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Restorative Justice Diversion as a Structural Health Intervention in the Criminal Legal System

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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 ordinariness 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.

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INTRODUCTION

Much of the current discourse in public health and public health law centers on advancing race-conscious and health justice¹ approaches to address deeply entrenched racialized regimes in American law. These regimes affect the social and structural drivers of health including housing,²

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).

² See, e.g., Yael Cannon, *Injustice Is an Underlying Condition*, 6 U. PA. J.L. & PUB. AFF. 201, 204–06 (2020); see also Yael Cannon, *Unmet Legal Needs as Health Injustice*, 56 U. RICH. L. REV. 801, 802–04 (2022); Emily E. Lynch, Lorraine Halinka Malcoe, Sarah E. Laurent, Jason Richardson, Bruce C. Mitchell & Helen C.S. Meier, *The Legacy of Structural Racism: Associations Between Historic Redlining, Current Mortgage Lending, and Health*, SSM POP. HEALTH 4–7 (2021); A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L. J. 1535 (2021).

employment,³ education,⁴ healthcare access,⁵ access to justice,⁶ and policing,⁷ to name only a few. Though not often explicit in characterizing

³ See, e.g., Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiyah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After Covid-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS 122, 162–68 (2020); Janette Dill & Mignon Duffy, *Structural Racism and Black Women's Employment in the U.S. Health Care Sector*, 41 HEALTH AFF. 265, 267–70 (2022); Courtney L. McCluney, Lauren L. Schmitz, Margaret T. Hicken & Amanda Sonnega, *Structural Racism in the Workplace: Does Perception Matter for Health Inequalities?*, 199 SOC. SCI. MED. 106, 106–08 (2017).

⁴ See, e.g., González et al., *supra* note 1, 1933–51; Lindsay Perez Huber, Robin N. Johnson & Rita Kohli, *Naming Racism: A Conceptual Look at Internalized Racism in U.S. Schools*, 26 CHICANA/O-LATINA/O L. REV. 138, 187–92 (2006); Erin M. Carr, *Education Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-Brown America*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 115, 126–34 (2020); Kristen Weir, *Inequality at School: What Is Behind Racial Disparity in Our Educational System*, AM. PSYCH. ASS'N (Nov. 2016), <https://www.apa.org/monitor/2016/11/cover-inequality-school> [https://perma.cc/SU4Z-ZC4R].

⁵ See, e.g., Medha D. Makhlof, *Health Justice for Immigrants*, 4 U. PA. J.L. & PUB. AFF. 235, 283–85 (2019); Ruqaiyah Yearby, Brietta Clark & José F. Figueroa, *Structural Racism in Historical and Modern U.S. Health Care Policy*, 41 HEALTH AFF. 187, 189–92 (2022) (detailing how health care coverage, financing, and quality create inequitable access to health care for minority populations in the contemporary moment); Monica E. Peek, *Racism and Health: A Call to Action for Health Services Research*, 56 HEALTH SERV. RES. 569, 570 (2022) (describing the role that interpersonal racism causes and exacerbates disparate access to health care); see also Alexander N. Ortega & Dylan H. Roby, *Ending Structural Racism in the U.S. Health Care System to Eliminate Health Care Inequities*, 326 JAMA 613, 614 (2021).

⁶ See, e.g., Yael Cannon, *Closing the Health Justice Gap: Access to Justice in Furtherance of Health Equity*, 53 COLUM. HUM. RTS. L. REV. 517, 517–81 (2021) (linking the civil “justice gap” with the social determinants of health); see also Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLAL. REV. 758, 762–831 (2020) (advocating an initiative for the “civil rights of health”, which brings together public health and civil rights advocates to understand health as a matter of justice and civil rights law as a health intervention); Julian M. Rucker & Jennifer A. Richeson, *Toward an Understanding of Structural Racism: Implications for Criminal Justice*, 374 SCI. 286, 286 (2021); Patricia Homan, Tyson H. Brown & Brittany King, *Structural Intersectionality as a New Direction for Health Disparities Research*, 62 J. HEALTH & SOC. BEHAV. 350, 350–70 (2021) (investigating how various sources of structural oppression shape health, including structural racism, structural sexism, and income inequality).

⁷ *Addressing Law Enforcement Violence as a Public Health Issue*, AM. PUB. HEALTH ASS'N (Nov. 13, 2018), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2019/01/29/law-enforcement-violence>; Robert J. Durán & Charlene M. Shroulote-Durán, *The Racialized Patterns of Police Violence: The Critical Importance of Research as Praxis*, 15 SOC. COMPASS 1, 8 (2021); Benjamin Snyder, *Policing the Police: Conflict Theory and Police Violence in a Racialized Society* 1–7 (2013) (M.A. thesis, University of Washington).

itself as within the tradition of critical race theory,⁸ as a field, public health has been clear to increasingly name racism as a public health crisis⁹ and in seeking to intertwine racial justice with health equity.¹⁰

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."¹¹ 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.¹² However, as Part III

⁸ Kimberlé W. Crenshaw, *The First Decade: Critical Reflections, or "A Foot Closing in the Door"*, 49 UCLA L. REV. 1343, 1356–71 (2002) (a 10-year reflection on the emergence and developments in critical race theory); Angela P. Harris, *Racing Law: Legal Scholarship and the Critical Race Revolution*, 52 EQUITY & EXCELLENCE EDUC. 12, 12–23 (2019) (a descriptive analysis of the field of critical race theory); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: THE CUTTING EDGE* 7–10 (2014); Jasmine B. Gonzales Rose, *Towards a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2249–58 (2017).

⁹ *Racism Is a Public Health Crisis*, AM. PUB. HEALTH ASS'N, <https://www.apha.org/topics-and-issues/health-equity/racism-and-health/racism-declarations> (last visited Sept. 30, 2022); *Racism and Health*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/minorityhealth/racism-disparities/index.html> [<https://perma.cc/N3FN-F6WL>]; RUQAIJAH YEARBY, CRYSTAL N. LEWIS, KEON L. GILBERT & KIRA BANKS, DATA FOR PROGRESS, *RACISM IS A PUBLIC HEALTH CRISIS. HERE'S HOW TO RESPOND* 2, 7 (2020), https://pressley.house.gov/sites/pressley.house.gov/files/20.09_Racism-is-a-Public-Health-Crisis.pdf.

¹⁰ See, e.g., Caroline E. Chandler, Caitlin R. Williams, Mallory W. Turner & Meghan E. Shanahan, *Training Public Health Students in Racial Justice and Health Equity: A Systemic Review*, 137 PUB. HEALTH REP. 375, 375–85 (2022) (identifying ways to incorporate racial justice and health equity into curriculum for US public health students); *The AMA's Strategic Plan to Embed Racial Justice and Advance Health Equity*, AM. MED. ASS'N, <https://www.ama-assn.org/about/leadership/ama-s-strategic-plan-embed-racial-justice-and-advance-health-equity> [<https://perma.cc/DT4U-R3LM>]; *Committing to Change*, AM. SOC. ADDICTIVE MED., <https://www.asam.org/advocacy/national-advocacy/advancing-racial-justice-and-health-equity> [<https://perma.cc/FJE3-QHHG>]; *American Academy of Pediatrics Calls for Elimination of Race-Based Medicine*, AM. ACAD. PEDIATRICS (May 2, 2022), <https://www.aap.org/en/news-room/news-releases/aap/2022/american-academy-of-pediatrics-calls-for-elimination-of-race-based-medicine> [<https://perma.cc/YC2X-ZYUE>]; *Media Statement from CDC Director Rochelle P. Walensky MD, MPH on Racism and Health*, CTR. FOR DISEASE CONTROL (Apr. 8, 2021), <https://www.cdc.gov/media/releases/2021/s0408-racism-health.html> [<https://perma.cc/37SH-M6YT>]; see also Chandra L. Ford & Collins O. Airhihenbuwa, *Critical Race Theory, Race Equity, and Public Health: Toward Antiracism Praxis*, 100 AM. J. PUB. HEALTH S30, S31–34 (2010) (introducing Critical Race Theory to the public health community, specifically focusing on praxis between research and practice).

¹¹ Rachel R. Hardeman, Eduardo M. Medina & Rhea W. Boyd, *Stolen Breaths*, 383 NEW ENG. J. MED. 197, 198 (2020).

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 system¹³ 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,¹⁴ or simply examines the contemporary racialized and gendered disparities,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>].

¹⁴ Kim Gilmore, *Slavery and Prison—Understanding the Connections*, 27 SOC. JUST. 195, 195–205 (2000) (tracing the history and relationship between slavery and prison, specifically linking the convict lease program, the Black Codes, and Jim Crow to the prison system and the carceral state); Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 261–86 (2021) (overviewing the “antiblack punitive tradition in America” as central to mass incarceration and implications of institutional racism, violence, and inequity in the criminal legal system); Aaron Gottlieb & Kalen Flynn, *The Legacy of Slavery and Mass Incarceration: Evidence from Felony Case Outcomes*, 95 SOC. SERV. REV. 3, 4–6 (2021); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 922–52 (2019) (articulating incarceration as slavery behind bars and describing the consequences, and importance to U.S. capitalism, of prison labor markets).

¹⁵ Nazgol Ghandoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, SENT’G PROJECT (Feb. 3, 2015), <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system> [<https://perma.cc/SCR5-BBCT>]; SUSAN NEMBHARD & LILY ROBIN, URBAN INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM 4 (2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf> [<https://perma.cc/4Y3F-2M2B>]; ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 1–10 (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/4DZ3-4FDH>] (highlighting the over-representation of Black Americans in the criminal legal system and overviewing the manifestations of racism and oppression through disparate treatment of black people in the system).

United States. Instead, it seeks to engage criminal law and other legal scholars directly with a health justice lexicon.¹⁶ 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

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.

Keon L. Gilbert & Robert S. Chang, *(Im)Balancing Acts Criminalization and De-Criminalization of Social and Public Health Problems*, 50 J. L., MED. & ETHICS 703, 708 (2023).

through the legal reification¹⁷ of racism,¹⁸ settler colonialism,¹⁹ slavery,²⁰ and anti-Blackness.²¹ While these distinct, yet genealogically inseparable,²²

¹⁷ See, e.g., Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 490–93 (2010); see also Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 1, 3–5, 11 (1994).

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 legitimization 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 HANEY LOPEZ, *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).

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).

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.

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 law²³ and the criminal legal system,²⁴ providing scholars with an illuminating and disturbing site of analysis,²⁵ and supplying legal advocates and movement activists with a critical domain for action.²⁶

experience of white women); Jonathon Booth, *Capitalism, Anti-Blackness, and the Law: A Very Short History*, 35 HARV. BLACKLETTER L. J. 5, 5–9 (2019); CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS 9 (2018).

²² Saito, *supra* note 19, at 30.

²³ See, e.g., Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 268, 290–91, 297 (2021); Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350, 353–54 (2016); Scott W. Duxbury, *Who Controls Criminal Law? Racial Threat and the Adoption of State Sentencing Law, 1975 to 2012*, 86 AM. SOC. REV. 123, 125–30 (2021); Nadia Woods, *The Presence of Racial Disparities at Every Decisional Phase of the Criminal Legal System*, 26 PUB. INST. L. REP. 1, 3 (2020); Rucker & Richeson, *supra* note 6, at 287–89; Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12–19 (2018).

²⁴ Hinton & Cook, *supra* note 14 at 2, 3, 7; HINTON, HENDERSON & REED, *supra* note 15.

²⁵ Bennet Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO STATE J. CRIM L. 1–7 (centralizing the salience of race in the criminal legal system and describing the use of Critical Race Theory as a methodological praxis across multiple articles); Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. ONLINE 119, 128–32 (2020); Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANNU. REV. L. & SOC. SCI. 433, 445 (2020).

²⁶ See, e.g., Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431, 445–50 (1994); NEMBARD & ROBIN, *supra* note 15, at 5–7.

