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RESTORATIVE JUSTICE DIVERSION AS A STRUCTURAL HEALTH INTERVENTION IN THE CRIMINAL LEGAL SYSTEM

THALIA GONZÁLEZ*

A new discourse at the intersection of criminal justice and public health is bringing to light how exposure to the ordinarness of racism in the criminal legal system—whether in policing practices or carceral settings—leads to extraordinary outcomes in health. Drawing on empirical evidence of the deleterious health effects of system involvement coupled with new threats posed by COVID-19, advocates and academics have increasingly called for race-conscious public health-driven reforms to carcerality in the United States. Recognizing the significance of health to carceral reform, the initiation of a health justice grounded lexicon in criminal justice has opened the doorway to new and dynamic scholarly engagement.

This Article initiates a two-pronged interdisciplinary project at the nexus of criminal law, public health, and restorative justice. First, it seeks to make visible an often-unnamed recursive theoretical framework—health inequities influence carcerality and carcerality influences health inequities. Second, it recognizes a gap in research, public discourse, and policy and specifically intervenes to examine restorative justice diversion in a manner that neither the legal nor public health fields have before. More precisely, it locates restorative justice diversion in the framework of structural health interventions.

Synthesizing multiple strands of research, this Article departs from the traditional understanding of upstream criminal justice interventions by identifying and mapping not only direct health outcomes of participation in restorative justice diversion but also how such interventions in the criminal

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legal system may alter the larger social context by which health disparities emerge and persist. This project's central aims are to: prioritize diminishing exposure to the criminal legal system; expand non-carceral measures for safety, accountability, community healing, and wellbeing; and, consequently, substantively impact racial health inequities.

INTRODUCTION

Much of the current discourse in public health and public health law centers on advancing race-conscious and health justice\(^1\) approaches to address deeply entrenched racialized regimes in American law. These regimes affect the social and structural drivers of health including housing,\(^2\)

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1. As a framework, health justice scholars place “subordination at the center of the problem of health disparities . . . [and] elevate[] how racism, social control, bias, privilege, as well as the political and legal systems in which they are embedded, influence the social determinants of health (SDH).” Thalia González, Alexis Etow & Cesar De La Vega, A Health Justice Response to School Discipline and Policing, 71 Am. U. L. Rev. 1927, 1931 (2022).

employment, education, healthcare access, access to justice, and policing, to name only a few. Though not often explicit in characterizing

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itself as within the tradition of critical race theory, as a field, public health has been clear to increasingly name racism as a public health crisis and in seeking to intertwine racial justice with health equity.

As the endemic of racial violence and the COVID-19 pandemic collided in 2020, the resulting effects brought to the forefront of non-public-health and health law scholars’ minds the idea that “all policy is health policy.” Despite this, at first glance, it may seem peculiar to advance a project—examination of restorative justice diversion as a structural health intervention—within the province of criminal law. However, as Part III

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12 While this Article focuses on restorative justice diversion in its most common form—in relationship to state processes—it is not a tacit or direct endorsement of the carceral state.
illuminates, there is simply no province of the criminal legal system\(^\text{13}\) that does not drive the persistence of racial health inequities. As such, this Article can be understood less as a departure from traditional disciplinary boundaries than as a chance to invigorate a dialogue across and between the fields of criminal law, public health, and restorative justice, where synergies already exist.

As Part I illustrates, the urgency to reform the American carceral state is not new. Stark evidence of individual and community consequences of criminal legal system involvement, by any measure, is clear. And, whether one looks historically at the inception of the carceral system and its roots in anti-Blackness and slavery,\(^\text{14}\) or simply examines the contemporary racialized and gendered disparities,\(^\text{15}\) there is little room to suggest “justice” is being achieved for Black people, Indigenous people, and people of color (BIPOC), or other structurally marginalized people. The central goal of this Article, however, is not to simply state the obvious about carcerality in the

\(^{13}\) I use the term “criminal legal system” in opposition to the “criminal justice system” to underscore the lack of justice in a system that was designed to control and oppression Black, Indigenous and people of color (BIPOC) and maintain white supremacy. See, e.g., Erica Bryant, Why We Say “Criminal Legal System,” Not “Criminal Justice System”, VERA (Dec. 1, 2021), https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system [https://perma.cc/4JCD-HKSW].


United States. Instead, it seeks to engage criminal law and other legal scholars directly with a health justice lexicon. Specifically, Part V locates restorative justice diversion in the framework of structural health interventions.

Synthesizing multiple strands of existing research, this Article departs from the traditional understanding of upstream criminal justice interventions—identifying and mapping not only direct health outcomes of participation in restorative justice diversion, but, as importantly, considering how such interventions in the criminal legal system may alter the larger social context by which health disparities emerge and persist. Recognizing this is the first construction of the logic of restorative justice as a structural health intervention, this Article concludes with recommendations for future work at this nexus. I hope that future scholarship will inform an ongoing development of structural health interventions in the criminal legal system, and further solidify a central thesis of this work—that health inequities influence carcerality and carcerality influences health inequities. Each of these pathways operates to advance another central premise of this Article: that by prioritizing divestment from the dominant model of the carceral state—including, but not limited to, implementing non-punitive measures for safety, accountability, community healing, and wellbeing—we can substantively impact racial health inequities.

I. CONTEXTUALIZING THE AMERICAN CRIMINAL LEGAL SYSTEM

Since its inception in the colonial period, the development of the United States has been marked by structural violence and social control constructed

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16 As Keon L. Gilbert and Robert S. Chang argue:

Shrinking the criminal legal system will help to: (1) address systemic racism that leads to police killings; (2) re-direct resources towards public health prevention strategies that can support reductions in social and structural determinants of health that lead to health inequities; and (3) reduce the burden of officers’ involvement in collecting revenue for municipalities’ general funds, which have become the primary strategies supporting detaining and arresting Black people through stop and frisk practices and other forms of hyper-surveillance.

through the legal reification\textsuperscript{17} of racism,\textsuperscript{18} settler colonialism,\textsuperscript{19} slavery,\textsuperscript{20} and anti-Blackness.\textsuperscript{21} While these distinct, yet genealogically inseparable,\textsuperscript{22}


\textsuperscript{18} There is a large body of legal scholarship that interrogates the complicity of law in upholding white supremacy and creating racial hierarchies to ensure the oppression and exploitation of non-white people. See generally Derrick Bell, Racial Realism, 24 CONN. L. REV. 363, 363–79 (1992) (highlighting the Racial Realism movement, which is a “legal and social mechanism on which blacks can rely to have their voice and outrage heard” through challenging the principle of racial equality, which subordinates Black individuals); Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1710–91 (1993) (articulating the legal legitimation of expectations of power and control as “whiteness as property,” which enshrines the status quo as a neutral baseline and masks the maintenance of white domination and privilege); IAN HANLEY LOLPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xiii–26 (1996); see also López, supra note 17, at 1; Walter Johnson, The Slave Trader, the White Slave, and the Politics of Racial Determination in the 1850s, 87 J. AM. HIST. 13, 20–21, 25–27, 29 (2000); Kimberlé W. Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 151–52 (1989); Neil Gotanda, A Critique of “Our Constitution Is Color-Blind”, 44 STAN. L. REV. 1, 23–61 (1991) (explaining the ways in which American law has classified people by race in a “socially determined and socially determinative” manner, and particularly the way American racial classifications and use of formal race have had particular rules for defining the racial categories of Black and white, which support racial subordination); Ariela J. Gross, What Blood Won’t Tell: A History of Race on Trial in America 48–73 (2008); Dorothy Roberts, Fatal Invention: How Science, Politics, and Big Business Re-creating Race in the Twenty-First Century 2, 3–10 (2011).

\textsuperscript{19} Settler colonialism is a distinct framework for analyzing subordination, exploitation, and exclusion. See generally NATSU TAYLOR SAITO, SETTLER COLONIALISM, IN RACE AND LAW: WHY STRUCTURAL RACISM PERSISTS 30–33, 41–56 (2020); Natsu Taylor Saito, Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory, 10 FLA. A&M U. L. REV. 1, 22–30 (2014); Patrick Wolfe, Settler Colonialism and the Elimination of the Native, 8 J. GENOCIDE RES. 387, 399–400 (2006) (focusing on the logic of elimination in U.S. settler colonialism towards Indigenous people); Evelyn Nakano Glenn, Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation, 1 SOC. RACE & ETHNICITY 52, 54–72 (2015) (examining the ways in which the settler goals, which were accomplished through violence and militarized violence, shaped the race and gender formations of various racialized groups in racist ways).

