and ICE had failed to implement a plan to minimize the risk, had deliberately failed to test detainees and staff, and had avoided undertaking safety measures. Nevertheless, many courts denied petitions by individual detainees who could not show a special risk factor for severe disease due to COVID-19 (Parmet, 2020).

Distorting public health. Throughout history, societies have blamed and scapegoated non-nationals and racial minorities for epidemics. The COVID-19 pandemic was no exception. President Trump and his supporters frequently called SARS-COV-2 "the China virus." This xenophobic lens helped frame and distort the federal government's response to the virus. For example, the travel bans that were imposed in the winter and spring of 2020 were issued under the President's immigration authority, rather than the Public Health Services Act, and were predicated on citizenship and immigration status, rather than exposure to the virus. At least early in the pandemic, President Trump seemed to take the position that the United States would be safe from the coronavirus as long as non-nationals were kept out of the country (Parmet, 2020). In the early days of his administration, President Biden has also relied on his immigration authorities to bar entry by non-nationals traveling from South Africa and Brazil, in an effort to keep out new variants of SARS-COV-2.

The CDC's promulgation of an emergency regulation permitting it to bar non-nationals from nations from which there is a "serious danger" of introduction of a communicable disease provides a different example of how the Trump administration's anti-immigration policies distorted the pandemic response (Parmet, 2020). Pursuant to this regulation, CDC issued an order closing the border with Mexico, which the Department of Homeland Security promptly used to override asylum law and expel asylum seekers (Parmet, 2020). Despite its different approach on immigration, as of February 2021, the Biden administration has maintained this order, continuing the tradition of hijacking public health policy in the service of immigration restriction (Miroff et al., 2021).

Moving Forward

America's experience with COVID-19 demonstrates that comprehensive immigration reform, such as President Biden has called for, is essential to an effective pandemic response. As long as millions of immigrants who live and work in the United States experience fear and insecurity, without access to basic benefits, large swaths of the population will remain at heightened risk of novel infectious diseases that can rapidly spread to the broader population. For that reason, comprehensive immigration reform is an essential element of pandemic preparedness.

While a full discussion of the contours of any immigration reform measure is beyond the scope of this Chapter, any reform must offer a rapid path to legalization for immigrants who reside in the United States. It should also reduce our reliance on enforcement, especially among immigrant communities living within the country, and detention of immigrants who pose no risk to public safety. Most importantly, any immigration reform must end the harmful practice of attempting to deter immigration by increasing vulnerability among immigrants. For this reason, any immigration reform bill should repeal the public charge provision in the INA, as well as the punitive restrictions in PRWORA that have blocked and deterred immigrants from accessing critical public benefits. These exclusions have led to lower rates of health insurance among noncitizens and have left the nation as a whole less able to respond effectively to public health emergencies.

Although only Congress can enact the type of comprehensive reform necessary to ensure that immigration laws no longer weaken our ability to respond to a pandemic, congressional action on immigration has long proven elusive. With the Democrats having only slim majorities in Congress, and our highly polarized politics, the prospects for imminent action remain uncertain. It will, therefore, be essential for the Biden administration, and the states, to do what they can do.

Much can be done at the federal administrative level. Already, President Biden has called upon his Department of Homeland Security (DHS) to reverse the Trump administration's efforts to end DACA, and to restore TPS for some immigrants. In addition, on February 1, 2021, DHS issued a statement encouraging everyone to be vaccinated regardless of immigration status, and promising that ICE will not conduct enforcement actions near vaccine distribution sites or health care facilities. And on February 2, 2021, the president directed DHS to review the public charge rule. Presumably, the review will lead DHS to begin the process of repealing the rule. In the meantime, DHS should repeal it for the duration of the pandemic.

The Biden administration can also immediately begin to reduce the number of immigrants in detention centers, jails, and prisons. It can also stop enforcement raids when public safety is not at stake, and begin rulemaking to prohibit ICE from receiving information from health care providers and public health agencies.


The Biden administration can also take several steps to increase health insurance coverage among non-citizens. In addition to suspending and eventually rolling back the public charge rule, it can reverse an Obama-era guidance holding that DACA recipients were ineligible to purchase insurance on the Affordable Care Act exchanges.

Finally, the Biden administration can and must stop the dangerous conflation of public health and immigration policies. CDC guidance and orders must be based solely on public health grounds, not aimed at furthering immigration goals.

Although states have less authority than the federal government over immigration, they can and should expand coverage to all categories of noncitizens who are eligible for federally-funded health insurance. States should also offer state-funded health insurance and other benefits to noncitizens who are ineligible for federal support. As the pandemic has shown, once a public health emergency strikes, states are forced to respond to communities facing higher rates of disease. Far better to provide coverage and care to these communities before they become "hot spots."

States can also ensure that COVID-19 vaccines are widely available to immigrants, regardless of legal or insurance status. Most importantly, states must make sure that information about the availability of vaccines is made available in all languages that are spoken in their communities.

Likewise, both the Biden administration and states need to undertake a robust messaging campaign to counter the false belief that immigrants endanger the health of Americans. Federal and state leaders also need to make clear that immigrants will not face adverse immigration consequences for being sick, seeking care, speaking with health officials, getting vaccinated or reporting unsafe work conditions. These messages need to be in all languages spoken in a community, and government officials at all levels need to work with grass root community leaders to help reduce the fear and restore the trust among newcomers to America.

Restoring that trust, and lessening the fear will not be easy. Unless we do it, we will never be prepared. 

Recommendations for Action

Federal government:

- Congress should enact comprehensive immigration reform that provides undocumented immigrants with a pathway to citizenship and reduces immigration insecurity.
- Congress should repeal the provisions within PRWORA that bar undocumented immigrants and those with less than five years of legal status from obtaining federally-funded benefits for which they would otherwise be eligible.
- Congress should repeal the public charge provision in the Immigration and Naturalization Act.
- Unless Congress repeals the public charge provision in the Immigration and Naturalization Act, the Department of Homeland Security should suspend the public charge rule during the pandemic and take steps to begin to repeal and replace it with one that codifies past practice.
- ICE should suspend immigration raids during the pandemic except when necessary for public safety, and should depopulate detention facilities to the extent compatible with public safety.

State governments:

- States should provide Medicaid and CHIP to all otherwise eligible noncitizens, and use their own funds to provide coverage to immigrants who are ineligible for federally-funded coverage.
- States must ensure that COVID-19 vaccines are accessible and available to noncitizens, regardless of immigration and insurance status.

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