As the historical and contemporary records reflect, structural racism²⁷ and oppression permeate our systems of “justice,”²⁸ including, but not limited

²⁷ While slightly variant in definitions of racism exist across disciplines, they all adhere to a common theme and establish the operation of racism at least three levels. *See, e.g.,* Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J. L. & BIOSCIENCES 1, 3–4 (2020) (“There are three different levels of racism: institutional, interpersonal, and structural. Institutional racism operates through ‘neutral’ organizational practices and policies that limit racial and ethnic minorities equal access to opportunity. Interpersonal racism operates through individual interactions, where an individual’s conscious and/or unconscious prejudice limits racial and ethnic minorities’ access to resources. Structural racism operates at a societal level and refers to the way laws are written or enforced, which advantages the majority, and disadvantages racial and ethnic minorities in access to opportunity and resources.”); Camara Phyllis Jones, *Foreword: An APHA Perspective in RACISM: SCIENCE & TOOLS FOR THE PUBLIC HEALTH PROFESSIONAL* xvii (2019) (“Racism is a system of structuring opportunity and assigning value based on the social interpretation of how one looks—what we call ‘race’—that unfairly disadvantages some individuals and communities, unfairly advantages other individuals and communities, and saps the strength of the whole society through the waste of human resources.”); *see also* Rachel R. Hardeman, Patricia A. Homan, Tongtan Chantarat, Brigitte A. Davis & Tyson H. Brown, *Improving the Measurement of Structural Racism to Achieve Antiracist Health Policy*, 41 HEALTH AFF. 179, 179–84 (2022) (focusing on three methodological approaches for conducting empirical studies on the links between racism and health: historical context, geographical context, and the multifaceted nature of structural racism, including intersectionality).

²⁸ As the Vera Institute notes, “From America’s founding to the present, there are stories of crime waves or criminal behavior and then patterns of disproportionate imprisonment of those on the margins of society.” Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *American History, Race and Prison*, VERA INST. OF JUST.: REIMAGINING PRISON WEB REPORT (2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> [<https://perma.cc/F94F-BS3G>]; James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. (Jul. 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/K46Q-EHQ4>].

to, policing,²⁹ arrests,³⁰ prosecution,³¹ sentencing,³² and community reentry.³³ 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

²⁹ See, e.g., Hinton & Cook, *supra* note 14, at 270, 263–65; Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1537, 1547 (2017); Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (Jul. 27, 2020), www.prisonpolicy.org/blog/2020/07/27/disparities.

³⁰ See, e.g., Hinton & Cook, *supra* note 14, at 269–70, 275, 277; Paul Butler, *The Problem of State Violence*, 151 DAEDALUS 22, 26, 30 (2022).

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 NEMBARD & 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).

³⁴ Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 246–47 (2010).

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 & Anastasiia 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); NEMBARD & 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); Niloofar 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).

³⁷ H. Richard Lamb, Linda E. Weinberger & Walter J. DeCuir, Jr., *The Police and Mental Health*, 53 PSYCH. SERV. 1266, 1266–71 (2022) (explaining the effects of law enforcement officers being the frontline professionals for mental illness, including criminalization); Liz Baker, *Mental Health and Police Violence: How Crisis Intervention Teams Are Failing*, NPR (Sept. 18, 2020, 5:00 AM), <https://www.npr.org/2020/09/18/913229469/mental-health-and-police-violence-how-crisis-intervention-teams-are-failing> [<https://perma.cc/474G-9JKY>]; Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT’L INST. JUST. J. 8, 9 (July. 2000), <https://www.ojp.gov/pdffiles1/jr000244c.pdf>; Nicholas Turner, *We Need to Think Beyond Police in Mental Health Crises*, VERA INST. OF JUST. (Apr. 6, 2022), <https://www.vera.org/news/we-need-to-think-beyond-police-in-mental-health-crises> [<https://perma.cc/P3VY-NGA6>]; Rob Waters, *Enlisting Mental Health Workers, Not Cops, in Mobile Crisis Response*, 40 HEALTH AFF. 864, 865, 868 (2021). While a discussion of police reform broadly falls outside the scope of this Article and project, I strongly agree that “reform *will not alone* eradicate racially disparate results. Policing reflects and contributes to structural and other forms of racism.” *A Roadmap for Re-Imagining Public Safety in the United States*, HUM. RTS. WATCH (Aug. 12, 2020, 8:00 AM), <https://www.hrw.org/news/2020/08/12/roadmap-re-imagining-public-safety-united-states> [<https://perma.cc/LC78-JGGZ>]; see also Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URB. L. J. 615, 615 (2016).

prison population—more than tripling since the 1970s.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.”³⁹ In 2021, the United States prison population was more than 1.2 million people⁴⁰ and in 2020, there were 3.89 to 4.4 million people under community supervision.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.⁴² For example, California’s incarceration rate is at least four times higher than the United Kingdom, France, and Canada.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.⁴⁴

³⁸ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/X7D7-3VUL>]. Despite evidence suggesting that such high levels of incarceration do not effectively reduce crime, America’s prison population has grown by 500% over the past 40 years. *Fact Sheet: Trends in U.S. Corrections*, SENT’G PROJECT 3 (Aug. 2020), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>.

³⁹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* ii (2010).

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.

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

⁴² *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>; Marc. H. Morial, *Until We Resolve Our Racially Unjust Incarceration System, We Cannot Be at Peace*, U.N. CHRONICLE (Jan. 2018), <https://www.un.org/en/chronicle/article/until-we-resolve-our-racially-unjust-incarceration-system-we-cannot-be-peace> [<https://perma.cc/CFN5-UG6W>]; see also Glenn C. Loury & Bruce Western, *The Challenge of Mass Incarceration in America*, 139 DAEDALUS J. AM. ACAD. ARTS & SCIENCES 1, 2 (2010).

⁴³ Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

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. *Id.* For example, Louisiana’s calculated incarceration rate is 1,094 people per 100,000, compared to Uganda, which is 142. *Id.*

Despite robust movements,⁴⁵ criminal justice reform,⁴⁶ and abolition⁴⁷ of the prison-industrial complex,⁴⁸ including, in 2021, the American Health

⁴⁵ Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [<https://perma.cc/8TA2-9C7M>]; Chris Blackwell & Rachael Seevers, *Abolish All Forms of Solitary Confinement in Washington State*, SEATTLE TIMES (Oct. 6, 2021, 2:07 PM), <https://www.seattletimes.com/opinion/abolish-all-forms-of-solitary-confinement-in-washington-state> [<https://perma.cc/RK4P-9ABM>]; RAM SUBRAMANIAN, LAUREN-BROOKE EISEN, TARYN MERKL, LEILY ARZY, HERNANDEZ STROUD, TAYLOR KING, JACKIE FIELDING, ALIA NAHRA & MICHAEL WALDMAN, BRENNAN CTR., A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM 11–16 (Dec. 9, 2020), <https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform> [<https://perma.cc/S959-99KQ>]. As Hinton and Cook note:

Over the past decade, *The New Jim Crow* has forced policymakers, scholars, and the public to confront the problem of mass incarceration in important new ways . . . [w]ithin 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.

⁴⁶ *See, e.g.*, Ben Levin, *What We Mean by “Mass Incarceration”*, INST. TO END MASS INCARC. <https://endmassincarceration.org/what-is-mass-incarceration> [<https://perma.cc/U5YV-TRWP>]; *Home*, SENT’G PROJECT, <https://www.sentencingproject.org> (last visited Oct. 2, 2022); *Smart Justice*, ACLU, <https://www.aclu.org/issues/smart-justice> [<https://perma.cc/G258-M8TH>].

⁴⁷ Taylor, *supra* note 46; *see* John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition> [<https://perma.cc/6VSP-CLQ2>]; Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1614–19 (2019); *see generally* MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021) (collecting essays and interviews reflecting upon the collective movement for abolition and transformative political struggle, envisioning justice beyond the punishment system and rethinking harm and accountability); Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 707–10, 739 (2019); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 200, 203, 217 (2020); MICHELLE BROWN, TRANSFORMATIVE JUSTICE AND NEW ABOLITION IN THE UNITED STATES 1–15 (2019); CRITICAL RESISTANCE, <https://criticalresistance.org> (last visited Oct. 2, 2022).

⁴⁸ *See, e.g.*, andré douglas pond cummings, “All Eyez on Me”: America’s War on Drugs and the Prison-Industrial Complex, 15 J. GENDER, RACE & JUST. 417, 419 (2012); Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), <https://colorlines.com/article/masked-racism-reflections-prison-industrial-complex> [<https://perma.cc/JLB5-QTUC>]; Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L. J. 589, 593–98 (2012); Eric Schlosser, *The Prison-Industrial Complex*, ATL. (Dec. 1998), <http://www.theatlantic.com/doc/199812/prisons>; *What Is the Prison Industrial Complex?*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/not-so-common-language>

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 theory⁵¹

[<https://perma.cc/QJ7A-DQ45>]; see generally Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (arguing for abolition of the prison system due to failure to address the goals of criminal law); Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY. 351, 351 (2021); Roberts, *supra* note 23, at 114–20 (explaining non-reformist abolitionist approaches to total eradication of the prison industrial complex and potential abolitionist readings of the Constitution).

⁴⁹ *Advancing Public Health Interventions to Address the Harms of the Carceral System*, AM. PUB. HEALTH ASS’N (Oct. 24, 2020), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2021/01/14/advancing-public-health-interventions-to-address-the-harms-of-the-carceral-system> [<https://perma.cc/7CQ2-Z7UQ>].

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 & Airhihenbuwa, *supra* note 10, at S30, S30–S34 (introducing Critical Race Theory as applied to public health, emphasizing structural racism’s impacts on health, health inequities, 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 health⁵² 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.”⁵³ Additionally, it may devalue the compounding⁵⁴ 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.⁵⁵ Thus, it is not an accidental outcome⁵⁶ that

⁵² Lisa Bowleg, *Reframing Mass Incarceration as a Social-Structural Driver of Health Inequity*, 110 AM. J. PUB. HEALTH 11, 11–12 (2020) (describing mass incarceration as a “fundamental social-structural driver of health inequities” and the necessity to critically engage public health in this discussion); Ford & Airhihenbuwa, *supra* note 10, at S30–S31; Christopher D. Wildeman & Emily A. Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, 389 LANCET 1464, 1470–74 (2017).

⁵³ See, e.g., Hinton & Cook, *supra* note 14, at 261–86 (reviewing criminalization and incarceration of black Americans through tracing the historical literature on slavery, Black Codes, Jim Crow, increased policing, expansion of the American carceral state in the 1960s, and the War on Crime); Goodwin, *supra* note 14, at 933; ALEXANDER, *supra* note 39, at 262; James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 NYU L. REV. 21, 123–131 (2012) (discussing the overrepresentation of Black people in rates of violent offenses and framing mass incarceration as a new form of Jim Crow); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 310–19 (1999).

⁵⁴ See *infra* Figure 1.

⁵⁵ 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:

[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.

Priscilla A. Ocen, *Unshackling Intersectionality*, 10 DU BOIS REV.: SOC. SCI. ON RACE 471, 474 (2013); see also Kimberlé W. Crenshaw, *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).

⁵⁶ 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

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.⁵⁷ Nor is it an anomaly that Latinx people, through legal, social, and political mechanisms, have faced racial discrimination and biases,⁵⁸ as evidenced by empirical data that they account for 23% of inmates nationally despite representing just 16% of the adult population.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.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.⁶¹ Latinx children are likewise

strengthened carcerality in the United States. Put plainly, racism and the protection of racial hierarchies—not racial identity—are underlying causes of population-level disparities evidenced at all stages of the criminal legal system.

⁵⁷ ASHLEY NELLIS, SENT'G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>. [https://perma.cc/H7L5-LQLQ]

⁵⁸ See, e.g., Cynthia Willis-Esqueda, *Bad Characters and Desperados: Latinxs and Causal Explanations for Legal System Bias*, 67 *UCLA L. REV.* 1204, 1207–14 (2020); see generally John F. Dovidio, Agata Gluszek, Melissa-Sue John, Ruth Dittmann & Paul Lagunes, *Understanding Bias Toward Latinos: Discrimination, Dimensions of Difference, and Experience of Exclusion*, 66 *J. SOC. ISSUES* 59, 61–63 (2010); Amado M. Padilla, *Social Cognition, Ethnic Identity, and Ethnic Specific Strategies for Coping with Threat Due to Prejudice and Discrimination*, *MOTIVATIONAL ASPECTS OF PREJUDICE AND RACISM* 7, 8 (Cynthia Willis-Esqueda ed., 2008); Justin D. Levinson, Ben Cohen & Koichi Hioki, *Deadly 'Toxins': A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 *GA. L. REV.* 225, 293–94 (2021).

⁵⁹ John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006> [https://perma.cc/VK4P-KBSS].