\textsuperscript{20} I adopt an expansive definition of slavery to be inclusive of antebellum slavery and slavery as it has evolved and transformed following the passage of the Thirteenth Amendment. See Goodwin, supra note 14.

\textsuperscript{21} See, e.g., BRUCE WESTERN, REIMAGINING JUSTICE: THE CHALLENGES OF VIOLENCE & PUNITIVE EXCESS 22 (2022); Kimberlé W. Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, 43 STAN. L. REV. 1241, 1241–99 (1991) (exploring the ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color and how this differs from the
phenomena are deeply rooted across all domains of society, they are uniquely implanted in criminal law and the criminal legal system, providing scholars with an illuminating and disturbing site of analysis, and supplying legal advocates and movement activists with a critical domain for action. 


22 Saito, supra note 19, at 30.


24 Hinton & Cook, supra note 14 at 2, 3, 7; Hinton, Henderson & Reed, supra note 15.


As the historical and contemporary records reflect, structural racism\(^{27}\) and oppression permeate our systems of “justice,”\(^{28}\) including, but not limited
As criminal law professor Paul Butler observes, the Fourth Amendment functions less as a guarantee of rights and instead as “a project by the Burger, Rehnquist, and Roberts Courts to expand the power of the police against people of color,” a project that allows for the “racial policing of space,” and “constructs the criminal as colored, and the white as innocent.”34 Coupled with Supreme Court decisions interpreting criminal law and constitutional protections, criminal policy has also served to expand the carceral system.35


31 See, e.g., Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 FORDHAM L. REV. 13 (1998) (examining the role of prosecutorial discretion and how it contributes to racial inequity in the criminal justice system at the prosecution stage); Robert J. Smith & Justin D. Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 SEATTLE U. L. REV. 795 (2012) (discussing the role of implicit bias in prosecutorial discretion and suggesting the creation of studies to further examine how and when implicit bias affects prosecutorial decision-making).

32 Studies, for example, have found that Black men are likely to receive a sentence that is 20% longer than their White counterparts who have been convicted of similar crimes. See, e.g., AM. CIV. LIBERTIES UNION, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES AND SENTENCING 1 (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf

Additionally, Black people comprise 13% of the United States population, but make up 56.4% of all lifetime prison sentences. Id. at 2; see also NEMBHARD & ROBIN, supra note 15, at 5; Cedric Merlin Powell, The Structural Dimensions of Race: Lock Ups, Systemic Chokeholds, and Binary Disruptions, 57 U. LOUISVILLE L. REV. 7, 32 (2018); Butler, supra note 30, at 26, 30.

33 Sandra Susan Smith, Elena Sokoloski & Isabella Jorgensen, Harv. Kennedy Sch. & Malcolm Weiner Ctr. for Soc. Pol’y, Racial Disparities in Community Supervision and Reentry: The Massachusetts Case 1–15 (2022) (documenting state-level racial disparities and mechanisms that cause inequities) (on file with author); Elizabeth J. Gifford, How Incarceration Affects the Health of Communities and Families, 80 N.C. MED. J. 372, 372–74 (2019) (reviewing the health effects of incarceration in communities and families, which include food insecurity, homelessness, negative physical health outcomes, stigma, and negative mental health impacts).


35 I use the terms carceral system, carcerality, and criminal legal system interchangeably in this Article. These terms individually, and collectively, refer to the social, political, economic, and legal mechanism associated with punishment deployed as control mechanisms disparately against BIPOC people and other structurally marginalized people in the United States.
including making policing and criminality the default response to social, economic, and public health needs.\(^{36}\) For example, since 1970, law enforcement officers—rather than mental health and behavioral professionals—have assumed the role of “frontline” responders to acute mental health emergencies and needs, resulting in escalating arrest rates, physical violence, and even death.\(^{37}\)

It is also well documented that the development of, and reliance on, “law and order” policies and practices led to an unprecedented increase in the

\(^{36}\) See, e.g., Kathleen Daly & Michael Tonry, Gender, Race, and Sentencing, 22 CRIME & JUST. 201 (1997) (describing the effects that race and gender enter into sentencing and other points in the criminal legal system, through use of stereotypes, social conditions, and notions of the role of punishment and reform); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America 276–306 (2016); Kathryn M. Nowotny & Anastasia Kutsevych-Timmer, Health and Justice: Framing Incarceration as a Social Determinant of Health for Black Men in the United States, 12 SOC. COMPASS 3, 5–7 (Feb. 2018); COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3–8 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); Nembiard & Robin, supra note 15, at 1–14 (discussing how racist policies that utilize definitions of criminality are rooted in structural inequalities and how racial biases of individual actors in the system influence outcomes for people involved in the criminal legal system); David H. Cloud, Reckoning with the Rise of the Carceral State, 107 AM. J. PUB. HEALTH 200, 200 (2017); Nilofar Ramezani, Alex J. Breno, Benjamin Mackey, Jill Viglione, Alison Evans Cuellar, Jennifer E. Johnson & Faye S. Taxman, The Relationship Between Community Public Health, Behavioral Health Service Accessibility, and Mass Incarceration, 22 BMC HEALTH SERVS. RES. 1, 1–11 (2022) (highlighting the relationship between behavioral health and healthcare services and risk of entry into legal systems).

prison population—more than tripling since the 1970s.\textsuperscript{38} These policies and practices include policing in structurally marginalized communities, growth of prosecutorial powers, and harsh sentencing guidelines, each contributing to what Michelle Alexander coined the “New Jim Crow.”\textsuperscript{39} In 2021, the United States prison population was more than 1.2 million people\textsuperscript{40} and in 2020, there were 3.89 to 4.4 million people under community supervision.\textsuperscript{41} Whether measured cumulatively (e.g., state and federal incarceration rates) or at an individual state-level of analysis, the United States is a global outlier in carcerality.\textsuperscript{42} For example, California’s incarceration rate is at least four times higher than the United Kingdom, France, and Canada.\textsuperscript{43} Moreover, a comparative analysis by the Prison Policy Initiative found that twenty-four states have higher incarceration rates than any other country in the world.\textsuperscript{44}


\textsuperscript{39} MICHELLE ALEXANDER, \textit{The New Jim Crow: Mass Incarceration in the Age of Colorblindness} ii (2010).

\textsuperscript{40} E. ANN CARSON, PRISONERS IN 2021 – STATISTICAL TABLES, U.S. DEP’T OF JUST. 1 (Dec. 2022). In 2020, the Prison Policy Initiative estimates there were approximately 2.3 million people confined in state and federal prisons. Sawyer & Wagner, supra note 38.

\textsuperscript{41} DANIELLE KAEBLE, DEP’T OF JUST., BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2020 1 (2021).


\textsuperscript{44} A 2021 measurement by the Prison Policy Initiative calculates that if every state in the United States was an independent nation, 24 states would have the highest incarceration rates in the world. \textit{Id.} For example, Louisiana’s calculated incarceration rate is 1,094 people per 100,000, compared to Uganda, which is 142. \textit{Id.}
Despite robust movements,\textsuperscript{45} criminal justice reform,\textsuperscript{46} and abolition\textsuperscript{47} of the prison-industrial complex,\textsuperscript{48} including, in 2021, the American Health


Over the past decade, \textit{The New Jim Crow} has forced policymakers, scholars, and the public to confront the problem of mass incarceration in important new ways . . . Within the policy arena, the growing mandate for criminal justice reforms that emerged during the Obama administration—including the decarceration of nonviolent drug offenders, community-oriented policing reforms, and the emphasis on comprehensive prison reentry and youth violence prevention programs—can be partly attributed to the influence of Alexander’s ideas.

Hinton & Cook, supra note 14, at 262; see also Alexander, supra note 39, at 262.


Association’s recommendation to “mov[e] toward the abolition of carceral systems,” 49 mass incarceration remains the norm.

Though “mass incarceration” 50 accurately describes the current landscape of the American system, it is essential from critical race theory 51


50 Mass incarceration descriptively names the scope and scale of racialized policing, violence, and confinement, with mass incarceration as the shorthand for the nature of racialized criminalization and incarceration in the criminal legal system that has roots in slavery and settler colonialism. See, e.g., Hinton & Cook, supra note 14, at 265–66; Cullen, supra note 28.

