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RACE, PUBLIC HEALTH, AND THE EPIDEMIC OF INCARCERATION

*Thalia González & Emma Kaeser**

The devastating impacts of the COVID-19 pandemic on people incarcerated in the United States¹ have generated urgent calls to action to address carceral policies as a community health crisis.² To mitigate COVID-19 health risks posed by penal institutions,³ legal scholars and advocates have sought legal interventions including early release of certain individuals,⁴ reform of sentencing laws,⁵ and judicially enforced safety measures inside carceral facilities.⁶ In line with a broader antiracist health equity movement,⁷ this discourse and action recognizes racism and white supremacy as a root cause of mass incarceration and a driver of racialized COVID-19 health disparities.⁸ Awareness that mass incarceration constitutes a racialized, health-harming system that necessitates new legal responses is an important step toward promoting health equity. However, a singular focus on legal interventions aimed at addressing COVID-19 characterizes the problem too narrowly.

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¹ See KEVIN T. SCHNEPEL ET AL., COUNCIL ON CRIMINAL JUSTICE, COVID-19 TESTING IN STATE PRISONS 3–4 (2021); Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL’Y INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covidsread.html>.

² See, e.g., Neha Jain, *Pandemics as Rights-Generators*, 114 AM. J. INT’L L. 677 (2020); Laura Cohen, *Incarcerated Youth and COVID-19: Notes from the Field*, 72 RUTGERS L. REV. 1475 (2020).

³ See, e.g., Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE 8–11 (2020).

⁴ Christine Scott-Hayward, *Correctional and Sentencing Law Commentary Compassionate Release, The First Step Act, and COVID-19*, 57 CRIM. L. BULL. 89 (2021); Camila Strassle & Benjamin Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV. 1083 (2020).

⁵ Kristin Nelson & Jeanne Segil, *The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19*, 98 DENV. L. REV. 337, 413 (2021); Cohen, *supra* note 2, at 1482.

⁶ Marsha Levick, *No Exit: How Litigation Failed Incarcerated Youth During the COVID-19 Pandemic*, 93 TEMPLE L. REV. 489, 508–09 (2021).

⁷ See Thalia González et al., *An Antiracist Health Equity Agenda for Education*, J.L. MED. & ETHICS (forthcoming 2022) (tracing and naming the current antiracist health equity movement).

⁸ See, e.g., Mary Crossley, *Prisons, Nursing Homes, and Medicaid: A COVID-19 Case Study in Health Injustice*, 30 ANNALS HEALTH L. 101 (2021); Cohen, *supra* note 2; Dolovich, *supra* note 3.

In this moment of heightened attention on the need for race-conscious and health-promoting carceral reforms, this Essay aims to broaden the conception of COVID-19 and incarceration as a public health threat⁹ by urging more expansive public health law interventions that recognize that the entire mass incarceration system (pathways to confinement, confinement itself, and post-release consequences) constitutes a racial health crisis. To mitigate the compounding negative health effects of mass incarceration, we argue that public health-centered reforms, bolstered by the momentum of the current juncture, must look upstream from confinement in addition to meeting the on-the-ground needs of those in jails and prisons across the country. As a first step in advancing this more inclusive vision of racial health equity, this Essay identifies four legal pipelines that simultaneously worsen individual and population health outcomes and drive Black, Indigenous and people of color (BIPOC) people into the carceral system. In drawing out connections between these pathways, health, and the system of mass incarceration, we seek to elevate the importance of more robust health law and public health law interventions within the larger carceral reform movement.

For decades, health and public health fields have recognized how mass incarceration drives poor health outcomes¹⁰ and how the overincarceration of BIPOC people contributes to the persistence of racial health disparities.¹¹ Not only do incarcerated people disproportionately suffer

⁹ See, e.g., Jain, *supra* note 2; Nelson & Segil, *supra* note 5.

¹⁰ JULIA ACKER ET AL., ROBERT WOOD JOHNSON FOUND. & UNIV. OF CAL. S.F., MASS INCARCERATION THREATENS HEALTH EQUITY IN AMERICA 10 (2019).