⁶⁰ KRISTEN HENNING, *RAGE OF INNOCENCE: HOW AMERICAN CRIMINALIZES BLACK YOUTH* 81–206 (2021) (overviewing criminalization of Black adolescence through policing and policing at school and its impacts on Black identity development, sexuality, and feelings towards police); see also DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 1–42 (2022) (arguing for abolition of the child welfare system given its explicit punishment and destruction of Black families).

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

⁶² Josh Rovner, *Latinx Disparities in Youth Incarceration*, SENT’G PROJECT (July 15, 2021), <https://www.sentencingproject.org/publications/latino-disparities-youth-incarceration> [<https://perma.cc/X2CC-JU8B>].

⁶³ Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT’L INST. JUST. J., May 2017, at 2, <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children>.

⁶⁴ LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, DEP’T OF JUST., BUREAU OF JUST. STAT., PARENTS IN PRISON AND THEIR MINOR CHILDREN: SURVEY OF PRISON INMATES, 2016 1 (2021).

⁶⁵ See *Children Who Had a Parent Who Was Ever Incarcerated in the United States*, ANNIE E. CASEY FOUND., <https://datacenter.kidscount.org/data/tables/9688-children-who-had-a-parent-who-was-ever-incarcerated?loc=1&loct=1#detailed/1/any/false/1696,1648,1603/any/18927,18928> (last visited Sept. 30, 2022) (showing that 7% of children from 2017–2019); Martin, *supra* note 63, at 2 (reporting that 11% of children may be at risk of experiencing parental incarceration).

⁶⁶ See MARUSCHAK ET AL., *supra* note 64, at 1; Angela Cai, *Insuring Children Against Parental Incarceration Risk*, 26 YALE J. L. & FEMINISM 1, 29–39 (2014); Nazgol Ghandnoosh, Emma Stammen & Kevin Muhitch, *Parents in Prison*, SENT’G PROJECT (2021), <https://www.sentencingproject.org/policy-brief/parents-in-prison> (In 2018, the Sentencing Project found that 20% of indigenous children and 13% of Black children experienced parental incarceration, compared to 6% of white children); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 10 DAEDALUS J. AM. ACAD. ARTS & SCIENCES 8, 8–9 (2010); Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, 46 DEMOGRAPHY 265, 265–80 (2009) (highlighting the effects of parental imprisonment and parental education on children and that childhood risk is concentrated among Black children and children of low-education parents); Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOWARD L.J. 344, 382–83 (2011).

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 Ruqaiyah 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

⁶⁷ *Social Determinants of Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 (last visited Apr. 8, 2023).

⁶⁸ *Social Determinants of Health*, HEALTHY PEOPLE 2030, <https://health.gov/healthypeople/priority-areas/social-determinants-health> (last visited Apr. 8, 2023).

⁶⁹ Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiyah 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 Ruqaiyah 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.

⁷¹ See, e.g., Merrill Rotter & Michael Compton, *Criminal Legal Involvement: A Cause and Consequence of Social Determinants of Health*, 73 PSYCH. SERVS. 108, 108–11 (2022) (exploring the relationship between the SDH and criminal legal contact and the role that SDH and systemic racism influence the overrepresentation of people of color at every level of the criminal legal system); Aysha Pamukcu & Angela P. Harris, *Using Health Justice to Reframe and Reshape the Criminal Legal System*, HARVARD L.: PETRIE-FLOM CTR. (Sept. 10, 2021), <https://blog.petrieflom.law.harvard.edu/2021/09/10/health-justice-criminal-legal-system> [<https://perma.cc/MLJ2-UVB6>]; *Policing as a Social Determinant of Health: Addressing the Public Health Crisis of Systemic Racism*, NETWORK FOR PUB. HEALTH L. (June 18, 2020), <https://www.networkforphl.org/news-insights/policing-as-a-social-determinant-of-health-addressing-the-public-health-crisis-of-systemic-racism> [<https://perma.cc/4ALD-ZKDL>].

discrimination, protects white privilege, and places those at the margins at the greatest risk,⁷² but also structurally entrenches health inequities.⁷³

Consider, for example, housing as a determinant of health.⁷⁴ Housing instability and homelessness are linked to poor health outcomes, including risk of chronic stress and mental illness,⁷⁵ infectious diseases,⁷⁶ violence,⁷⁷ substance abuse,⁷⁸ and death. For people experiencing economic instability and homelessness, there is little dispute that laws criminalizing poverty serve

⁷² Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1925–27 (2000); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

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/doi/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).

⁷⁵ HOMELESSNESS AND HEALTH, NATIONAL HEALTH CARE FOR THE HOMELESS COUNCIL, 1 (2019) <https://nhhc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf> (People who are homeless have higher rates of illness and die on average twelve years sooner than the general U.S. population); HEALTH AND HOMELESSNESS, AM. PSYCH. ASS’N, HEALTH AND HOMELESSNESS, <https://www.apa.org/pi/ses/resources/publications/homelessness-health.pdf> (documenting health harms of homelessness).

⁷⁶ See generally Emily Mosites, Laura Hughes & Jay C. Butler, *Homelessness and Infectious Diseases: Understanding the Gaps and Defining a Public Health Approach: Introduction*, 226 J. INFECTIOUS DISEASES S301, S302 (2022).

⁷⁷ See generally JANA L. JASINSKI, JENNIFER K. WESELY, ELIZABETH MUSTAINE & JAMES D. WRIGHT, *THE EXPERIENCE OF VIOLENCE IN THE LIVES OF HOMELESS WOMEN: A RESEARCH REPORT 7–11* (2005).

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.⁷⁹ Anti-houseless laws ban life-sustaining behaviors, such as sleeping in public,⁸⁰ begging in public,⁸¹ loitering,⁸² sitting or lying down in public,⁸³ and sleeping in a vehicle.⁸⁴ 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.⁸⁵ Research shows disparities exist, with more frequent police searches of, and issuance of citations to, unhoused BIPOC individuals as compared to unhoused white people.⁸⁶ In conjunction with police surveillance and anti-poverty measures, these laws create a cycle between homelessness and incarceration that accelerates poor health.⁸⁷

⁷⁹ See, e.g., *Criminalization of Poverty as a Driver of Poverty in the United States*, HUMAN RTS. WATCH (Oct. 4, 2017), <https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states#>.

⁸⁰ E.g., MANCHESTER, N.H., CODE OF ORDINANCES TIT. XIII § 130.01(A) (2021).

⁸¹ E.g., MOBILE, ALA., CODE OF ORDINANCES §§ 55-101–05 (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).

⁸⁵ MEGHAN HENRY, RIAN WATT, ANNA MAHATHEY, JILLIAN OUELLETTE & AUBREY SITLER, U.S. DEP'T OF HOUS. & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 14, 20 (2019).

⁸⁶ Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Poverty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 1, 7 (2019).

⁸⁷ Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFF. REV. 41, 42–44 (2017); COALITION ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO, 33, 38 (2015).

While contemporary legal discourse⁸⁸ and scholarship⁸⁹ has increasingly focused on the racialized health harms of policing,⁹⁰ state violence,⁹¹ and mass incarceration as a public health crisis vis-à-vis COVID-19,⁹² decades of research confirms the undeniable relationship of the SDH as

⁸⁸ See ANTHONY A. BRAGA & ROD K. BRUNSON, U.S. DEP'T OF JUST., NAT'L INST. OF JUST., *THE POLICE AND PUBLIC DISCOURSE ON "BLACK-ON-BLACK" VIOLENCE* 1 (2015) (describing "how news media coverage sometimes distorts racial issues" and presenting a "more cool-headed analysis of black-on-black violence (measured as a homicide problem)."); Caitlin G. Lynch, *Don't Let Them Kill You on Some Dirty Roadway: Survival, Entitled Violence, and the Culture of Modern American Policing*, 21 CONTEMP. JUST. REV. 33, 33–44 (2017) (discussing "survivability rhetoric" that police officers carry and how this rhetoric creates belief that they are entitled to violence "in the name of guardianship"); Sheryl Gay Stolberg, *Pandemic Within a Pandemic: Coronavirus and Police Brutality Roil Black Communities*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html>; John Eligon, *Police Killings Have Harmed Mental Health in Black Communities, Study Finds*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/police-shootings-black-mental-health.html>.

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).

⁹⁰ See Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, AM. J. L. & MED. 279, 279–95 (2017) (examining use of force policies as distinctively a public health issue, causing widespread health impacts); Jesse M. Ehrenfeld & Patrice A. Harris, *Police Brutality Must Stop*, AM. MED. ASS'N (May 29, 2020), <https://www.ama-assn.org/about/leadership/police-brutality-must-stop> [<https://perma.cc/EK4F-CZC4>]; Paul J. Fleming, William D. Lopez, Maren Spolum, Riana Elyse Anderson, Angela G. Reyes & Amy J. Schulz, *Policing Is a Public Health Issue: The Important Role of Health Educators*, 48 HEALTH EDU. & BEHAV. 553, 553–58 (2021) (advocating for public health institutions to frame and address policing as a public health issue); Thilagawathi Abi Deivanayagam, Sarah Lasoye, James Smith & Sujitha Selvarajah, *Policing Is a Threat to Public Health and Human Rights*, 6 BMJ GLOBAL HEALTH 1, 1–3 (2021) (naming policing as a public health concern as a tool of racist power structures that harm the health and well-being of people of color through criminalizing behaviors and punitive responses).

⁹¹ Lisa L. Miller, *Racialized State Failure and the Violent Death of Michael Brown*, 17 JOHN HOPKINS U. P. 1, 1–5 (2014).

⁹² Alexandria Macmadu, Justin Berk, Eliana Kaplowitz, Marquisele Mercedes, Josiah D. Rich & Lauren Brinkley-Rubinstein, Comment, *COVID-19 and Mass Incarceration: A Call for Urgent Action*, 5 LANCET e571, e571–e572 (2020) (describing the effect of the COVID-19 pandemic on Black communities and people who are incarcerated by exploring the link between health, race, and incarceration); Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (2020) (describing the impact of COVID-19 to incarcerated individuals, including negative health outcomes, and insufficient measures within

risk factors for, and consequences of, criminal legal system involvement.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.⁹⁴

jails to limit spread, failed efforts to lower incarceration); Apryl Alexander, *Sick and Shut In: Incarceration During a Public Health Crisis*, 60 J. HUMANISTIC PSYCH. 647, 647–56 (2020); Alison O. Jordan, *Covid-19 Highlights Mass Incarceration as a Public Health Crisis*, APHA 2021 ANNUAL MEETING & EXPO. (2021), <https://apha.confex.com/apha/2021/meetingapi.cgi/Session/64468?filename=2021Session64468.pdf&template=Word> [<https://perma.cc/FH62-9AQX>].

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 Sociostructurally Determinant 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).

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 individual⁹⁵ and community levels.⁹⁶ 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).

⁹⁵ See, e.g., *Incarceration*, *supra* note 93; I.A. Binswanger, P.M. Krueger & J.F. Steiner, *Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the United States Compared with the General Population*, 63 J. EPIDEMIOLOGY & CMTY. HEALTH 912, 912–19 (2009) (reporting that incarcerated individuals had higher chances of hypertension, asthma, arthritis, hepatitis, and cervical cancer compared with the general population); Zulficar G. Restum, *Public Health Implications of Substandard Correctional Health Care*, 95 AM. J. PUB. HEALTH 1689, 1689–91 (2005) (examining the risk of contracting a communicable disease due to poor healthcare for incarcerated individuals and inferior follow-up health care upon their release and framing this as a public health problem that requires further examination); *Incarceration and Health: A Family Medicine Perspective*, AM. ACAD. FAM. PHYSICIANS (Apr. 2017), <https://www.aafp.org/about/policies/all/incarceration.html> [<https://perma.cc/DC5R-3EEB>]; LOIS M. DAVIS, MALCOLM V. WILLIAMS, KATHRYN PITKIN DEROSE, PAUL STEINBERG, NANCY NICOSIA, ADRIAN OVERTON, LISA MIYASHIRO, SUSAN TURNER, TERRY FAIN & EUGENE WILLIAMS, UNDERSTANDING PUBLIC HEALTH IMPLICATIONS OF PRISONER REENTRY IN CALIFORNIA: STATE-OF-THE-STATE REPORT i–ii (2011); Gifford, *supra* note 33, at 372–74.