51 As a discipline, critical race theory reconstitutes the centrality of racism in legal scholarship with particular attention to deconstructing colorblindness and operation of race-neutrality in legal thought and doctrine. See, e.g., Gotanda, supra note 18, at 62; see also Kevin R. Johnson, An Essay on the Nomination and the Confirmation of the First Latina Justice on the U.S Supreme Court: The Assimilation of Demand at Work, 30 Chicana/o-Latina/o L. Rev. 97 (2011); see also Angela P. Harris, Racing Law: Legal Scholarship and the Critical Race Revolution, 52 Equity & Excellence in Educ. 12, 17–18 (2019) (summarizing the contributions of critical race theory as three-fold: “First, CRT scholars argue that racism is endemic to American history, society, and politics, and that the problem of racial justice is therefore fundamental to American law. As we have already seen, the previous generation of civil rights scholars sought to fit racial justice into the institutional constraints of legal process. CRT scholars seek the converse, reorganizing legal scholarship’s priorities. Second, CRT scholars have infused greater social, disciplinary, and scholastic ‘reflexivity’ into legal scholarship on race. Third, CRT scholars have developed a rich and nuanced language for understanding race and racism, replacing an earlier and less sophisticated conception of people of color as ‘discrete and insular’ minorities facing unreasoning prejudice.”). The influence of critical race theory is not isolated to law and, in fact, has been accepted in fields ranging from public health to medicine to education to political science to sociology. See, e.g, Ford & Aihihenbuwa, supra note 10, at S30, S30–S34 (introducing Critical Race Theory as applied to public health, emphasizing structural racism’s impacts on health, health inequalities, and research); Rachel Zewude, Critical Race Theory in Medicine, 193 CMAJ E739, E739–41 (2021) (applied to medicine); Jeanne M. Powers, The Relevance of Critical Race Theory to Educational Theory and Practice, 41 J. Phil. & Educ. 151, 151–53 (2007) (applied to education); Glenn E. Bracey, Toward a Critical Race Theory of State, 41 ASS’N CRITICAL SOC. 553, 556–58 (2014) (applied to political science); Devon W. Carbado & Daria Roithmayr, Critical Race Theory Meets Social Science, 10 Ann. Rev. L. & Sci. 149, 149–67 (2014) (exploring sociology as a useful methodology to advance and empirically support key critical race claims, including structural racism, intersectionality, race as social construct, use of racial stereotypes, and racism at the subconscious and conscious level).
and public health\textsuperscript{52} perspectives to emphasize that the use of this term may serve to disguise structural racism and decontextualize the role of law in framing, naming, and transforming Black identity into “criminal.”\textsuperscript{53} Additionally, it may devalue the compounding\textsuperscript{54} health harms experienced by subordinated individuals and communities impacted by the carceral expansion and the carceral state. This Article intentionally names each of these conceptual frames and lived realities as underpinning the historical and contemporary patterns of discrimination and policies of exclusion.

However, carcerality in the United States is more than an outcome reduced to data disparities. It is a compounding set of norms, laws, and systems predicated on racism.\textsuperscript{55} Thus, it is not an accidental outcome\textsuperscript{56} that

\begin{itemize}
  \item See infra Figure 1.
  \item One simply cannot discuss criminality in the United States without elevating the missteps of single-axis analysis of mass incarceration and the compounded oppression that people with intersectional identities face. As critical race feminist legal scholar Priscilla Ocen illuminates:

  \begin{quote}
  [A] single-axis analysis of mass incarceration is insufficient to capture the broad impact of the prison and the raced and gendered logics that animate its operation. As a consequence of the failure to engage intersectionality in the context of the prison, legal scholarship on incarceration tends to obscure the centrality of Black women’s gender in the racialized system of control and posits Black men as the primary targets of mass incarceration.
  \end{quote}

  Priscilla A. Ocen, \textit{Unshackling Intersectionality}, 10 DU BOIS REV.: SOC. SCI. ON RACE 471, 474 (2013); see also Kimberlé W. Crenshaw, \textit{From Private Violence to Mass Incarceration: Thinking Intersectionality About Women, Race, and Social Control}, 59 UCLA L. REV. 1418, 1418–72 (2012) (linking mass incarceration with the interactions of forces that constitute race, gender, and class power and the way in which they create social punishment, emphasizing the structural, political and legal dimensions of mass incarceration).
  \item The vulnerabilities that Black Americans face as members of a socially constructed, and legally reinforced, racial category is not what places them at direct risk for incarceration, but rather how the architecture of racism, structural discrimination, and anti-Blackness has
\end{itemize}
states incarcerate Black Americans at five times the rate of white Americans and that Black Americans constitute the majority of the prison population in twelve states.\textsuperscript{57} Nor is it an anomaly that Latinx people, through legal, social, and political mechanisms, have faced racial discrimination and biases,\textsuperscript{58} as evidenced by empirical data that they account for 23\% of inmates nationally despite representing just 16\% of the adult population.\textsuperscript{59} Furthermore, neither the depth of reliance on criminalization nor its far-reaching consequences are isolated to adults.

As juvenile justice scholar Kristin Henning argues, Black youth are exposed to a constant convergence of federal, state, and local policies in the domains of community, school, and home.\textsuperscript{60} Disparities present in the adult system hold true for young people—Black children account for 32\% of children arrested, 42\% of children detained, and 52\% of children whose cases are judicially waived to criminal court, yet Black Americans overall only represent 14\% of the population.\textsuperscript{61} Latinx children are likewise


\textsuperscript{61} Criminal Justice Fact Sheet, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet [https://perma.cc/R8K6-MYUX].
overrepresented in the juvenile justice system and are 28% more likely to be detained or committed in juvenile facilities than their white peers.62

Additionally, as data compiled by the National Institute of Justice reflect, the number of children who have experienced parental incarceration at least once in their childhood may range from 1.7 million to 2.7 million.63 Further, the 2021 Bureau of Justice Statistics “estimated [that] 684,500 state and federal prisoners were parents of at least one minor child in 2016,” nearly half (47%) of male and over half (58%) of female state or federal prisoners.64 Such findings are consistent with data from the National Institute of Corrections and the Annie E. Casey Foundation Kid Count Data Center, which indicate that 7% of children in the United States have experienced parental incarceration. This number has remained consistent from 2017 to 2019.65 Consistent with disparities in all other domains of the mass incarceration system, a disproportionate burden falls on BIPOC youth and communities.66

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II. A HEALTH DETERMINANT ANALYSIS OF THE CRIMINAL LEGAL SYSTEM

The social determinants of health (SDH) are widely accepted as “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.”67 This broad array of factors can impact health in five main domains: economic stability; neighborhood and built environment; education access and quality; social and community context; and healthcare access and quality.68 Within the social determinant framework, these domains are subdivided into “structural determinants” and “intermediary determinants.”69 In 2020, public health law scholar Ruqaiijah Yearby introduced a revised SDH approach identifying structural discrimination as the root cause of health inequities and explicating how it operates through political and legal “tools” to shape the social determinant in ways that produce differential health outcomes.70 Under the revised SDH framework, law—and for purposes of this Article, specifically criminal law and criminal legal processes71—not only reinforces

69 Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiijah Yearby, Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities Before and After COVID-19, 19 YALE J. HEALTH POL’Y L. & ETHICS 122, 126–27 (2020) (“Structural determinants of health are ‘social and political mechanisms that generate, configure and maintain social hierarchies’ and organizations and institutions that can impact behavior. Structural determinants (discrimination, poverty, and other forms of subordination, as well as the political and legal systems in which subordination is embedded), impact the intermediary determinants of health. The intermediary determinants include material and environmental circumstances, such as health care, housing, and employment conditions.”).
70 Ruqaiijah Yearby, Structural Racism and Health Disparities: Reconfiguring the Social Determinants of Health Framework to Include the Root Cause, 48 J.L. MED. & ETHICS 518, 521 (2020). I join with Professor Yearby and others in adopting the revised SDH framework, and in the revised SDH framework that scaffolds this Article.
discrimination, protects white privilege, and places those at the margins at the greatest risk, but also structurally entrenches health inequities.

Consider, for example, housing as a determinant of health. Housing instability and homelessness are linked to poor health outcomes, including risk of chronic stress and mental illness, infectious diseases, violence, substance abuse, and death. For people experiencing economic instability and homelessness, there is little dispute that laws criminalizing poverty serve


73 See, e.g., Sheila Foster, Yael Cannon & Gregg Bloche, Health Justice Is Racial Justice: A Legal Action Agenda for Health Disparities, HEALTH AFF. (Jul. 2, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20200701.242395/full (highlighting how policies maintaining structural inequalities related to housing exacerbated the effect of COVID-19 in minority communities); Yearby, supra note 70, at 520–21 (demonstrating that “the totality of ways in which societies foster discrimination, via mutually reinforcing systems of discrimination (e.g. in housing, education, employment, earnings, benefits, credit, media, health care, criminal justice, etc.) . . . reinforce discriminatory beliefs, values, and distribution of resources.”).