¹¹ See, e.g., Brian Houle, *The Effect of Incarceration on Adult Male BMI Trajectories, United States, 1981–2006*, 1 J. RACIAL & ETHNIC HEALTH DISPARITIES 21 (2014); Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 L. & SOC'Y REV. 275 (2008); ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2016); SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY (2013).

from poor health outcomes, including infectious diseases¹² and chronic health conditions,¹³ but they also experience serious mental health problems,¹⁴ substance use problems,¹⁵ and increased suicide risk.¹⁶ Confinement itself is also becoming increasingly deadly; even before COVID-19, death rates in prisons had risen dramatically since the early 2000s.¹⁷ And the health harms of this system extend beyond the individuals incarcerated in correctional facilities as incarceration has been shown to diminish the physical¹⁸ and mental¹⁹ health of children²⁰ and families, and to drive poor community-level health outcomes.²¹ When one examines population health through the lens of race and gender, BIPOC communities experience the highest rates of harm as a result of mass incarceration.²²

¹² Aiden Varan et al., *Hepatitis C Seroprevalence Among Prison Inmates Since 2001: Still High but Declining*, 129 PUB. HEALTH. REP. 187 (2014); Joseph Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047 (2007).

¹³ Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illness*, 49 J. HEALTH & SOC. BEHAV. 56 (2008); Houle, *supra* note 11.

¹⁴ U.S. DEP'T OF JUST., INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, 3–4 (2017); Jason Schnittker et al., *Out and Down: Incarceration and Psychiatric Disorders*, 53 J. HEALTH & SOC. BEHAV. 448 (2012).

¹⁵ Seena Fazel et al., *Substance Use Disorders in Prisoners: An Updated Systematic Review and Meta-Regression Analysis in Recently Incarcerated Men and Women*, 112 ADDICTION 1725 (2017).

¹⁶ E. ANN CARSON & MARY P. COWHIG, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS, 2000–2016—STATISTICAL TABLES (2020); Seena Fazel et al., *Suicide in Prisons: An International Study of Prevalence and Contributory Factors*, 4 LANCET PSYCHIATRY 946 (2017).

¹⁷ E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2018, STATISTICAL TABLES 1 (2021).

¹⁸ Hedwig Lee et al., *A Heavy Burden: The Cardiovascular Health Consequences of Having a Family Member Incarcerated*, 104 AM. J. OF PUB. HEALTH 421 (2014); Ram Sundaresh et al., *Exposure to Family Member Incarceration and Adult Wellbeing in the United States*, 4 JAMA NETWORK OPEN (2021).

¹⁹ WAKEFIELD & WILDEMAN, *supra* note 11.

²⁰ There is a significant body of evidence documenting the adverse effects of parental incarceration on children. *See e.g.*, Christopher Wildeman et al., *Parental Incarceration and Child Health in the United States*, 40 EPIDEMIOLOGIC REV. 146 (2018).

²¹ Christopher Wildeman, *Imprisonment and Infant Mortality*, 59 SOC. PROBS. 228 (2012); Rucker Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on Acquired Immune Deficiency Syndrome Infection Rates Among African American Women and Men*, 52 J.L. & ECON. 251 (2009).

²² *See, e.g.*, WAKEFIELD & WILDEMAN, *supra* note 11.

The health consequences that persist post-confinement and impose long-lasting damaging are also well-established.²³ Research and activism have called attention to how harsh conditions of confinement in jails, prisons, and juvenile detention facilities contribute to these poor health outcomes. Among other factors, overcrowding,²⁴ lack of access to health care,²⁵ unhealthy diets,²⁶ violence,²⁷ and solitary confinement²⁸ threaten the health status of incarcerated individuals with BIPOC individuals most deeply affected. Post-confinement, formerly incarcerated individuals not only face health-harming conditions (e.g., unemployment,²⁹ housing instability,³⁰ recidivism³¹) and barriers to health insurance and health care;³² they also face direct health and mental effects (e.g., depression, post-traumatic stress disorder and premature death).³³ Like the amplified impact of COVID-19 on BIPOC individuals in confinement, the health disparities post-confinement reflect the cumulative impacts of racism.³⁴

²³ Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115 (2007); Massoglia, *supra* note 13; Elizabeth S. Barnet et al., *Child Incarceration and Long-Term Adult Health Outcomes: A Longitudinal Study*, 14 INT’L J. PRISON HEALTH 26 (2018).

²⁴ See NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 179–83 (2014) [hereinafter THE GROWTH OF INCARCERATION].

²⁵ See INCARCERATED WORKERS ORGANIZING COMM. CRUEL AND UNUSUAL: A NATIONAL PRISONER SURVEY OF PRISON FOOD AND HEALTH CARE QUALITY 4 (2018).

²⁶ *Id.* at 3.

²⁷ See Meghan Novisky & Robert Peralta, *Gladiator School: Returning Citizens’ Experiences with Secondary Violence Exposure in Prison*, 15 VICTIMS & OFFENDERS 594 (2020).