⁹⁶ See, e.g., NELLIS, *supra* note 57, at 15 (noting on an individual level, incarceration “creates obstacles to building stable lives,” and on a community level, incarceration “cause[s] high crime rates and neighborhood deterioration, thus fueling greater disparities”); Thalia González, *Race, School Policing, and Public Health*, 73 STAN. L. REV. 180, 180–93 (2021) (summarizing the individual health and public health consequences of school policing, including decreased mental health and physical safety, diminishing protective health factors, and a heightened risk for entry into the justice-system); GREGORY HOOKS & WENDY SAWYER, MASS INCARCERATION, COVID-19, AND COMMUNITY SPREAD, PRISON POL’Y INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covidspread.html> (finding higher rates of COVID-19 infection in communities and counties with more people incarcerated); *Advancing Public Health Interventions to Address the Harms of the Carceral System*, *supra* note 49; Gifford, *supra* note 33, at 372–74.

also worsens population health,⁹⁷ incarceration produces and amplifies negative health and mental health outcomes.⁹⁸ 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 suicide⁹⁹ as well as experience symptoms of major depression and delusions.¹⁰⁰ 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.¹⁰¹ Additionally, the risk of premature death following release is greater for those that experienced solitary confinement than those who did not.¹⁰² 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.¹⁰³

⁹⁷ Meghan Peterson & Lauren Brinkley-Rubinstein, *Incarceration Is a Health Threat. Why Isn't It Monitored Like One?*, HEALTH AFFS. (Oct. 19, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20211014.242754>.

⁹⁸ Julie L. Kuper & Jillian J. Turanovic, *The Consequences Are Black and White: Race and Poor Health Following Incarceration*, RACE & JUST. 3–5 (2021) <https://doi.org/10.1177/2153368721998053>; KAMALA MALLIK-KANE, ELLEN PADDOCK & JESSE JANNETTA, NAT'L INST. OF CORRS., HEALTH CARE AFTER INCARCERATION: HOW DO FORMERLY INCARCERATED MEN CHOOSE WHERE AND WHEN TO ACCESS PHYSICAL AND BEHAVIORAL HEALTH SERVICES? 9–10, 12 (2018).

⁹⁹ Erin Renee Morgan, Frederick P. Rivara, Myduc Ta, David C. Grossman, Karl Jones & Ali Rowhani-Rahbar, *Incarceration and Subsequent Risk of Suicide: A Statewide Cohort Study*, 52 SUICIDE & LIFE-THREATENING BEHAV. 467, 468, 471 (2022).

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.

¹⁰¹ Tiana Herring, *The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm*, PRISON POL'Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium.

¹⁰² *Id.*

¹⁰³ AM. CIV. LIBERTIES UNION, STILL WORSE THAN SECOND CLASS: SOLITARY CONFINEMENT FOR WOMEN IN THE UNITED STATES 9 (2019), https://www.aclu.org/sites/default/files/field_document/062419-sj-solitaryreportcover.pdf; *see generally* Cynthia A. Golembeski, Carolyn B. Sufirin, Brie Williams, Precious S. Bedell, Sherry A. Glied, Ingrid A. Binswanger, Donna Hylton, Tyler N.A. Winkelman & Jaimie P. Meyer, *Improving Health Equity for Women Involved in the Criminal Legal System*, 30 WOMEN'S HEALTH ISSUES 313, 315–16 (summarizing the health outcomes and needs of incarcerated women and girls, with particular focus on reproductive and maternal health, aging populations, and reentry).

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 racism¹⁰⁸ 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 carcerality 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

¹⁰⁴ Michael Massoglia & Brianna Remster, *Linkages Between Incarceration and Health*, 134 PUB. HEALTH REP. 8S, 10S (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>.

¹⁰⁶ LeMasters et al., *supra* note 93, at e288; Brennan Klein, C. Brandon Ogbunugafor, Benjamin J. Schafer, Zarana Bhadracha, Preeti Kori, Jim Sheldon, Nitish Kaza, Emily A. Wang, Tina Eliassi-Rad, Samuel V. Scarpino & Elizabeth Hinton, *The COVID-19 Pandemic Amplified Long-Standing Racial Disparities in the United States Criminal Justice System*, MEDRXIV 1–15 (2021). In examining the relationship between large racial disparities in COVID-19, researchers examined jail cycling in Cook County concluding that “the cycling of individuals through Cook County Jail in March 2020 effectively functioned to seed the virus in disproportionately criminalized Black and Hispanic communities early in the COVID-19 pandemic at a time when relatively few cases had yet been documented in Chicago.” Erin Reinhart & Daniel L. Chin, *Carceral-community Epidemiology, Structural Racism, and COVID-19 Disparities*, 118 PNAS, no. e2026577118, May 5, 2021, at 6.

¹⁰⁷ Sebastian Daza, Alberto Palloni & Jerrett Jones, *The Consequences of Incarceration for Mortality in the United States*, 57 DEMOGRAPHY 577, 577 (2020).

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.

¹⁰⁹ Benjamin J. Bovell-Ammon, Ziming Xuan, Michael K. Paasche-Orlow, Marc R. LaRochelle, *Association of Incarceration with Mortality by Race From a National Longitudinal Cohort Study*, JAMA NETWORK OPEN, Dec. 23, 2021, at 1, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2787436>.

¹¹⁰ Crenshaw, *supra* note 18, at 151–52.

¹¹¹ Lauren Dyer, Rachel Hardeman, Dovile Vilda, Katherine Theall & Maeve Wallace, *Mass Incarceration and Public Health: The Association Between Black Jail Incarceration and Adverse Birth Outcomes Among Black Women in Louisiana*, 19 BMC PREGNANCY & CHILDBIRTH, no. 525, Dec. 27, 2019, at 6–9; Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1249–58 (2012); Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality: A Case Study in Structural Racism*, CTR. FOR AM. PROGRESS (Jun. 5, 2018),

However, disparities at the nexus of incarceration and health outcomes do not exist merely at the individual level;¹¹² incarceration also affects the population health of Black communities.¹¹³

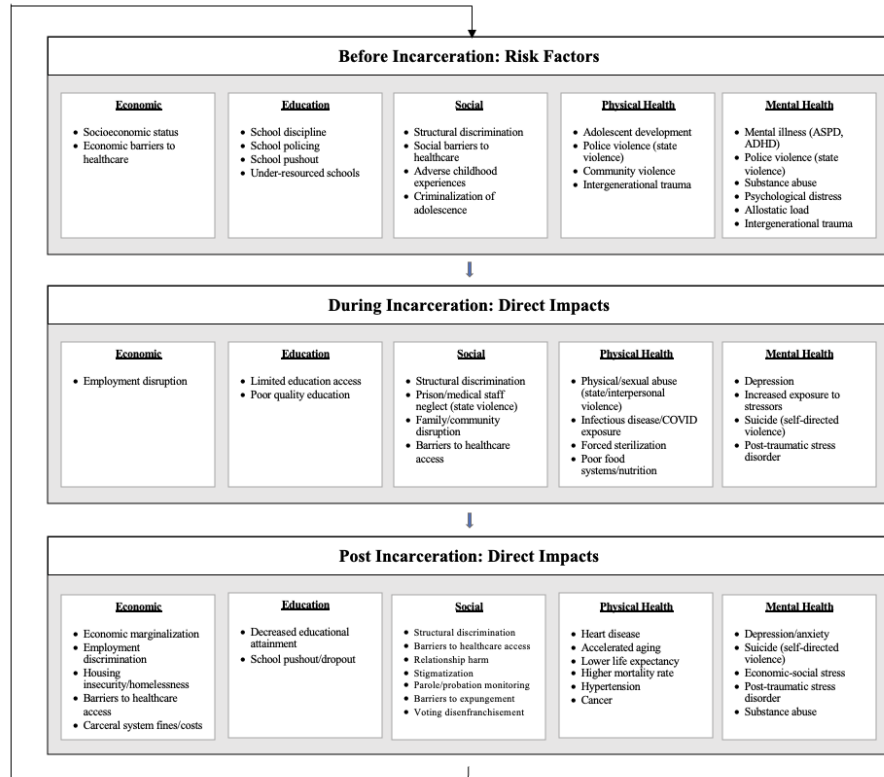


Figure 1. Risk Factors For and Impacts of Criminal Legal System Involvement

<https://www.americanprogress.org/article/mass-incarceration-stress-black-infant-mortality>. 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.

¹¹² Shervin Assari, Reuben Jonathan Miller, Robert Joseph Taylor, Dawne Mouzon, Verna Keith & Linda M. Chatters, *Discrimination Fully Mediates the Effects of Incarceration History on Depressive Symptoms and Psychological Distress Among African American Men*, 5 J. RACIAL & ETHNIC HEALTH DISPARITIES 243, 246–48 (2017); Peterson & Brinkley-Rubinstein, *supra* note 97.

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 1¹¹⁴ illustrates, structural forces that can shape health inequities in the criminal legal system are not limited to incarceration.

¹¹⁴ Amanda Tufts, *Born to Be an Offender? Antisocial Personality Disorder and Its Implications on Juvenile Transfer to Adult Court in Federal Proceedings*, 17 LEWIS & CLARK L. REV. 333, 350–55 (2013); Benjamin J. Bovell-Ammon, Ziming Xuan, Michael K. Paasche-Orlow & Marc R. LaRochelle, *Association of Incarceration with Mortality by Race From a National Longitudinal Cohort Study*, JAMA NETWORK OPEN, no. e2133083, Dec. 23, 2021, at 3, 9 (2021); C.A. Mallett, *A Lost Generation of Students: The School-to-Prison Pipeline*, 52 CRIM. L. BULL. 300, 301 (2016); Chandra L. Ford, *Graham, Police Violence, and Health Through a Public Health Lens*, 100 B.U. L. REV. 1093, 1098–1102 (2020); Dana DeHart, Cheri Shapiro & Stephanie Clone, *“The Pill Line Is Longer Than the Chow Line”: The Impact of Incarceration on Prisoners and Their Families*, 98 PRISON J. 188, 190–93 (2018); Erin M. Carr, *Educational Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-Brown America*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 115, 125–33 (2020); Eduardo R. Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice By Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549, 566–76 (2016); Gus Tupper, Akua Amaning & Jaboa Lake, *Fines and Fees Are a Barrier to Criminal Record-Clearing*, CTR. FOR AM. PROGRESS (Nov. 30, 2021), <https://www.americanprogress.org/article/fines-and-fees-are-a-barrier-to-criminal-record-clearing> [<https://perma.cc/7DLL-WLU3>]; K. LIBMAN & N. BERNER-WONG, HEALTHY EATING RSCH., LEVERAGING JUVENILE JUSTICE FOOD ENVIRONMENTS TO ADVANCE HEALTH EQUITY 4–5 (2020); Nowotny & Kutsevych-Timmer, *supra* note 36, at 3–7; MALLIK-KANE ET AL., *supra* note 98, at 4–5, 9; Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 305–10 (2012); Kuper & Turanovic, *supra* note 98, at 3–4, 10–13; Jennifer Smith-Merry, Damian Mellifont, Kirsty McKenzie & Paul Clenaghan, *A Narrative Review of Mental Health Support for People During Transition from Incarceration to Community: The Grass Can Be Greener on the Other Side of the Fence*, 28 J. MENTAL HEALTH 189, 189–91 (2019); Lauren C. Porter, *Being ‘on Point’: Exploring the Stress-Related Experiences of Incarceration*, 9 SOC. & MENTAL HEALTH 1, 3–4 (2019); Lukas Carey, Adam Grant & Scott Thompkins, *Swinging Doors: An Autoethnographic Look at the Challenges Faced by Previously Incarcerated People in the USA and Australia*, 30 J. PRISONERS ON PRISONS 38, 40–54 (2022); Laurie Chassin, *Juvenile Justice and Substance Use*, 18 FUTURE CHILD. 165, 167 (2008); Miriam E. Van Dyke, Nicole Kau’i Baumhofer, Natalie Slopen, Mahasin S. Mujahid, Cheryl R. Clark, David R. Williams & Tené T. Lewis, *Pervasive Discrimination and Allostatic Load in African American and White Adults*, 82 PSYCHOSOMATIC MED. 3, 5 (2020); Massoglia & Remster, *supra* note 104, at 8S–14S; Mark T. Berg, Ethan M. Rogers, Man-Kit Lei & Ronald L. Simons, *Losing Years Doing Time: Incarceration Exposure and Accelerated Biological Aging Among African American Adults*, 62 J. HEALTH & SOC. BEHAV. 459, 462 (2021); *COVID-19 in Prisons and Jails*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/virus> (last visited June 13, 2023); *Health*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/health.html> (last visited May 25, 2022); Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 L. & INEQ. 1, 3–10 (2009); Sertis Camacho & Roger Clark, *The Pathways to and Politics of Mass Incarceration by Gender*, 43 INT’L REV. MOD. SOCIO. 179, 185–90 (2017).