74 See, e.g., Tomáš Habánik, Mental Health Problems as One of the Factors in the Development and Persistence of Homelessness, 2 KONTAKT 181, 181–86 (2018) (reporting a study linking homelessness and mental health issues, as well as consequences of failure to treat psychological problems among the homeless, limiting reintegration into society).


78 Carolyn J. Tompsett, Sarah E. Domoff & Paul A. Toro, Peer Substance Use and Homelessness Predicting Substance Abuse from Adolescence Through Early Adulthood, 51 AM. J. CMTY. PSYCH. 520, 520–23 (2013) (reporting a study that shows adolescents who experience homelessness are at higher risk for abusing substances, or to be exposed to peers who use substances); See generally Robert W. Aldridge, Alistair Story, Stephen W. Hwang, Merete Nordentoft, Serena A. Luchenski, Greg Hartwell, Emily J. Tweed, Dan Lewer, Srinivasa Vittal Katikireddi & Andrew C. Hayward, Morbidity and Mortality in Homeless Individuals, Prisoners, Sex Workers, and Individuals with Substance Use Disorders in High-Income Countries: A Systematic Review and Meta-Analysis, 391 LANCET 241, 242 (2017).
as a pipeline to incarceration. Anti-houseless laws ban life-sustaining behaviors, such as sleeping in public, begging in public, loitering, sitting or lying down in public, and sleeping in a vehicle. The racialized costs of such criminalization are clear—Black people comprise 40% of all people who are unhoused, but make up less than 14% of the total population. Research shows disparities exist, with more frequent police searches of, and issuance of citations to, unhoused BIPOC individuals as compared to unhoused white people. In conjunction with police surveillance and anti-poverty measures, these laws create a cycle between homelessness and incarceration that accelerates poor health.

80 E.g., MANCHESTER, N.H., CODE OF ORDINANCES Tit. XIII § 130.01(A) (2021).
82 E.g., AUSTIN, MINN., CODE OF ORDINANCES § 10.23 (2021).
83 E.g., OAKLAND, CAL., CODE OF ORDINANCES § 9.08.160 (2021).
84 E.g., L.A., CAL., MUNICIPAL CODE, CH. VIII § 85.02 (2021).
While contemporary legal discourse and scholarship has increasingly focused on the racialized health harms of policing, state violence, and mass incarceration as a public health crisis vis-à-vis COVID-19, decades of research confirms the undeniable relationship of the SDH as


89 Harris & Pamukcu, supra note 6 (introducing the civil rights of health framework); Eisha Jain, The Mark of Policing: Race and Criminal Records, 73 STAN. L. REV. 162, 162–79 (2021) (advocating for a racial reckoning in policing regarding the use of criminal records, as these records entrench racial inequality stemming from policing by creating a “negative credential” every time a new record of arrest is created); Sirry Alang, Donna McAlpine, Ellen McCreedy & Rachel Hardeman, Police Brutality and Black Health: Setting the Agenda for Public Health Scholars, 17 AM. J. PUB. HEALTH 662, 662–65 (2017).


risk factors for, and consequences of, criminal legal system involvement.\textsuperscript{93} From evidence of direct physical and mental health harms of school discipline and policing, to the impact of stop and frisk policies and state violence on mental health, to police presence in hospital emergency rooms deterring people from seeking medical care, to the health-harming conditions of incarceration, to post-release collateral health consequences, it is clear that individual and community health is disrupted by mass incarceration. Further, it is critical to emphasize that one cannot decouple the negative cumulative impact of racism and discrimination in society on the physical and mental health for Black individuals and communities and how that may interact with and even drive system engagement.\textsuperscript{94}

\textsuperscript{93} Martin, supra note 63, at 1–7 (examining the risk factors that children of incarcerated parents face, including future incarceration, involvement with the criminal legal system, psychological problems, educational attainment problems, limited parent-child attachment, and economic loss); Stacy Becker & Lindsey Alexander, Understanding the Impacts of Incarceration on Health, RETHINK HEALTH 4–14 (Mar. 2016), https://rethinkhealth.org/wp-content/uploads/2016/04/ReThink-Health-March-17-Report-1.pdf [https://perma.cc/L893-ZYH2] (describing the ways in which incarceration impacts health, leading to poor health outcomes and health inequities, and further creating a “reinforcing loop” which causes recidivism and re-incarceration); Collateral Consequences, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/collateral.html; Incarceration, HEALTHY PEOPLE 2030, https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/incarceration. Following national attention on racial violence against Black Americans, including mass public demonstrations, there is a new line of public health scholarship developing an analysis of mass incarceration as a structural or socio-structural determinant. See Nowotny & Kuptsevych-Timmer, supra note 36, at 2–42 (2018) (arguing that incarceration is a social determinant of health for Black men and their families in terms of health effects for the incarcerated, and effects for the community geographically affected); Erin J. McCauley, Katherine LeMasters, Michael F. Behne & Lauren Brinkley-Rubinstein, Commentary, A Call to Action to Public Health Institutions and Teaching to Incorporate Mass Incarceration as a Sociodeterminant of Health, PUB. HEALTH REP. 1–4 (2022) (advocating for public health scholars to prioritize education and training of the role that health inequity and the social determinants of health play in mass incarceration, highlighting the health harms mass incarceration causes); Jaquelyn L. John, A Multilevel Approach to Understanding Mass Incarceration and Health: Key Directions for Research and Practice, 110 AM. J. PUB. HEALTH 550, 550–51 (2020).

\textsuperscript{94} O. Kenrik Duru, Nina T. Harawa, Dulcie Kermah & Keith C. Norris, Allostatic Load Burden and Racial Disparities in Mortality, 104 J. NAT’L MED. ASS’N 89, 94 (2012) (finding the mortality disparities between Black and white Americans that persist after adjustment for socioeconomic status and health behaviors can be partially explained by a higher rate of
As Figure 1 reflects, the criminal legal system operates as a cyclical and compounding process impacting health outcomes on individual and community levels. As a “structural determinant of individual health that repeated or chronic life stressors among Black Americans,” Rudolfo A. Bulatao & Norman B. Anderson, Understanding Racial and Ethnic Differences in Health in Late Life: Research Agenda 83–84 (2004) (summarizing recent research interrogating the relationship between race, racism, and exposure to stress); David R. Williams, Stress and the Mental Health of Populations of Color: Advancing Our Understanding of Race-related Stressors, 59 J. HEALTH & SOC. BEHAV. 466, 466–85 (2018) (describing how racial discrimination, cultural racism, and internalized racism are deeply linked with mental health and physical health, particularly stress); Yin Paradies, Jehonathan Ben, Nida Denson, Amanuel Elias, Naomi Priest, Alex Pieterse, Arpana Gupta, Margaret Kelaher & Gilbert Gee, Racism as a Determinant of Health: A Systemic Review and Meta Analysis, 10 PLOS ONE 2, 24–26 (2015) (synthesizing the body of epidemiological evidence documenting the mental and physical health impacts of racism); Gene H. Brody, Man-Kit Lei, David H. Chae, Tianyu Yu, Steven M. Kogan & Steven R. H. Beach, Perceived Discrimination Among African American Adolescents and Allostatic Load: A Longitudinal Analysis with Buffering Effects, 85 CHILD DEV. 989, 990–92 (2014) (examining perceived racial discrimination with allostatic load and reporting that adolescents who received emotional support from parents and peers had a lower allostatic load, but shows a positive association between perceived discrimination and allostatic load).


also worsens population health, incarceration produces and amplifies negative health and mental health outcomes. Studies show, for example, that incarceration leads to increased rates of depression and serious mental health issues. In Washington state, incarcerated people are 62% more likely than the general population to commit suicide as well as experience symptoms of major depression and delusions. For those that spend time in solitary confinement, the mental health and health effects are dramatic, as these individuals account for approximately half of those who die by suicide. Additionally, the risk of premature death following release is greater for those that experienced solitary confinement than those who did not. For pregnant people, the use of solitary confinement not only risks extreme psychological harm but also threatens their access to prenatal, reproductive, and maternal health care.