²⁸ See THE GROWTH OF INCARCERATION, *supra* note 24, at 185–88; Tianna 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/.

²⁹ Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

³⁰ *Five Charts that Explain the Homelessness-Jail Cycle—and How to Break It*, URB. INST. (Sept. 16, 2020), <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it>.

³¹ LEONARDO ANTENANGELI & MATTHEW DUROSE, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 24 STATES IN 2008: A 10-YEAR FOLLOW-UP PERIOD (2008–2018) 1 (2021).

³² AM. ACAD. OF FAM. PHYSICIANS, INCARCERATION AND HEALTH: A FAMILY MEDICINE PERSPECTIVE (POSITION PAPER) (2021).

³³ See, e.g., ACKER ET AL., *supra* note 10, at 6; Kate Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/>.

³⁴ See, e.g., Couloute & Knopf, *supra* note 29.

However, it is clear that the racialized, health-harming effects of mass incarceration begin before individuals even reach confinement. Upstream channels such as poverty,³⁵ housing instability,³⁶ the school-to-prison pipeline,³⁷ and aggressive policing practices³⁸ all elevate the risk of carceral involvement. In addition to fueling criminal legal system involvement, each of these social-structural systems,³⁹ or social determinants of health (SDH),⁴⁰ shape health outcomes and drive health disparities. In the case of poverty, low-income people face greater barriers to accessing primary and specialty medical care and health insurance.⁴¹ Socioeconomic disparities also correlate with experiences of chronic stressors, which create a higher allostatic load and diminished health.⁴² And, the health consequences of the pandemic have not affected all communities equally, with low-income communities experiencing some of the highest infection and mortality rates. Houselessness and other forms of housing instability are also connected to poor health outcomes, including risk of chronic stress and mental illness,⁴³ infectious diseases,⁴⁴

³⁵ See AM. CIV. LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS 5–6 (2010).

³⁶ See MADELINE BAILEY ET AL., VERA INST. OF JUST., NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 1 (2020).

³⁷ See, e.g., EQUAL JUST. SOC’Y, BREAKING THE CHAINS: THE SCHOOL-TO-PRISON PIPELINE, IMPLICIT BIAS, AND RACIAL TRAUMA 2 (2016).

³⁸ See, e.g., S. REBECCA NEUSTETER ET AL., VERA INST. OF JUST., GATEKEEPERS: THE ROLE OF POLICE IN ENDING MASS INCARCERATION 2 (2019).

³⁹ SAMANTHA ARTIGA & ELIZABETH HINTON, BEYOND HEALTH CARE: THE ROLE OF SOCIAL DETERMINANTS IN PROMOTING HEALTH AND HEALTH EQUITY 2–3 (2018).

⁴⁰ Defined as “the conditions in which people are born, grow, live, work, and age, and the wider set of forces and systems shaping the conditions of daily life.” *Id.*

⁴¹ Dhruv Khullar & Dave A. Chokshi, *Health, Income & Poverty: Where We Are and What Help*, HEALTH AFFAIRS (Oct. 4, 2018), https://www.healthaffairs.org/doi/10.1377/hpb20180817.901935/full/HPB_2017_RWJF_05_W.pdf.

⁴² Jennifer W. Robinette et al., *Neighborhood Features and Physiological Risk: An Examination of Allostatic Load*, 41 HEALTH PLACE 110 (2016).

⁴³ Tomáš Habánik, *Mental Health Problems as One of the Factors in the Development and Persistence of Homelessness*, 2 KONTAKT 181 (2018).

⁴⁴ INST. OF MED., COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS (1988); AM. PSYCH. ASS’N, HEALTH & HOMELESSNESS (2011).

violence,⁴⁵ substance abuse,⁴⁶ and death.⁴⁷ Low educational attainment is likewise a strong predictor of a host of negative health outcomes at the individual and community levels,⁴⁸ and exposure to punitive school discipline poses physical and mental health risks for youth.⁴⁹ Finally, policing is a critical yet underexamined SDH.⁵⁰ The health consequences of policing for BIPOC communities are both acute (immediate physical harm, violence, and death)⁵¹ and long-term (psychological stress, mental health disorders, and immunosuppression).⁵²

Research⁵³ and policy advocacy⁵⁴ have increasingly elevated how racism, social control, bias, and privilege uniquely influence SDH. In the case of poverty, the relationship between

⁴⁵ JANA L. JASINSKI ET AL., THE EXPERIENCE OF VIOLENCE IN THE LIVES OF HOMELESS WOMEN: A RESEARCH REPORT (2005).