Upstream social-structural pathways¹¹⁵ 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.¹¹⁶ Likewise, BIPOC youth experience unique risk factors for criminal legal system involvement at individual,¹¹⁷ family,¹¹⁸ peer,¹¹⁹ and community levels¹²⁰ 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

¹¹⁵ Nazleen Bharmal, Kathryn Pitkin Derose, Melissa Felician & Margaret M. Weden, *Understanding the Upstream Social Determinants of Health* 1–4, 6–9 (RAND Corp., Working Paper No. WR-1096-RC 2015).

¹¹⁶ Dhruv Khullar & Dave A. Chokshi, *Health, Income, & Poverty: Where We Are & What Could Help*, HEALTH AFFS. (Oct. 4, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180817.901935/full>; Joshua C. Cochran, Sonja E. Siennick & Daniel P. Mears, *Social Exclusion and Parental Incarceration Impacts on Adolescents' Networks and School Engagement*, 80 J. MARRIAGE & FAM. 478, 480–82, 487, 492–93 (2018).

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).

¹¹⁸ Ashley Provencher & James M. Conway, *Health Effects of Family Member Incarceration in the United States: A Meta-Analysis and Cost Study*, 103 CHILDREN & YOUTH SERVS. REV. 87, 94–96 (2019).

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

¹²⁰ Gloria Huei-Jong Graf, Stanford Chihuri, Melanie Blow & Guohua Li, *Adverse Childhood Experiences and Justice System Contact: A Systematic Review*, 147 PEDIATRICS, no. e2020021030, Jan. 2021, at 2.

social context of high levels of stress,¹²¹ complex trauma,¹²² and adverse childhood experiences,¹²³ 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.¹²⁴ A common example of such hybrid legal controls exists at the intersection of immigration and criminal law,¹²⁵ where evidence points to clear deleterious health outcomes at individual and population health levels.¹²⁶ Scholars and public health professionals alike conclude that the punitive processes of detainment, incarceration, and deportation generate inequities and negative consequences.¹²⁷ Moreover, the

¹²¹ Robert H. Stensrud, Dennis D. Gilbride & Robert M. Bruinekool, *The Childhood to Prison Pipeline: Early Childhood Trauma as Reported by a Prison Population*, 62 REHAB. COUNSELING BULL. 195, 196 (2018) (linking childhood trauma to physiological health through the former’s effect on gene expression, neurocognitive networks, and gut microbiome); Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 303 (2014); Christopher Wildeman, Alyssa W. Goldman & Kristin Turney, *Parental Incarceration and Child Health in the United States*, 40 EPIDEMIOLOGIC REV. 146, 150–51 (2018).

¹²² NAT’L CHILD TRAUMATIC STRESS NETWORK, COMPLEX TRAUMA: IN URBAN AFRICAN AMERICAN CHILDREN, YOUTH, AND FAMILIES 2 (2017) https://www.nctsn.org/sites/default/files/resources//complex_trauma_facts_in_urban_african_american_children_youth_families.pdf; see generally Rachel Wamser-Nanney, Kathryn E. Cherry, Claudia Campbell & Elise Trombetta, *Racial Differences in Children’s Trauma Symptoms Following Complex Trauma Exposure*, 36 J. INTERPERSONAL VIOLENCE 2498 (2018).

¹²³ Vanessa Sacks & David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race/Ethnicity*, CHILD TRENDS (Feb. 12, 2018), <https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity>; Zachary Giano, Denna L. Wheeler & Randolph D. Hubach, *The Frequencies and Disparities of Adverse Childhood Experiences in the U.S.*, 20 BMC PUB. HEALTH, no. 1327, Sept. 10, 2020, at 1.

¹²⁴ Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222–24 (2012).

¹²⁵ Catherine Duarte, *Policy Determinants of Inequitable Exposure to the Criminal Legal System and Their Health Consequences Among Young People*, 110 AM. J. PUB. HEALTH S43, S46–47 (2020).

¹²⁶ Kathryn Hampton, Ranit Mishori, Marsha Griffin, Claire Hillier, Elizabeth Pirrotta & Ewen Wang, *Clinicians’ Perceptions of the Health Status of Formerly Detained Immigrants*, 22 BMC PUB. HEALTH, No. 525, Mar. 23, 2022, at 9.

¹²⁷ Maria-Elena De Trinidad Young, Hiram Beltrán-Sánchez & Steven P. Wallace, *States with Fewer Criminalizing Immigrant Policies Have Smaller Health Care Inequities Between Citizens and Noncitizens*, 20 BMC PUB. HEALTH, No. 1460, Oct. 15, 2020, at 8–9; Julie M. Linton, Marsha Griffin & Alan J. Shapiro, *Detention of Immigrant Children*, 139 PEDIATRICS, No. e20170483, Apr. 2017, at 6 (reporting that unaccompanied immigrant

nexus between the immigration and criminal legal systems is racialized¹²⁸ 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.¹²⁹

III. RESTORATIVE JUSTICE DIVERSION AND THE CRIMINAL LEGAL SYSTEM

Emerging in the 1970s in the United States, the philosophy of restorative justice¹³⁰—as associated with criminal law and processes—was first operationalized as practices and programs for juvenile offenders.¹³¹

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

¹²⁸ Jane Lorenzi & Jeanne Batalova, *South American Immigrants in the United States*, MIGRATION POL'Y INST. (Feb. 16, 2022), <https://www.migrationpolicy.org/article/south-american-immigrants-united-states> (describing the effects of factors such as nationality, English language proficiency, and income on immigration outcomes); Matthew Claire & Asad L. Asad, *Criminal and Immigration Laws Shape Health Outcomes of Racial and Ethnic Minorities*, SOCIO. POL'Y BRIEFS (June 1, 2019), <https://www.policybriefs.org/briefs/race-law-health> (examining how “[c]riminal and immigration laws creat[e] . . . ’racialized legal statuses,’ . . . or “discredited social positions that disproportionately impact marginalized racial and ethnic minorities”); Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOCIO. RACE & ETHNICITY 82, 83 (2017).

¹²⁹ Nolan Kline, *Policing Race and Performing State Power: Immigration Enforcement and Undocumented Latinx Immigrant Precarity in Central Florida*, 33 CITY & SOC'Y 364, 370–72 (2021).

¹³⁰ This Article acknowledges the importance of, and *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, *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.” *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.

¹³¹ See, e.g., Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020); Karl A. Racine & Elizabeth Wilkins, *Toward a*

Since then, the field has evolved and grown exponentially.¹³² These developments have garnered notice from academics,¹³³ policymakers,¹³⁴ and

Just System for Juveniles, 22 U.D.C. L. REV 1, 14–16 (2019); see also John Braithwaite & Heather Strang, *Connecting Philosophy and Practice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 203 (2000). Early adoption of criminal legal system-centered restorative justice models resulted from the Balanced and Restorative Justice Project (BARJ) supported by the Office of Juvenile Justice and Delinquency Prevention. Peter Freivalds, *Balanced and Restorative Justice Project*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST. 1–2 (1996); see also *Our Balanced and Restorative Justice Mission*, JUV. CT. JUDGES' COMM'N., <https://www.jcjc.pa.gov/Balanced-Restorative-Mission/Pages/default.aspx> [<https://perma.cc/V4WY-JZAV>].

¹³² See, e.g., *Restorative Justice*, CLAY CNTY., MINN., <https://claycountymn.gov/184/Restorative-Justice> [<https://perma.cc/M62U-2TLE>] (describing the rationale, process, and intended outcomes of restorative justice); *Restorative Justice Overview*, COLO. JUD. BRANCH, <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=rj> [<https://perma.cc/Y7PN-E29R>] (explaining the creation of the Colorado Coordinating Council on Restorative Justice); *Step Up Texas: Improving Juvenile Justice Outcomes with Trauma-Informed and Restorative Practices Training*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST. (Dec. 21, 2021), <https://ojjdp.ojp.gov/funding/awards/15pjd-21-gk-04689-mumu> [<https://perma.cc/6MMZ-DY8Q>]; LINDSEY E. WYLIE & ANNE HOBBS, NEBRASKA JUVENILE DIVERSION PROGRAM 2012 TO 2015, JUV. JUST. INST., UNIV. OF NEB. OMAHA 5–6 (2016); CAITLIN M. O'NEIL, RESTORATIVE JUSTICE AS DIVERSION IN CALIFORNIA'S JUVENILE AND CRIMINAL JUSTICE SYSTEMS: POTENTIAL IMPACTS AND STATE POLICY 9–10, 27 (2016). 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.

¹³³ See, e.g., Shannon M. Silva, Elizabeth H. Porter-Merrill & Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal Justice System: The Case of Colorado*, 28 KAN. J. L. & PUB. POL'Y 456, 462–65 (2019); see also Bruce A Green & Lara Bazelon, *Restorative Justice From Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2287–91 (2020); González, *supra* note 131, at 1148; Lanni, *supra* note 132, 640–48; M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 NEW MEX. L. REV. 121, 124–25 (2016).

¹³⁴ E.g., Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL'Y J. 1, 4 (2016); Ian Marder, *Developing Restorative Justice in Law, Policy and Practice: Learning from Around the World*, PENAL REFORM INT'L (Jan. 10, 2019), <https://www.penalreform.org/blog/developing-restorative-justice-in-law-policy-and-practice> [<https://perma.cc/8HTH-WRAU>]; Nketiah Berko, *Restorative Justice, DEMOCRACY POL'Y NETWORK*, <https://democracypolicy.network/agenda/strong-people/>

national organizations including the American Bar Association,¹³⁵ cementing restorative justice squarely in the criminal legal reform discourse. In all sectors, a focus on restorative justice—in particular its upstream forms—has intensified in tandem with escalating attention on the racialized realities of the American criminal legal system.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,¹³⁷ for example, has expanded beyond Oakland and San Francisco to cities and counties across the country, where

strong-communities/restorative-justice [https://perma.cc/3TAS-53UG]; Thalia González, *The Legalization of Restorative Justice: A Fifty State Empirical Analysis*, 5 UTAH. L. REV. 1027, 1056–59 (analyzing the increase in restorative justice laws from 1975 to 2019).

¹³⁵ AM. BAR ASS'N, CRIM. JUST. STANDARDS ON DIVERSION iii–iv, xix (2022), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/501-annual-2022.pdf; Raul Ayala & Stephen Zeidman, *Corrections & Sentencing Division*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/committees/corrections_senescencing [https://perma.cc/VNW6-97C6]; AM. BAR ASS'N, *Restorative Justice & Gender-Based Violence* (July 22, 2020), https://www.americanbar.org/groups/crsj/events_cle/archive/restorative-justice-and-gbv [https://perma.cc/V5ZC-H8ZA]; Kristen M. Blankley, *Expanding Options for Restorative Justice*, AM. BAR ASS'N (March 31, 2020), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2020/dr-magazine-criminal-justice-reform/expanding-options-for-restorative-justice [https://perma.cc/TLR5-VMBZ].

¹³⁶ *Restorative Justice*, CTR. FOR JUST. INNOVATION, https://www.innovatingjustice.org/areas-of-focus/restorative-justice [https://perma.cc/AW7K-CNCV]; Matt Watkins, *Restorative Justice Is Racial Justice*, CTR. FOR JUST. INNOVATION, https://www.innovatingjustice.org/publications/restorative-racial-justice [https://perma.cc/S 922-VDMR]; Vanessa Hernandez, *Restorative Justice Offers a Powerful Alternative to Prisons and Jails*, AM. CIV. LIBERTIES UNION WASH. (Oct. 24, 2016), https://www.aclu-wa.org/story/restorative-justice-offers-powerful-alternative-prisons-and-jails [https://perma.c c/749V-GYN2]; Mark Fancher & Jeffrey Edison, *Using Restorative Justice to Combat Mass Incarceration*, AM. CIV. LIBERTIES UNION MICH., https://www.aclumich.org/en/cases/using-restorative-justice-combat-mass-incarceration [https://perma.cc/H5ZK-KWVE]; see NAACP, *Resolution Promoting Restorative Justice* (2007), https://naacp.org/resources/promoting-restorative-justice [https://perma.cc/9F57-6N32]; Kejsi Demaj, *Restorative Justice: The Path to Abolishing the Current Criminal Justice System*, HARV. POLS. REV. (Mar. 14, 2022), https://harvardpolitics.com/restorative-justice-abolition [https://perma.cc/GMY4-GGMC].