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100 Timothy G. Edgemon & Jody Clay-Warner, Inmate Mental Health and the Pains of Imprisonment, 9 SOC’Y & MENTAL HEALTH 33, 33–34 (2019). Additionally, conditions of overcrowding in prisons may amplify the “cognitive strain” that incarcerated people experience. Id. at 35.
102 Id.
Incarcerated and formerly incarcerated people are also more likely to experience higher rates of infectious diseases, including Hepatitis C,\(^{104}\) HIV,\(^{105}\) and COVID-19,\(^{106}\) and higher rates of mortality.\(^{107}\) And it cannot be overstated how structural racism\(^{108}\) significantly shapes the health outcomes of system-involved Black Americans. In a longitudinal analysis of 7,974 individuals, for example, researchers found that incarceration was associated with a 65% higher mortality rate among Black participants.\(^{109}\) Further, when carceralty and structural racism are analyzed through the framework of intersectionality,\(^{110}\) there is little ambiguity that Black women experience unique health-harming conditions and stressors during confinement.\(^{111}\)

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\(^{104}\) Michael Massoglia & Brianna Remster, Linkages Between Incarceration and Health, 134 PUB. HEALTH REP. 85, 105 (2019) (finding rates of Hepatitis C were 8.7 times higher for incarcerated individuals compared to the general population).

\(^{105}\) Rates of HIV for incarcerated individuals are three times higher than the general population. Lara B. Strick & Jehan Z. Budak, HIV and Corrections, NAT'L HIV CURRICULUM (Aug. 26, 2020), https://www.hiv.uw.edu/go/key-populations/hiv-corrections/core-concept/all.


\(^{108}\) Yearby, supra note 5 at, 187–92 (describing how structural racism in health care policy prevents equitable health care coverage, financing, and quality); Racism Is a Public Health Crisis, supra note 9.


\(^{110}\) Crenshaw, supra note 18, at 151–52.

However, disparities at the nexus of incarceration and health outcomes do not exist merely at the individual level; incarceration also affects the population health of Black communities.


Additionally, Black women face racist presumptions of criminality and stereotypes of white femininity that result in harsher treatment, including the use of solitary confinement. Am. C. L. UNION, supra note 103, at 7.


113 Sinikka Elliot & Megan Reid, Low-Income Black Mothers Parenting Adolescents in the Mass Incarceration Era: The Long Reach of Criminalization, 84 AM. SOC. REV. 197, 202, 216 (2019); Massoglia & Remster, supra note 104, at 9S–11S; Gifford, supra note 33, at 372–73.
As Figure 1 illustrates, structural forces that can shape health inequities in the criminal legal system are not limited to incarceration.

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Upstream social-structural pathways such as poverty, housing, education, health care access, and community context function independently but also co-influentially to elevate the risk of system involvement and diminished health status. Low-income people, for example, face pronounced barriers to accessing medical care and health insurance, and socioeconomic disparities also correlate with experiences of chronic stressors elevating their overall risk for system involvement. Likewise, BIPOC youth experience unique risk factors for criminal legal system involvement at individual, family, peer, and community levels that make them particularly susceptible to the system’s harmful health outcomes. It is also essential to nest health harms and health risks for BIPOC youth within the broader environmental and


117 OFF. OF JUV. JUST. & DELINQ. PREVENTION, RISK/NEEDS ASSESSMENTS FOR YOUTHS 2, 7 (2015); NAT’L CONF. STATE LEGIS., YOUNG ADULTS IN THE JUSTICE SYSTEM 3–4 (2019) (citing structural obstacles faced by Black youth—such as increased rates of childhood trauma, parental incarceration, and housing and food insecurity that increase the likelihood of system involvement).


119 Cochran et al., supra note 116, at 478.

social context of high levels of stress, complex trauma, and adverse childhood experiences, all of which can contribute to diminished health.

Research has also identified a “shadow carceral state” represented by increased civil and administrative pathways to incarceration, civil ‘alternatives’ to invalidated criminal statutes, and incorporation of criminal law into administrative legal processes. A common example of such hybrid legal controls exists at the intersection of immigration and criminal law, where evidence points to clear deleterious health outcomes at individual and population health levels. Scholars and public health professionals alike conclude that the punitive processes of detainment, incarceration, and deportation generate inequities and negative consequences. Moreover, the

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nexus between the immigration and criminal legal systems is racialized\textsuperscript{128} by the targeting and unlawful policing of specific ethnic and racial groups. For example, Latin American immigrants comprised 94% of total deportations, despite representing 8% of the population of immigrants to the United States.\textsuperscript{129}

III. RESTORATIVE JUSTICE DIVERSION AND THE CRIMINAL LEGAL SYSTEM

Emerging in the 1970s in the United States, the philosophy of restorative justice\textsuperscript{130}—as associated with criminal law and processes—was first operationalized as practices and programs for juvenile offenders.\textsuperscript{131}

children detained in the U.S. suffer high rates of PTSD, anxiety, depression, suicidal ideation, and other problems).


\textsuperscript{130} This Article acknowledges the importance of, and \textit{distinction} between, restorative justice and transformative justice as intersecting . . . paradigms, frameworks, and . . . practices for responding to harm between people, and at their best they work to challenge the structural violence and oppression often at the root of interpersonal harm. At their best, both RJ and TJ are invested in non-punitive responses to seek healing, accountability, and transformation while avoiding the reproduction of violence and domination core to the criminal legal system and other carceral settings.

Cameron Rasmussen & Sonya Shah, \textit{Growing Justice}, INQUEST (Sept. 9, 2022), https://inquest.org/growing-restorative-transformative-justice. They emerged in the United States through different pathways, most particularly, transformative justice growing out of anti-violence movements of the late 1990s led “by Black women, women of color, domestic and sexual violence survivors, and queer communities . . . [with] TJ’s approach . . . responding to harm between people without relying on the state—the police and incarceration especially.” \textit{Id}. While transformative justice practices fall outside the scope of this Article, most practically as there is not data available for inclusion, they are profoundly important to its core thesis and should not be dismissed within a structural health intervention framework.

\textsuperscript{131} See, e.g., Thalia González, \textit{The State of Restorative Justice in American Criminal Law}, 20 WIS. L. REV. 1147, 1148 (2020); Karl A. Racine & Elizabeth Wilkins, Toward a
Since then, the field has evolved and grown exponentially. These developments have garnered notice from academics, policymakers, and the general public. The expansion of restorative justice in the criminal process is not universally accepted. As I have discussed in prior work, critiques include questions of voluntariness, net-widening, and net-deepening, and whether the commitments of restorative justice are fundamentally incompatible with the criminal legal system. González, supra note 131, at 1149; see also Adriaan Lanni, Taking Restorative Justice Seriously, 69 BUFF. L. REV. 635, 640, 648–51 (2021); Donna Coker, Crime Logic, Campus Sexual Assault, and Restorative Justice, 49 TEX. TECH. L. REV. 147, 155–62 (2017). Further, with the expansion of the restorative justice in American criminal law, there are open issues as to lack of confidentiality protections and admissibility bars, discretionary decision-making, waiver of rights, and “pay-to-play” requirements (e.g., fines and fees). González, supra note 131, at 1147; There is no consensus across jurisdictions as to the effect of an offender’s agreement to enter into restorative justice processes on the final disposition of the case. Id. at 1187.


national organizations including the American Bar Association,\textsuperscript{135} cementing restorative justice squarely in the criminal legal reform discourse. In all sectors, a focus on restorative justice—\textit{in particular its upstream forms}—has intensified in tandem with escalating attention on the racialized realities of the American criminal legal system.\textsuperscript{136} In some instances, the demand for expansion of restorative justice diversion has led to the scaling up of existing models and, in other jurisdictions, the development of new programs.

The work of Impact Justice,\textsuperscript{137} for example, has expanded beyond Oakland and San Francisco to cities and counties across the country, where

\begin{itemize}
  \item [\textsuperscript{137}] Impact Justice’s restorative justice diversion (RJD) programs are: post-arrest but pre-charge, meaning that the young person who committed harm has been arrested but has not been charged with a crime. Instead of being processed through the juvenile legal system, the young person is diverted to the RJD program by police, probation, or the district attorney’s office. RJD programs are run by community-based organizations (CBOs), who are always independent of any law enforcement or systems partner. They are often local nonprofits experienced in supporting youth and are rooted in the communities they serve.
\end{itemize}
it provides national technical assistance to “build pre-charge restorative justice diversion programs that reduce youth criminalization.” 138 Similarly, the Longmont Community Justice Partnership has developed a state-wide approach to diversion programs. 139 The result of this partnership is that “all youth in Longmont who meet the criteria will be diverted from adjudication in Longmont’s municipal court.” 140 In 2020, the Center for Restorative Justice in Massachusetts adapted to offer virtual restorative justice services in the wake of the COVID-19 pandemic with a statewide restorative-justice-first approach. 141 Additionally, there now exist multiple restorative justice courts across the country, including in Illinois, 142 Wisconsin, 143 and California. 144 Though not the dominant model, some counties have also sought to implement integrated multi-sector restorative justice, in which upstream interventions from the criminal legal system exist as part of a continuum. 145 And, funders, such as the Annie E. Casey Foundation, have

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141 COMMUNITIES FOR RESTORATIVE JUST., MAKING BOLD STRIDES 1–3 (2021), https://drive.google.com/file/d/1zSxDxJ0U9nrKndypuQ2C6iSFNS6-xq9_lv/view [https://perma.cc/6MKP-62JS].


increased resources for restorative justice projects as part of their portfolios of juvenile justice reform.\textsuperscript{146}

In the United States, there is no formal uniform definition of restorative justice in criminal systems.\textsuperscript{147} However, there is broad acceptance that “[r]estorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in the specific offense or harm and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”\textsuperscript{148} It also is positioned in diametric opposition to retributive and punitive philosophies and practices.\textsuperscript{149} As such, restorative justice approaches crime and the legal construction of criminality “as an injury to people and communities, and the aim of justice as healing . . . [and] crime is not merely a legal construct but a violation of people and relationships which creates an obligation to make things right.”\textsuperscript{150} First implemented in the form of victim-offender mediations,\textsuperscript{151} the contemporary restorative justice landscape represents a diverse set of

\begin{center}
\footnotesize


150 Sliva et al., supra note 133, at 460.

151 U.S. DEP’T OF JUST., NAT’L INST. OF JUST., VICTEM OFFENDER MEDIATION: CONFLICT RESOLUTION AND RESTITUTION 1–2 (1985); Mark S. Umbreit, Jean Greenwood, U.S. DEP’T OF JUST., OFF. FOR VICTEM OF CRIME, GUIDELINES FOR VICTEM-SENSITIVE VICTEM-OFFENDER
upstream (e.g., early diversion, pre-plea diversion, and post-plea diversion) and downstream interventions (e.g., post-adjudication, in carceral settings, and community re-entry). Though no comprehensive national data exist documenting the scope and scale of “on-the-ground” restorative justice interventions—whether formal or informal—associated with the criminal legal system in the United States, they are codified into 266 laws in 46 states and the District of Columbia specific to criminal contexts. Diversity exists in the legal schemes adopting restorative justice, with some jurisdictions normatively setting forth a moral imperative for a departure from retributive frameworks, while others have adopted a more narrowly tailored prescriptive approach focusing on operationalization. However, when viewed nationally, empirical research indicates that restorative justice laws are most highly concentrated in the form of upstream diversion interventions aimed at limiting system contact for juveniles. In the absence of a comprehensive national framework, the development and application of

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154 Vermont is one of the few states to adopt restorative justice as a system-level approach for its justice system; state policy is “that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses . . . .” VT. STAT. ANN. tit. 28, § 2a (2020).

155 In Nebraska, restorative justice exists only in the context of pre-trial diversion of juveniles. * Neb. Rev. Stat. § 43-275 (2019); id. § 43-2,108.03 (2019); id.§ 43-260.066 (2019); id. § 43-276 (2019); id. § 43-274 (2019).


157 In other countries, restorative justice is approached comprehensively at national and local levels. See, e.g., *Connecting People to Restore Just Relations*, EUROPEAN FORUM FOR RESTORATIVE JUST., https://www.euforumrj.org/en [https://perma.cc/S8V2-GUC3] (an international network organization to increase access to restorative justice services);
restorative justice diversion is controlled at local levels in district attorneys’ and prosecutors’ offices with implementation by community-based practitioners.158

Within the criminal legal process, restorative justice diversion occurs in three main categories: pre-arrest, pre-charge, and post-charge.159 Pre-arrest diversion operates as a discretionary process whereby law enforcement officers or agencies refer individuals directly to a restorative justice process without formal arrest.160 This decision is guided by existing agency policy and procedure regarding pre-arrest diversion or informal agreements with restorative justice service providers.161 Law enforcement agencies may also engage in post-arrest direct referral before a case is sent to the prosecutor’s office for charging.162 In this instance, the incident report is held open until the individual successfully completes the restorative justice diversion, subject to applicable statutory limitations.163 It should be noted that while technically a pre-charge diversion, direct police referral remains distinctly outside the jurisdiction of the prosecutor’s office and resides within law enforcement discretion.164

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161 Scharrer, supra note 159.

162 Id.

163 Id.

164 Id.
Pre-charge restorative justice diversion eligibility criteria and selection at the level of the prosecutor’s office largely depends on program design and size of the office and whether the restorative justice program is internal or external to that office.\textsuperscript{165} Cases may be screened for eligibility by individual prosecutors, support staff, or other program administrators for pre-charge diversion, varying by jurisdiction and office.\textsuperscript{166} This same type of eligibility screening will likewise be present in post-charge restorative justice diversion.\textsuperscript{167}

Post-charge diversion for restorative justice can exist in two spaces: pre-plea and post-plea, and may involve a negotiated process for diversion between multiple system actors including the prosecutor, defense attorney, and judge.\textsuperscript{168} Post-plea restorative justice diversion takes place through the use of a deferred prosecution agreement.\textsuperscript{169} Like other deferred prosecution agreements, the conviction is either held open for a set period of time for the offender to complete the restorative justice process and resulting agreement or the conviction is entered and then re-opened and dismissed after successful completion.\textsuperscript{170}

The most common forms of practice include conflict-resolution programs,\textsuperscript{171} community conferencing,\textsuperscript{172} family group conferences,\textsuperscript{173} victim-impact panels,\textsuperscript{174} victim-offender mediations or dialogues.\textsuperscript{175}

\begin{thebibliography}{99}
\bibitem{Schrerrer159}Schrerrer, \textit{supra} note 159; \textit{see also} Pre-charge Diversion, \textit{RESTORATIVE JUST. CHATHAM-KENT}, https://rjck.org/programs/pre-charge-diversion-program (last visited Sept 29, 2022); \textit{IMPACT JUST.}, \textit{supra} note 138 at 7. Restorative Justice Chatham-Kent’s Pre-Charge Diversion Program also has eligibility criteria for age, type of offense, and certain conduct. \textit{Id.}
\bibitem{Schrerrer159}Schrerrer, \textit{supra} note 159.
\bibitem{Schrerrer159}\textit{Id.}
\bibitem{Schrerrer159}\textit{Id.}
\bibitem{Schrerrer159}\textit{Id.}
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\bibitem{Schrerrer159}\textit{About, RESTORATIVE D.C.}, https://restorativedc.org/aboutrdc [https://perma.cc/NQE 2-992S].
\end{thebibliography}
circles, and community reparative boards. While practices vary in form, the basic principle is to provide a new lens through which legal systems define and respond to crime, punishment, and harm. Additionally, as qualitative interviews with practitioners reveal, they are developed in localized contexts and aim to “address the dehumanization frequently experienced by people in the traditional criminal [legal] system” by centering community engagement as a foundational element of processes. Furthermore, practices are co-designed between practitioners and participants, to promote agency and autonomy for victims and offenders in contrast to traditional criminal legal processes and healing and reparative outcomes. As is the case with non-restorative justice diversion, early-stage interventions in the criminal legal system are understood as best practices to mitigate deep system involvement, in particular for BIPOC and other structurally marginalized people. As a 2022 report by the Sentencing

177 Erin Cordell, Interview by Cassiopeia Land, OCCIDENTAL COLL. (March 2022); González, supra note 131, at 1149.
179 Erin Freeborn, Interview by Cassiopeia Land, OCCIDENTAL COLL. (March 2022).
180 Cordell, supra note 177.
181 I use the terms victim and offender in this Article given their continued prevalence and formal use in empirical data and the criminal legal system. However, I argue there is a critical need to the shift away from this terminology as reinforces racial stereotypes and perpetuates individual blame, rather than system failures for legal conditions.
182 Freeborn, supra note 179.
184 Gary Sweeten, Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement, 23 JUST. Q. 462, 471–77 (2006). For example, the likelihood of dropping out of high school is nearly doubled by a first-time arrest and nearly quadrupled by a first-time court appearance.
Project notes, diversion is a “hidden key to combating racial and ethnic disparities in the juvenile justice system.”\textsuperscript{185}

A common metric of evaluation of restorative justice diversion is recidivism. Though study design varies—including single-site analysis, random controlled trials, and meta-analyses—there is scholarly consensus regarding positive correlations. For example, a meta-analysis of nineteen youth restorative justice diversion programs, specifically with participation in family boards, found a 24% reduction in recidivism.\textsuperscript{186} Similarly, a comparative analysis of recidivism rates of the Community Works West in Alameda County, California, observed a 17.1% differential between the control group (36.7%) and participants in the restorative justice community conferencing program (19.6%) eighteen months following the intervention.\textsuperscript{187} A pre-sentencing restorative justice diversion program in Longmont, Colorado, revealed that their restorative justice program had a 7% recidivism rate, compared to 70% for the traditional penal process.\textsuperscript{188} Figure 3 highlights the significance of recidivism and limited system contact across multiple SDH.