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.

RESTORATIVE JUST. PROJECT, RJD PROGRAM OVERVIEW & ELEMENTS 2 (2019), https://rjdtoolkit.impactjustice.org/wp-content/uploads/2019/04/Resource-RJD-Program-Overview--Elements.pdf [https://perma.cc/KM5Q-W92P].

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

¹³⁸ *Partnering with Communities to Address Harm Through Dialogue*, IMPACT JUST., <https://impactjustice.org/innovation/restorative-justice-diversion> [<https://perma.cc/VS84-JZAR>].

¹³⁹ LONGMONT CMTY. JUST. P’SHP, <https://www.lcjp.org> [<https://perma.cc/3WY9-YLGU>] (providing an overview of Longmont Community Justice Partnership including training institutes and community restorative justice programs). In 2022, the California Legislature also allocated \$15 million to further develop the work of Impact Justice. Press Release, Impact Just., California Legislature Earmarks \$15 million to Bring the Homecoming Project to Los Angeles and Fund Other Impact Justice Innovations (Sept. 13, 2022), <https://impactjustice.org/15m-ca-legislature> [<https://perma.cc/9683-Y5FP>].

¹⁴⁰ In addition to local practices and state-wide applications, in 2007, Colorado law established the Colorado Justice Coordinating Council. *What We Do*, COLO. RESTORATIVE JUST. COUNCIL, <https://rjcolorado.org/programs/the-colorado-restorative-justice-council> [<https://perma.cc/55NL-9PUP>].

¹⁴¹ COMMUNITIES FOR RESTORATIVE JUST., *MAKING BOLD STRIDES 1–3* (2021), https://drive.google.com/file/d/1zSx5oU0nrKndypuQ2C6l8FNS6-xq9_lv/view [<https://perma.cc/6MKP-62JS>].

¹⁴² *Restorative Justice Community Courts*, COOK CNTY. CT., <https://www.cookcounty.court.org/ABOUT-THE-COURT/Restorative-Justice-Community-Courts> [<https://perma.cc/5W4C-PK9Y>].

¹⁴³ *The Dane County Restorative Court (CRC)*, DANE CNTY. DEP’T OF HUM. SERVS., <https://dcdhs.com/Children-Youth-and-Family/Community-Restorative-Court> [<https://perma.cc/ZCH8-LTAQ>].

¹⁴⁴ *Collaborative Justice Courts*, MARIN CNTY. SUPERIOR CT., <https://www.marin.courts.ca.gov/collaborative-justice-courts> [<https://perma.cc/WE3E-EV5V>].

¹⁴⁵ RESTORATIVE ARLINGTON INITIATIVE, *RESTORATIVE ARLINGTON STRATEGIC PLAN 4, 7* (2020); Matt Blitz, *New Restorative Justice Program Launches, Diverting Some Young Adults from Justice System*, ARL NOW (May 17, 2022), <https://www.arlnow.com/2022/05/17/new-restorative-justice-program-launches-diverting-some-young-adults-from-justice-system> [<https://perma.cc/FBH4-TBY4>].

increased resources for restorative justice projects as part of their portfolios of juvenile justice reform.¹⁴⁶

In the United States, there is no formal uniform definition of restorative justice in criminal systems.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.”¹⁴⁸ It also is positioned in diametric opposition to retributive and punitive philosophies and practices.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.”¹⁵⁰

First implemented in the form of victim-offender mediations,¹⁵¹ the contemporary restorative justice landscape represents a diverse set of

¹⁴⁶ *Foundation Seeks Proposals for Juvenile Justice Reform Projects Led by Young People*, ANNIE E. CASEY FOUND. (May 16, 2022), <https://www.aecf.org/blog/foundation-seeks-proposals-for-juvenile-justice-reform-projects-led-by-young-people> [<https://perma.cc/UT5U-HJCA>]. Impact Justice now maintains a restorative justice diversion resource list of funders interested in restorative justice diversion programs. *Potential RJD Funders*, RESTORATIVE JUST. PROJECT 1–3 (2019), https://rjdt toolkit.impactjustice.org/wp-content/uploads/2019/04/Resource_-_Potential-RJD-Funders.pdf.

¹⁴⁷ This is in contrast to other countries that have adopted uniform definitions for restorative justice. U.N., *HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES* 6 (2006), https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programme_s.pdf [<https://perma.cc/SMV7-T3X3>]; CAN. RESOURCE CTR. FOR VICTIMS OF CRIME, *RESTORATIVE JUSTICE IN CANADA: WHAT VICTIMS SHOULD KNOW* 2 (2011), <http://tj.lillooet.ca/documents/restjust.pdf>; MINISTRY OF JUST., *RESTORATIVE JUSTICE BEST PRACTICE IN NEW ZEALAND* 6 (2011), <https://www.justice.govt.nz/assets/documents/publications/rj-best-practice.pdf>; *Key Messages on Restorative Justice*, CORR. SERV. CAN. 6 (Dec. 22, 2009), <https://www.csc-scc.gc.ca/restorative-justice/003005-4005-eng.shtml>.

¹⁴⁸ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 50 (2015).

¹⁴⁹ *See, e.g.*, DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORING JUSTICE*, 41–45 (1997); HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 184–85 (1990); Dena M. Gromet & John M. Darley, *Retributive and Restorative Justice: Importance of Crime Severity and Shared Identity in People’s Justice Responses*, 60 *AUSTRALIAN J. PSYCH.* 50, 50 (2009); Donald H.J. Hermann, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 16 *SEATTLE J. SOC. JUST.* 71, 79–84 (2017); *see ZEHR, supra* note 148, at 50.

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

¹⁵¹ U.S. DEP’T OF JUST., NAT’L INST. OF JUST., *VICTIM OFFENDER MEDIATION: CONFLICT RESOLUTION AND RESTITUTION* 1–2 (1985); MARK S. UMBREIT, JEAN GREENWOOD, U.S. DEP’T OF JUST., OFF. FOR VICTIMS OF CRIME, *GUIDELINES FOR VICTIM-SENSITIVE VICTIM-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).¹⁵² 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.¹⁵³ Diversity exists in the legal schemes adopting restorative justice, with some jurisdictions normatively setting forth a moral imperative for a departure from retributive frameworks,¹⁵⁴ while others have adopted a more narrowly tailored prescriptive approach focusing on operationalization.¹⁵⁵ 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.¹⁵⁶ In the absence of a comprehensive national framework,¹⁵⁷ the development and application of

MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE 1–7 (April 2001); Toran Hansen & Mark Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence*, 36 CONFLICT RESOL. Q. 99, 100 (2018).

¹⁵² Bridget McCormack, *Let’s Move Criminal Justice Reforms Upstream: A Perspective from the Bench*, 74 SMU L. REV. 575, 576–80 (2021); Shannon M. Slivia & Mark Plassmeyer, *Effects of Restorative Justice on Pre-File Diversion Legislation on Juvenile Filing Rates: An Interrupted Time-Series Analysis*, 20 CRIM. & PUB. POL’Y 21, 22 (2020); Ruth Muller & Martha Kenney, *A Science of Hope? Tracing Emergent Entanglements between the Biology of Early Life Adversity, Trauma-informed Care, and Restorative Justice*, 46 SCI., TECH. & HUM. VALUES 1237, 1238 (2020); Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CITY UNIV. N.Y. L. REV. 331, 339, 342 (2017).

¹⁵³ González, *supra* note 131, at 1152. Since publication, two more jurisdictions have passed restorative justice legislations: North Dakota and Illinois. 2021 ND H.B. 1393 (NS) (April 12, 2021); 735 ILL. COMP. STAT. 5/8-804.5 (2021).

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.* § 43-260.06(6) (2019); *id.* § 43-276 (2019); *id.* § 43-274 (2019).

¹⁵⁶ González, *supra* note 131, at 1165–74; *see also* Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL’Y PRAC. 77, 85 (2015).

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

Increasing the Use of Restorative Justice in Criminal Matters in Canada - Baseline Report, PUB. SAFETY CAN., <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2020-resjus-jusrep/index-en.aspx> (last visited Sept. 29, 2022) (a federal-provincial-working government group focusing on the use of restorative justice processes in the Canadian criminal justice system); *How Restorative Justice Works*, JUST. GOV'T N.Z., <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works> (last visited Sept. 29, 2022) (New Zealand Ministry of Justice providing restorative justice services).

¹⁵⁸ Bailey Maryfield, Roger Przybylski & Mark Myrent, *Research on Restorative Justice Practices*, JUST. RSCH. STAT. ASS'N 2 (2020); *Who We Are*, NEW PATH CTR., <http://www.newpathcenter.org/about> [<https://perma.cc/3X6C-RS86>]; S.O.U.L SISTERS LEADERSHIP COLLECTIVE, <https://soulsistersleadership.org> [<https://perma.cc/5WDQ-WVUG>]; *Restorative Justice*, N.Y. PEACE, <https://nypeace.org/restorative-justice> [<https://perma.cc/AM7K-ZWUN>].

¹⁵⁹ Email from Jonathan Scharrer, Clinical Assoc. Prof., Restorative Justice Project, Dir., Frank J. Remington Ctr., U. Wisconsin L. School, to author (Dec. 16, 2021, 8:12 PM) (on file with author); see also *Restorative Justice*, INSIGHT PRISON PROJECT, <http://www.insightprisonproject.org/a-restorative-justice-agency.html> [<https://perma.cc/Z3GC-Q52C>] (focusing on engaging prisoners and their victims in restorative justice services).

¹⁶⁰ Email from Jonathan Scharrer, *supra* note 159; see also *What We Do*, LONGMONT JUST. PROJECT, <https://www.lcjp.org> [<https://perma.cc/C54X-7QAU>]; *Neighborhood Justice Program (NJP)*, L.A CITY ATT'Y, <https://cityattorney.lacity.gov/neighborhood-justice-program-njp> [<https://perma.cc/YDH6-BPB8>]. see also *Adult Pre-Arrest Diversion (OC-PAD)*, ORANGE CNTY. N.C., <http://www.orangecountync.gov/2824/Adult-Pre-Arrest-Diversion-OC-PAD> [<https://perma.cc/6SG9-5NLD>].

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.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.¹⁶⁶ This same type of eligibility screening will likewise be present in post-charge restorative justice diversion.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.¹⁶⁸ Post-plea restorative justice diversion takes place through the use of a deferred prosecution agreement.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.¹⁷⁰

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

¹⁶⁵ Scharrer, *supra* note 159; *see also Pre-charge Diversion*, RESTORATIVE JUST. CHATHAM-KENT, <https://rjck.org/programs/pre-charge-diversion-program> (last visited Sept. 29, 2022); IMPACT JUST., *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. *Id.*

¹⁶⁶ Scharrer, *supra* note 159.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *About*, RESTORATIVE D.C., <https://restoratedc.org/aboutrdc> [<https://perma.cc/NQE2-992S>].

¹⁷² *The Impact of Community Conferencing*, RESTORATIVE RESPONSE, <https://www.restorativeresponse.org/impact-of-community-conferencing> (last visited Sept. 29, 2022).

¹⁷³ *Family Group Conferences for Families*, MISS. STATE, <https://www.missouri.state.edu/CDR/FGC.htm> (last visited Sept. 29, 2022).

¹⁷⁴ *Victim Impact Panel Program*, RESTORATIVE JUST. WISC., <https://restorativejustice.wi.org/victim-impact-panel> (last visited Sept. 29, 2022).

¹⁷⁵ *Restorative Justice*, MARIN CNTY., <https://www.marincounty.org/depts/pb/divisions/adult-services/restorative-justice> [<https://perma.cc/7EMK-95BH>].

circles,¹⁷⁶ and community reparative boards.¹⁷⁷ 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.¹⁷⁸ 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”¹⁷⁹ by centering community engagement as a foundational element of processes.¹⁸⁰ Furthermore, practices are co-designed between practitioners and participants, to promote agency and autonomy for victims and offenders¹⁸¹—in contrast to traditional criminal legal processes—and healing and reparative outcomes.¹⁸² As is the case with non-restorative justice diversion,¹⁸³ 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.¹⁸⁴ As a 2022 report by the Sentencing

¹⁷⁶ *How the Circle Process Works*, COMMUNITIES FOR RESTORATIVE JUST., <https://www.c4rj.org/what-is-restorative-justice/how-the-circle-process-works> (last visited Sept. 29, 2022).