It is important to recognize that, as the field has grown, agencies such as the Office of Juvenile Justice and Delinquency Prevention, the Bureau of Justice Assistance, the Office of Justice Programs, and the National Institute for Justice have sought to engage in research and evaluation.\textsuperscript{189} In 2020, a National Center on Restorative Justice (NCORJ) was established with the

\textsuperscript{188} Id.
aim of “improv[ing] criminal justice policy and practice by broadening the understanding of justice systems and restorative approaches.” However, none of the existing research and evaluations, or the work of the NCORJ, address what this project sets forth to understand, despite the ripeness of such inquiry.

IV. BUILDING A NEW FRAMEWORK: RESTORATIVE JUSTICE AS A STRUCTURAL HEALTH INTERVENTION

Structural health interventions reach beyond traditional health care settings by “chang[ing] the social, physical, economic, or political environments that may shape or constrain health behaviors and outcomes, [and] altering the larger social context by which health disparities emerge and persist.” Unlike other public health interventions, “they locate, often implicitly, the cause of public health problems in contextual or environmental factors that influence risk behavior, or other determinants of infection or morbidity, rather than in characteristics of individuals who engage in risk behaviors.” As such, they target risk factors such as economic instability, barriers to health care access, education, racism, and discrimination.

The relevance of the structural health intervention framework to criminal legal system reformists should be fairly straightforward. By definition, structural health interventions aim to address the cause of public health problems in contextual or environmental factors, thereby diminishing health inequities. And as Part II sets forth, the carceral state is a health harming system. Yet, as a conceptual framework, or practical application, structural health interventions in the criminal legal system are an overlooked area in the literature, policy, and practice. This vacuum exists despite the


192 Brown et al., supra note 191, at S72–S73; BUREAU OF JUST. ASST., supra note 182.

193 Brown et al., supra note 191, at S72–S73.
accumulated evidence and calls for race conscious, public health-centered reforms following the onset of COVID-19. This Article recognizes this acute gap in research, policy, and practice and attends to the absence.

To understand restorative justice—and more specifically upstream or early-stage practices and processes—as a structural health intervention, this Article examined existing literature and identified two domains of outcomes. First, it isolated studies that observed direct health or mental health benefits of participation in pre-conviction restorative justice interventions in juvenile and/or adult populations (Figure 2). Second, it reviewed research to explore the potential of restorative justice processes to directly or indirectly influence health through targeting risk factors or social-structural pathways and determinants of health (Figure 3). Taken together, Figures 2 and 3 represent a conceptual and comparative framework of restorative justice and health as applied to the criminal legal context.

194 In 2020, the American Public Health Association called for investment in restorative justice as an evidence-based strategy under the banner of “advancing public health interventions to address the harms of the carceral system.” AM. PUB. HEALTH ASS’N, supra note 49.

195 The two-domain approach is important as restorative justice diversion operates not only to intervene structurally in the criminal legal system but its practices also produce an independent set of positive health and mental outcomes.


197 Rugge, supra note 196, at 1, 2.
**Figure 2.** Physical and Mental Health Outcomes of Restorative Justice Diversion Interventions

**Figure 3.** Effects on the Social Determinants of Health: Restorative Justice Diversion Intervention vs. Criminal Legal System
Although still within a nascent body of literature, several studies were identified that include measurements of physical and mental health outcomes associated with early-stage restorative justice diversion (Figure 2). For example, a national study examining the physical and psychological health of participants (offenders and victims) found positive changes along three scales of evaluation from pre-program to post-program.\(^\text{198}\) Both victims and offenders reported improved physical health in such indicators as sleeping, eating, and drug use.\(^\text{199}\) Participants also experienced positive changes in psychological health including feeling optimism, empathy, self-efficacy, hope, and decreased anxiousness and depression.\(^\text{200}\) Other studies demonstrated improved self-control; ability to process personal and family trauma; and reduced stress, psychological distress, and aggression for offender participants.\(^\text{201}\) Comparative data of victim satisfaction rates also shows higher rates associated with restorative justice diversion over traditional criminal legal processes.\(^\text{202}\) Though no studies explore specific associations between physical health and satisfaction of restorative justice diversion participants (victims or offenders), the potential for such interactions seems likely. Moreover, given the strong link between physical and mental health,\(^\text{203}\) there is a high probability of direct and indirect effects and pathways between them.

Figure 3 maps restorative justice intervention outcomes and the SDH\(^\text{204}\) comparatively to traditional criminal legal processes. As it illustrates, restorative justice intersects with multiple social determinant mediators (e.g., socio-emotional wellbeing, physical health, education, economic stability, and community context), upstream to decrease contact with criminal legal processes. One potential significant outcome of this mediation or intervention into criminal legal pathways is limiting the negative dose-

\(^{198}\) See id.

\(^{199}\) See id.

\(^{200}\) See Poulson, supra note 196, at 166–68; Caroline B. Evans, Paul R. Smokowski, James Barbee, Meredith Bower & Shaun Barefoot, Restorative Justice Programming in Teen Court: A Path to Improved Interpersonal Relationships and Psychological Functioning for High-Risk Rural Youth, 40 J. RURAL MENTAL HEALTH 15, 17 (2016).

\(^{201}\) See S.O.U.L SISTERS LEADERSHIP COLLECTIVE, supra note 158; see Rugge & Scott, supra note 196; Rugge, supra note 196.

\(^{202}\) COMMUNITIES FOR RESTORATIVE JUST., supra note 141.


response effect\textsuperscript{205} of incarceration on health status. When examining restorative justice diversion or other possible structural health interventions in the criminal legal system, it is important to note that relationships do not exist on a single axis. The SDH are co-influential and multiple feedback loops exist between and among them.\textsuperscript{206}

Consider the example of health and socioeconomic status. Socioeconomic status influences physical and psychosocial\textsuperscript{207} health in multi-variant ways, and in turn affects education outcomes such as preparation and attainment.\textsuperscript{208} As a key SDH, education functions as a strong predictor of both positive and negative health outcomes at individual and community levels, including disease, disability, mental health, substance


abuse, morbidity, and mortality. Similarly, socioeconomic status affects housing and food security. And, in the context of the criminal legal system, a clear relationship between socioeconomic status and system involvement exists.

Similar to the evidence of direct health and mental health outcomes, discussed supra, there is significant opportunity for new research to explore how restorative justice diversion reduces the health consequences of linked social-structural pathways that influence health disparities produced and


213 Healthy People 2030 defines a health disparity “as “a particular type of health difference that is closely linked with social, economic, and/or environmental disadvantage. Health disparities adversely affect groups of people who have systematically experienced
reproduced within the criminal legal system. This is particularly true in light of the revised SDH framework and an explicit recognition of the role of systemic and structural racism as drivers of law and legal processes. While different models for system change can be conceptualized, the guiding impetus remains—dismantling racist structures that create and perpetuate preventable health consequences emerging from the carceral state.