¹⁷⁷ Erin Cordell, Interview by Cassiopeia Land, OCCIDENTAL COLL. (March 2022); González, *supra* note 131, at 1149.

¹⁷⁸ Jonathan Scharrer, *About Restorative Justice*, U. OF MADISON-WISCONSIN, <https://law.wisc.edu/fjr/rjp/justice.html> (last visited May 23, 2022).

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.

¹⁸³ ANNIE E. CASEY FOUND., EXPAND THE USE OF DIVERSION FROM THE JUVENILE JUSTICE SYSTEM 4 (2020), <https://www.aecf.org/resources/expand-the-use-of-diversion-from-the-juvenile-justice-system>; ACLU KANSAS, CHOOSING INCARCERATION 10–17 (2017), https://www.aclukansas.org/sites/default/files/field_documents/choosing_incarceration_-_aclu_report_on_diversion_in_kansas_-_december_2017.pdf; CTR. FOR HEALTH & JUST. AT TASC, A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES 12–23 (2013), https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf; Michael Rempel, Melissa Labriola, Priscilla Hunt, Robert C. Davis, Warren A. Reich & Samantha Cherney, *A Multisite Evaluation of Prosecutor-Led Pretrial Diversion: Effects on Conviction, Incarceration, and Recidivism*, 32 CRIM. JUST. POL’Y REV. 891, 903 (2021).

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.”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.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.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.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.¹⁸⁹ In 2020, a National Center on Restorative Justice (NCORJ) was established with the

¹⁸⁵ RICHARD MENDEL, SENT’G PROJECT, DIVERSION A HIDDEN KEY TO COMBATING RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE 1 (2022).

¹⁸⁶ SUJATHA BALIGA, SIA HENRY & GEORGIA VALENTINE, RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST’S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY, IMPACT JUST. 1, 7 (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf.

¹⁸⁷ David Newton. *Restorative Justice and Youthful Offenders*, Fed. Bureau of Investigation (Oct. 6, 2016), <https://leb.fbi.gov/articles/featured-articles/restorative-justice-and-youthful-offenders>.

¹⁸⁸ *Id.*

¹⁸⁹ David B. Wilson, Ajima Olaghere & Catherine S. Kimbrell, *Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis*, NAT’L CRIM. JUST. REF. SERV. 13–16 (2017); *Office of Juvenile Justice and Delinquency Prevention, MODEL PROGRAMS GUIDE*, <https://bja.ojp.gov/program/national-center-restorative-justice/overview> (last visited Sept. 30, 2022); *National Center of Restorative Justice*, U.S. DEP’T OF JUST., BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/program/national-center-restorative-justice/overview> (last visited Sept. 30, 2022); U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, RESTORATIVE JUSTICE: AN EVALUATION OF THE RESTORATIVE RESOLUTIONS PROJECT (1998), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/restorative-justice-evaluation-restorative-resolutions-project>; U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS & NAT’L INST. OF JUST., NIJ FY22 RESEARCH AND EVALUATION ON THE ADMINISTRATION OF JUSTICE: DIVERSION AND RESTORATIVE JUSTICE 2–17 (2022).

aim of “improv[ing] criminal justice policy and practice by broadening the understanding of justice systems and restorative approaches.”¹⁹⁰ 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.”¹⁹¹ 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.”¹⁹² As such, they target risk factors such as economic instability, barriers to health care access, education, racism, and discrimination.¹⁹³

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

¹⁹⁰ *The Establishment of a National Center on Restorative Justice at Vermont Law School*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/funding/awards/15pbja-20-gk-00035-ncrj> (last visited Oct. 3, 2022).

¹⁹¹ Arleen F. Brown, Grace X. Ma, Jeanne Miranda, Eugenia Eng, Dorothy Castille, Teresa Brockie, Patricia Jones, Collins O. Airhihenbuwa, Tilda Farhat, Lin Zhu & Chau Trinh-Shevrin, *Structural Interventions to Reduce and Eliminate Health Disparities*, 109 AM. J. OF PUB. HEALTH S72, S72–S73 (2019); Kim M. Blankenship, S. R. Friedman, S. Dworkin & J. E. Mantell, *Structural Interventions: Concepts, Challenges, and Opportunities for Research*, 83 J. URB. HEALTH 59, 59–61 (2006); *see also*, Christine Bourey, Whitney Williams, Erin Elizabeth Bernstein & Rob Stephenson, *Systematic Review of Structural Interventions for Intimate Partner Violence in Low- and Middle-Income Countries: organizing evidence for prevention*, 15 BMC PUB. HEALTH 3, 7 (2015) (presenting examples of structural health interventions).

¹⁹² Brown et al., *supra* note 191, at S72–73; 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-19.¹⁹⁴ 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.¹⁹⁵ 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).¹⁹⁶ 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).¹⁹⁷ 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 it the practices *also* produce an independent set of positive health and mental outcomes.

¹⁹⁶ Barton Poulson, *Recreating Relationships: The Interpersonal Implications of Restorative Justice for Juvenile Offenders and Their Victims*, 10 J.L. & FAM. STUD. 161, 168–70 (2007); *see also* Peterson & Brinkley-Rubinstein, *supra* note 97, at 38–40; *Success Data*, COMMUNITIES FOR RESTORATIVE JUST., <https://www.c4rj.org/what-is-restorative-justice/success-data> (last visited May 23, 2022); DeHart et al., *supra* note 114, at 188, 190–93; Goel, *supra* note 114, at 8–10; Maryfield et al., *supra* note 158, at 5; Tanya Rugge & Scott T-L, *Restorative Justice’s Impact on Participants’ Psychological and Physical Health*, 15 PUB. SAFETY CANADA 1, 1–26 (2009); Tanya Rugge, *Restorative Justice Impact on Participant Health*, 15 PUB. SAFETY CANADA 1, 1–2 (2010). Robert Kinscherf, Robert Franks, Karli Keator & Matthew J. Pecoraro, *Promoting Positive Outcomes for Justice-Involved Youth: Implications for Policy, Systems, and Practice*, JUDGE BAKER CHILDS. CTR. 28 (2019); Vasso Artinopoulo, *Restorative Justice: Value for Money Justice?*, 8 REG. SCI. INQ. 107, 119 (2016).

¹⁹⁷ Rugge, *supra* note 196, at 1, 2.

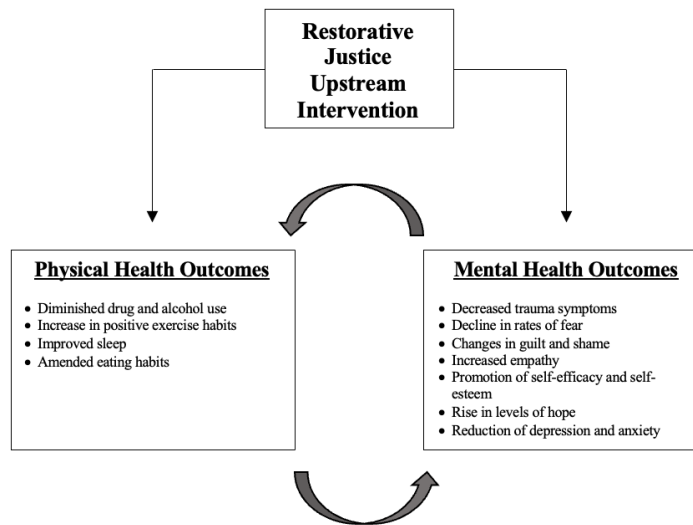


Figure 2. Physical and Mental Health Outcomes of Restorative Justice Diversion Interventions

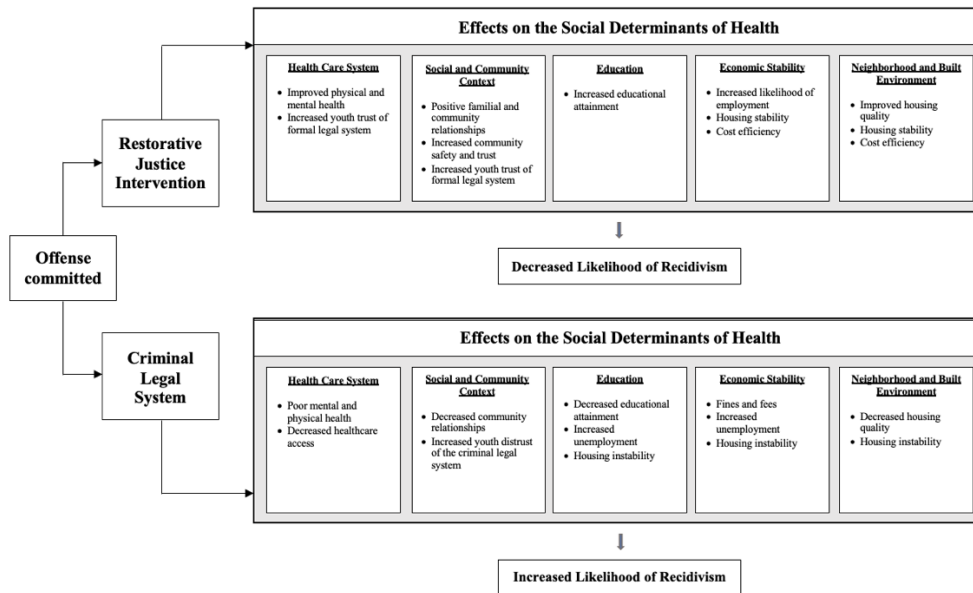


Figure 3. Effects on the Social Determinants of Health: Restorative Justice Diversion Intervention vs. Criminal Legal System

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.¹⁹⁸ Both victims and offenders reported improved physical health in such indicators as sleeping, eating, and drug use.¹⁹⁹ Participants also experienced positive changes in psychological health including feeling optimism, empathy, self-efficacy, hope, and decreased anxiousness and depression.²⁰⁰ Other studies demonstrated improved self-control; ability to process personal and family trauma; and reduced stress, psychological distress, and aggression for offender participants.²⁰¹ Comparative data of victim satisfaction rates also shows higher rates associated with restorative justice diversion over traditional criminal legal processes.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,²⁰³ there is a high probability of direct and indirect effects and pathways between them.

Figure 3 maps restorative justice intervention outcomes and the SDH²⁰⁴ 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* Ruge & Scott, *supra* note 196; Ruge, *supra* note 196.

²⁰² COMMUNITIES FOR RESTORATIVE JUST., *supra* note 141.

²⁰³ Julius Ohmberger, Eleonora Fichera & Matt Sutton, *The Relationship Between Physical and Mental Health: A Mediation Analysis*, 195 SOC. SCI. MED. 44, 45 (2017).

²⁰⁴ *See* OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUM. SERVS., *Social Determinants of Health*, HEALTHY 2030, <https://perma.cc/5PC5-DEQ5> (archived Sept. 30, 2022).

response effect²⁰⁵ 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.²⁰⁶

Consider the example of health and socioeconomic status. Socioeconomic status influences physical and psychosocial²⁰⁷ health in multi-variant ways, and in turn affects education outcomes such as preparation and attainment.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

²⁰⁵ See Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. PUB. HEALTH ASS'N 523, 523–27 (2013); Bovell-Ammon et al., *supra* note 114, at 8.

²⁰⁶ See, e.g., Levi N. Bonnell, Abigail M. Crocker, Kathleen Kemp & Benjamin Littenberg, *The Relationship Between Social Determinants of Health and Functional Capacity in Adult Primary Care Patients with Multiple Chronic Conditions*, 34 J. AM. BD. FAM. MED. 688, 694 (2021); see OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, *supra* note 204; Samantha Artiga & Elizabeth Hinton, *Beyond Health Care: The Role of Social Determinants in Promoting Health and Health Equity*, KFF (May 10, 2018), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/beyond-health-care-the-role-of-social-determinants-in-promoting-health-and-health-equity> [<https://perma.cc/PY4Z-4GFC>].