In the domain of social and community context, several studies affirm improved social cohesion, as indicated by social and community relationships, as a direct outcome of restorative justice diversion participation. A health impact assessment of a restorative justice community conferencing program in San Diego found that youth participants experienced feelings of increased safety in their neighborhoods and connections with community members after participating in the conferences. They also identified positive changes within their family relationships and the development of positive interpersonal skills. Additionally, a meta-analysis of thirty-five restorative justice programs identified that participation by youth offenders led to increased trust in the criminal legal system, improved problem-solving skills, and positive social relationships. Social and community contexts, including positive community and family relationships, safety, and trust, are important determinants of health. For adolescents, family relationships and connectedness also function as key protective health factors.

greater obstacles to health based on their racial or ethnic group; religion; socioeconomic status; gender; age; mental health; cognitive, sensory, or physical disability; sexual orientation or gender identity; geographic location; or other characteristics historically linked to discrimination or exclusion.” Health Equity in Healthy People 2030, U.S. DEP’T HEALTH HUM. SERVS., https://health.gov/healthypeople/priority-areas/health-equity-healthy-people-2030


216 See Gramlich, supra note 59.

217 See id.

218 See Poulson, supra note 196, at 166–70.

engagement in the criminal legal system, from police interactions\textsuperscript{220} to incarceration,\textsuperscript{221} functions to disrupt social and community support.\textsuperscript{222}

In the domain of education, evidence shows that youth who participate in restorative justice programs are more likely to achieve academic success compared to peers who engage in traditional criminal legal processes. A recent study, for example, found that those youth are 32\% more likely to receive high school credentialing.\textsuperscript{223} Structural health interventions are grounded in an understanding that health disparities exist and can be addressed through impacting multiple determinants of health.

In the case of restorative justice diversion, the fact that it can be linked to at least two SDH (education and social cohesion) is promising. Like social cohesion, education uniquely supports lifelong health,\textsuperscript{224} particularly for youth populations. By age twenty-five, individuals with a high school degree can expect to live over ten years longer than those without one,\textsuperscript{225} and with every year of additional education, adult mortality risk decreases.\textsuperscript{226} In the case of education, the structural effect of restorative justice diversion is not limited to disrupting and altering the conditions in which health disparities occur, but also acts as a buffering effect against future poor health. System involvement is highly disruptive to educational outcomes for youth,\textsuperscript{227} and advancing practices and policies that can mitigate such harm is critical. While the current level of educational attainment among youth in confinement nationally is unknown, studies indicate low levels of educational attainment


\textsuperscript{221} See DeHart et al., supra note 114, at 190–94.

\textsuperscript{222} The negative health consequences mass incarceration and carceral approaches is not limited to individuals. Emerging evidence shows effects on population health more broadly. See, e.g., Gifford, supra note 33, at 372–75.

\textsuperscript{223} Kinscherf et al., supra note 196, at 28. It is unclear if finding accounts for the effects of selection criteria and eligibility for the restorative justice program.


\textsuperscript{225} See Rostron et al., 209 note 199, at 1.


\textsuperscript{227} A 10-year study of how incarceration impacts a youth’s life chances, for example, found that juvenile incarceration decreases the likelihood of high school graduation by 13\% to 39\% and increases the likelihood of incarceration as an adult by 23\% to 41\%, as compared to the average public-school student in the same area. Anna Aizer & Joseph Doyle, Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly Assigned Judges, NAT’L BUREAU OF ECON. RSCH., Working Paper No. 19102, 2013, at 17–18, https://www.nber.org/papers/w19102.
as measured by high school diploma or GED\textsuperscript{228} attainment and re-entry into school.\textsuperscript{229} Furthermore, lower academic achievement is associated with a higher likelihood of recidivism.\textsuperscript{230}

Similar to a lack of findings of educational outcomes and restorative justice diversion, there is a lack of rigorous evaluations of economic stability or employment opportunities following or during program participation. However, preliminary data from one evaluation following restorative justice diversion intervention show that 76\% of participants held a job for three months or longer and 72\% of participants were employed two years after program completion.\textsuperscript{231} By contrast, movement through traditional criminal legal processes has been shown to increasingly lead to diminished economic support and opportunities.\textsuperscript{232} As Figure 1 identifies, the economic collateral consequences of the criminal legal system extend to economic

\textsuperscript{228} OFF. OF JUV. JUST. & DELINQ. PREVENT., supra note 117.

\textsuperscript{229} See SNAPSHOT: IMPROVING EDUCATIONAL OPPORTUNITIES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM, NAT’L JUVENILE JUST. NETWORK 3–4 (2016).

\textsuperscript{230} See Ian A. Silver, Joshua C. Cochran, Ryan T. Motz & Joseph L. Nedelec, Academic Achievement and the Implications for Prison Program Effectiveness and Reentry, 47 CRIM. JUST. & BEHAV. 848, 849–51 (2020).

\textsuperscript{231} See Kinscherf et al., supra note 196, at 28.

marginalization employment discrimination, housing insecurity, and carceral costs, fines, and fees. Other studies have shown that criminal system involvement, from arrest to incarceration, results in lost earnings and joblessness, both of which deepen health inequities.

Specific to the social determinant of health care access and quality, presently there are no studies available that examine health care access or utilization by juveniles or adults following or during restorative justice interventions. Despite this, the existence of a relationship is probable. As

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237 Shawn Bushway, Barred from Employment: More Than Half of Unemployed Men in Their 30s Had a Criminal History of Arrest, 8 SCI. ADV. 1, 7 (2022).

238 Carey et al., supra note 5; see also Craigie et al., supra note 233.


240 There is an emerging body of research exploring healthcare utilization by persons under community supervision, e.g., probation and parole, that may provide a valuable foundation for future research in this area. See e.g., Anastasiaa Timmer & Kathryn M. Nowotny, Mental Illness and Mental Health Care Treatment Among People with Criminal Justice Involvement in the United States, 32 J. HEALTH CARE FOR POOR & UNDERSERVED 397, 403–05 (2021); Laura Hawks, Emily A. Wang, Benjamin Howell, Steffe Woolhandler, David U. Himmelstein, David Bor & Danny McCormick, Health Status and Health Care Utilization of U.S. Adults Under Probation: 2015–2018, 110 AM. J. PUB. HEALTH 1411, 1411–12 (2020);
discussed *supra*, by diminishing or eliminating contact with carceral processes, restorative justice diversion alters a social and environmental condition that perpetuates social and health inequities, thereby decreasing short-term and long-term needs for health care services.

**CONCLUSION**

This Article has three aims. First, it aims to draw increased attention to the co-influential relationship between health and carcerality in the United States. Second, it articulates a new understanding of restorative justice grounded in health justice and race-conscious frameworks. Third, it challenges legal scholars to more intentionally engage with work outside traditional disciplinary domains. The project to resist carcerality, challenge the control, surveillance, and punishment of BIPOC people and other structurally marginalized people, and achieve health equity requires engagement and action at all levels.

Turning specifically to restorative justice diversion, applying the structural health intervention framework invites the possibility that existing non-carceral approaches to crime and harm may do more than reduce disparities in the criminal legal system. As the literature indicates, restorative justice, in particular early-stage and upstream processes,241 may change the mechanisms, pathways, and risk factors that lead to adverse health outcomes and health disparities for BIPOC and other structurally marginalized people.

This novel approach is not without gaps. Limited data and the reliance on recidivism as the primary measure of success of restorative justice interventions in the criminal legal system presents an incomplete picture. The criminal law, public health, and restorative justice fields would all benefit significantly from new rigorous studies, in particular designs applying social–epidemiological models, to analyze and address the criminal legal system’s health harms across multiple levels. Furthermore, the academic, policy, and practice sectors would be well served to advance critical

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241 While this Article focuses on restorative justice interventions at early stages of the criminal legal system, it does not exclude the potential for post-adjudication or conviction practices to likewise alter the social context in which racialized health disparities emerge and persist.

Marisa Elena Domino, Alex Gertner, Brigid Grabert, Gary S. Cuddeback, Trentia Childers & Joseph P. Morrissey, *Do Timely Mental Health Services Reduce Re-incarceration Among Prison Releases With Severe Mental Illness?*, 54 HEALTH SERV. RSCH. 592, 600–02 (2019); William C. Bryson, Brandi P. Cotton, Lisa C. Barry, Martha L. Bruce, Jennifer Piel, Stephen M. Thielke & Brie A. Williams, *Mental Health Treatment Among Older Adults with Mental Illness of Parole or Probation*, 7 HEALTH & JUST. 1, 2 (2019).
research\textsuperscript{242} and employ collaborative participatory models\textsuperscript{243} to ensure those most deeply impacted by the carceral state are not simply subjects of study but are engaged as experts in developing solutions. And of course, as noted in other examinations of structural health interventions, addressing potential challenges that exist in measurement, study design, funding, evaluation, and dissemination are central.

As advocates and academics continue to expose the extraordinary health outcomes of criminal legal system involvement, the work of elevating and implementing structural health interventions is vital. Though it is increasingly commonplace for legal discourse to acknowledge that all American public systems are deeply rooted in racism, arguably none have operated in the same manner and form as the carceral state, and with as far-reaching consequences for health and wellbeing.