²⁰⁷ See, e.g., Matthew W. Ridley, Gautam Rao, Frank Schilbach & Vikram H. Patel, *Poverty, Depression, and Anxiety: Casual Evidence and Mechanisms*, 370 SCI., Dec. 11, 2020, at 5–7; Dhruv Khullar & Dave A. Choski, *Health, Income, and Poverty: Where We Are & What Could Help*, HEALTH AFFAIRS (Oct. 4, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180817.901935/full>; Sally Murray, *Poverty and Health*, 176 NAT'L LIB. MED. 1, 1 (2006); Esther E. Palacios-Barrios & Jamie L. Hanson, *Poverty and Self-Regulation: Connecting Psychosocial Processes, Neurobiology, and the Risk for Psychopathy*, 90 COMPREHENSIVE PSYCH. 52, 58 (2019); FOOD RSCH. & ACTION CTR., *THE IMPACT OF POVERTY, FOOD INSECURITY, AND POOR NUTRITION ON HEALTH AND WELL-BEING* 3–4 (2017), <https://frac.org/hunger-poverty-america>.

²⁰⁸ See, e.g., Peter W. Cookson Jr., *A World of Hardship: Deep Poverty and the Struggle for Educational Equity*, LEARNING POL. INST. (Oct. 6, 2020), <https://learningpolicyinstitute.org/blog/covid-deep-poverty-struggle-education-equity>; Marc Tucker, *Child Poverty and Its Impact on Education in the U.S.*, NCEE (Dec. 5, 2019), <https://ncee.org/quick-read/child-poverty-and-its-impact-on-education-in-the-u-s/>; Marisol Silva-Laya, Natalia D'Angelo, Elda García, Laura Zúñigab & Teresa Fernández, *Urban Poverty and Education. A Systemic Literature Review*, 29 EDUC. RSCH. REV. 1 (2020); Elizabeth P. Pungello, Kirsten Kainz, Margaret Burchinal, Barbara H. Wasik, Joseph J. Sparling, Craig T. Ramey & Frances A. Campbell, *Early Educational Intervention, Early Cumulative Risk, and the Early Home Environment as Predictors of Young Adult Outcomes Within a High-Risk Sample*, 81 CHILD DEV., 410, 411–12 (2010); T.ROSS, GRACE KENA, AMY RATHBUN, ANGELIA KEWAL RAMANI, JIJUN ZHANG, PAUL KRISTAPOVICH & EILEEN MANNING, *HIGHER EDUCATION: GAPS IN ACCESS AND PERSISTENCE STUDY*, NAT'L CTR. FOR EDUC. STATS. 214–18 (2012).

abuse, morbidity, and mortality.²⁰⁹ Similarly, socioeconomic status affects housing²¹⁰ and food security.²¹¹ And, in the context of the criminal legal system, a clear relationship between socioeconomic status and system involvement exists.²¹²

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 disparities²¹³ produced and

²⁰⁹ See, e.g., CTR. SOC'Y & HEALTH, VA. COMMONWEALTH UNIV., WHY EDUCATION MATTERS TO HEALTH: EXPLORING THE CAUSES 1, 2–4 (2015), <https://societyhealth.vcu.edu/work/the-projects/why-education-matters-to-health-exploring-the-causes.html>; S. Jay Olshansky, Toni Antonucci, Lisa Berkman, Robert H. Binstock, Axel Boersch-Supan, John T. Cacioppo, Bruce A. Carnes, Laura L. Carstensen, Linda P. Fried, Dana P. Goldman, James Jackson, Martin Kohli, John Rother, Yuhui Zheng & John Row, *Differences in Life Expectancy Due to Race and Educational Differences Are Widening, and Many May Not Catch Up*, 31 HEALTH AFFS. 1803, 1805–06 (2012); Brian L. Rostron, John L. Boies & Elizabeth Arias, *Education Reporting and Classification on Death Certificates in the United States*, 151 VITAL HEALTH STAT. 1, 7–8 (May 2010); Natalie McGill, *Education Attainment Linked to Health Throughout Lifespan: Exploring Social Determinants of Health*, 46 NATION 1, 1 (2016). As education and health have a co-influential relationship, diminished health can be the result of low educational attainment and induce educational setbacks. See, e.g., Sara B. Johnson, Paul Spin, Faith Connolly, Marc Stein, Tina L. Cheng & Katherine Connor, *Asthma and Attendance in Urban Schools*, 16 PREV. CHRONIC DIS., No. E148, Oct. 2019, at 1; Healthy People 2030, *Education Access and Quality*, HEALTHYPEOPLE.GOV, <https://health.gov/healthypeople/objectives-and-data/browse-objectives/education-access-and-quality> (last visited Sept. 30, 2022).

²¹⁰ See, e.g., Peggy Bailey, *Priced Out: The State of Housing in America*, CTR. BUDGET & POL'Y PRIORITIES (July 21, 2022), <https://www.cbpp.org/research/housing/priced-out-the-state-of-housing-in-america>; *The Problem*, NAT'L. LOW INCOME HOUSING COALITION, <https://nlihc.org/explore-issues/why-we-care/problem> (last visited Sept. 30, 2022).

²¹¹ See, e.g., FEEDING AM., FOOD INSECURITY AND POVERTY IN THE UNITED STATES: FINDINGS FROM THE USDA AND U.S. CENSUS BUREAU 1–4 (2018), https://hungerandhealth.feedingamerica.org/wp-content/uploads/2018/10/Food-Insecurity-Poverty-Brief_2018.pdf; CHILD STATS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 18 (2022); *Hunger and Poverty in America*, FOOD RSCH. & ACTION CTR., <https://frac.org/hunger-poverty-america> (last visited Sep. 21, 2022).

²¹² Roderik Rekker, Dustin Pardini, Loes Keijsers, Susan Branje, Rolf Loeber & Wim Meeus, *Moving In and Out of Poverty: The Within-Individual Association Between Socioeconomic Status and Juvenile Delinquency*, 10 PLOS ONE 1, 7–11 (2015); see Lisa Foster, *The Price of Justice: Fines, Fees, and the Criminalization of Poverty*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 1, 3 (2020); Peter Edelman, *The Criminalization of Poverty and the People Who Fight Back*, 26 GEO. J. POVERTY L. & POL'Y 213, 221 (2019); Peter Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE. L. REV. 114, 117–21 (2020).

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 racism²¹⁴ 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.²¹⁵ 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.²¹⁶ They also identified positive changes within their family relationships and the development of positive interpersonal skills.²¹⁷ 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.²¹⁸ 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.²¹⁹ In contrast,

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>

²¹⁴ See Paula A. Braverman, Elaine Arkin, Dwayne Proctor, Tina Kauh & Nicole Holm, *Systemic and Structural Racism: Definitions, Examples, Health Damages, and Approaches to Dismantling*, 41 HEALTH AFF. 171, 172–74 (2022).

²¹⁵ See Bianca Cortez, *Healing Communities Through Restorative Justice*, CTR. ON JUVENILE & CRIM. JUST. (Jan. 24, 2019), <http://www.cjcj.org/news/12435>; see also Poulson, *supra* note 196, at 168–70; Gramlich, *supra* note 59; Meredith Rossner & Jasmine Bruce, *Trajectories and Typologies of Pre-Sentence Restorative Justice Rituals*, 51 AUST. & N.Z. J. CRIMINOLOGY 502, 513–15 (2018); S. Jordan, Brenna Dickey & Aaron B. Bath, *Reintegration: The Road to Grace*, NAT’L PARALEGAL REPORTER (2020), <https://www.millernash.com/asset/60a00fa9d1315> (last visited May 23, 2022).

²¹⁶ See Gramlich, *supra* note 59.

²¹⁷ See *id.*

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

²¹⁹ See *Youth Connectedness Is an Important Protective Factor for Health and Well-being*, CTR. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/healthyyouth/protective/youth-connectedness-important-protective-factor-for-health-well-being.htm> (last visited May 23, 2022).

engagement in the criminal legal system, from police interactions²²⁰ to incarceration,²²¹ functions to disrupt social and community support.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.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,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,²²⁵ and with every year of additional education, adult mortality risk decreases.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,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

²²⁰ See Jordan DeVylder, Lisa Fedina & Bruce Link, *The Impact of Police Violence on Mental Health: A Theoretical Framework*, 110 AM. J. PUB. HEALTH 1704, 1705 (2020).

²²¹ See DeHart et al., *supra* note 114, at 190–94.

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.

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.

²²⁴ See Olshansky et al., *supra* note 209, at 1803; Viju Raghupathi & Wullianallur Raghupathi, *The Influence of Education on Health: An Empirical Assessment of OECD Countries for the Period 1995–2015*, 78 ARCHIVES PUB. HEALTH 1, 3 (2020).

²²⁵ See Rostron et al., 209 note 199, at 1.

²²⁶ See Richard G. Rogers, Bethany G. Everett, Anna Zajacova & Robert A. Hummer, *Educational Degrees and Adult Mortality Risk in the United States*, 56 BIODEMOGRAPHIC & SOC. BIO 80, 9–11 (2010).

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 GED²²⁸ attainment and re-entry into school.²²⁹ Furthermore, lower academic achievement is associated with a higher likelihood of recidivism.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.²³¹ By contrast, movement through traditional criminal legal processes has been shown to increasingly lead to diminished economic support and opportunities.²³² As Figure 1 identifies, the economic collateral consequences of the criminal legal system extend to economic

²²⁸ OFF. OF JUV. JUST. & DELINQ. PREVENT., *supra* note 117.

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

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).

²³¹ See Kinscherf et al., *supra* note 196, at 28.

²³² See Megan Denver, Justin T. Pickett & Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664, 680–83 (2017); Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INSTIT. (Mar. 14, 2018), <https://www.brookings.edu/research/work-and-opportunity-before-and-after-incarceration>; Terry-Ann Craige, Ames Grawert, Cameron Kimble & Joseph E. Stiglitz, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>; Bruce Western & Catherine Sirois, *Racialized Re-entry: Labor Market Inequality After Incarceration*, 97 J. SOC. FORCES 1517, 1536–38 (2018); Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL. INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

marginalization²³³ employment discrimination,²³⁴ housing insecurity,²³⁵ and carceral costs, fines, and fees.²³⁶ Other studies have shown that criminal system involvement, from arrest²³⁷ to incarceration, results in lost earnings²³⁸ and joblessness,²³⁹ 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.²⁴⁰ Despite this, the existence of a relationship is probable. As

²³³ Charles Weller, Akua Amaning, Rebecca Vallas, *America's Broken Criminal Legal System Contributes to Wealth Inequality*, CTR FOR AM. PROGRESS (Dec. 13, 2022) <https://www.americanprogress.org/article/americas-broken-criminal-legal-system-contributes-to-wealth-inequality/>; Terry-Ann Craigie, Ames Grawert, Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. (Sept. 15, 2020) <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>.

²³⁴ Terry Ann Craigie, *Employment After Discrimination: Ban the Box and Racial Discrimination*, BRENNAN CTR. (Oct. 13, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/employment-after-incarceration-ban-box-and-racial-discrimination>; Elizabeth P. Weissert, Comment, *Get Out of Jail Free? Presenting Employment Discrimination Against People with Criminal Records Using Ban the Box Laws*, 164 U. PA. L. REV. 1529, 1533–36 (2016).

²³⁵ David S. Kirk, *The Collateral Consequences of Incarceration for Housing*, in HANDBOOK ON THE CONSEQUENCES OF SENTENCING AND PUNISHMENT DECISIONS 60–64 (Beth M. Huebner & Natasha A. Frost eds., 2018); AM. BAR ASS'N, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 5 (2018); Claire W. Herbert, Jeffrey D. Morenoff & David Harding, *Homelessness and Housing Insecurity Among Former Prisoners*, 1 RUSSELL SAGE FOUND. J. SOC. SCIS. 44, 46–47 (2015); Tom Stanley-Becker, *Breaking the Cycle of Homelessness and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 U. PA. J. L. & PUB. AFF. 257, 262–65 (2022).

²³⁶ Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCI. 1, 6 (2021).

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.

²³⁹ *See* Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment>.

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.*, Anastasiia 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

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 Releasees 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).

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.

research²⁴² and employ collaborative participatory models²⁴³ 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.

²⁴² Ford & Airhihenbuwa, *supra* note 10, at S30, S34 (introducing and describing a new public-health–critical-race framework that adapts Critical Race Theory for public health research and practice).

²⁴³ Fran Baum, Colin MacDougall & Danielle Smith, *Participatory Action Research*, 60 J. EPIDEMIOLOGY CMTY. HEALTH 854, 854–57 (2006).