⁴⁶ Carolyn J. Tompsett et al., *Peer Substance Use and Homelessness Predicting Substance Abuse from Adolescence Through Early Adulthood*, 51 AM. J. CMTY. PSYCH. 520 (2013).

⁴⁷ Robert W Aldridge et al., *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 (2017).

⁴⁸ *Healthy People 2030*, U.S. DEP'T HEALTH AND HUM SERVS. OFF. DISEASE PREVENTION & HEALTH PROMOTION, <https://health.gov/healthypeople> (last visited Sept. 9, 2021).

⁴⁹ Thalia González, *Race, School Policing, and Public Health*, 73 STAN. L. REV. ONLINE 180 (2021); Thalia González et al., *A Health Justice Response to School Discipline and Policing*, 71 AM. U. L. REV. (forthcoming 2022).

⁵⁰ *Policing as a Social Determinant of Health: Addressing the Public Health Crisis of Systemic Racism*, NETWORK FOR PUBLIC HEALTH LAW (June 18, 2020), <https://www.networkforphl.org/news-insights/policing-as-a-social-determinant-of-health-addressing-the-public-health-crisis-of-systemic-racism/>; Jordan E. DeVlyder et al., *Elevated Prevalence of Suicide Attempts Among Victims of Police Violence in the USA*, 94 J. URB. HEALTH 629, 630–31 (2017); Melissa N. McLeod et al., *Police Interactions and the Mental Health of Black Americans: A Systematic Review*, 7 J. RACIAL & ETHNIC HEALTH DISPARITIES 10, 23–25 (2020).

⁵¹ Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 23 (2014); Jordan E. DeVlyder et al., *Association of Exposure to Police Violence With Prevalence of Mental Health Symptoms Among Urban Residents in the United States*, 7 JAMA NETWORK OPEN 1 (2018).

⁵² O. Kenrik Duru et al., *Allostatic Load Burden and Racial Disparities in Mortality*, 104 J. NAT'L MED. ASSOC. 89 (2012); Jordan DeVlyder et al., *Impact of Police Violence on Health: A Theoretical Framework*, AM. PUB. HEALTH ASS'N. (Oct. 7, 2020), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2020.305874>.

⁵³ Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y. & ETHICS 122, 127 (2020); David R. Williams et al., *Understanding How Discrimination Can Affect Health*, HEALTH SERV. RSCH. 1374 (2019); Gene H. Brody et al., *Perceived Discrimination among African American Adolescents and Allostatic Load: A Longitudinal Analysis with Buffering Effects*, 85 CHILD DEV. 989 (2014); Edith Chen et al., *Understanding Health Disparities: The Role of Race and Socioeconomic Status in Children's Health*, 96 AM. J. PUB. HEALTH 702, 702 (2006).

⁵⁴ *Structural Racism is a Public Health Crisis: Impact on the Black Community*, AM. PUB. HEALTH ASS'N (Oct. 24, 2020), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2021/01/13/structural-racism-is-a-public-health-crisis>; *Why Declaring Racism a Public Health Crisis Matters*, HARVARD T.H. CHAN PUBLIC HEALTH SCHOOL, <https://www.hsph.harvard.edu/news/hsph-in-the-news/racism-public-health-crisis-bassett/> (last visited Nov. 14, 2021); Kevin B. O'Reilly, *AMA: Racism is a Threat to Public Health*, AM. MED. ASS'N (Nov. 16, 2020), <https://www.ama-assn.org/delivering-care/health-equity/ama-racism-threat-public-health>.

economic status and negative health status is even more pronounced in BIPOC communities across multiple categories, including mental illness, chronic disease, and life expectancy.⁵⁵ Not only do Black Americans continue to have lower incomes and shorter lifespans than white Americans, but chronic hardship caused by centuries of exploitation and segregation, alongside the direct toxic effects of discrimination on mental and physical health, plays a central role in racial health disparities.⁵⁶ Like poverty, racial disparities in education also exist with BIPOC students graduating from high school at lower rates than their white peers.⁵⁷ And BIPOC students are the most likely to enter into the school-to-prison pipeline.⁵⁸ Racial health disparities in police violence are also clear. A national sample of Black adults showed that each additional police killing of an unarmed Black American in the same state results in increased poor mental health days.⁵⁹ Studies also show that BIPOC are at a greater risk of exposure to police violence than their white counterparts.⁶⁰

In short, as social determinants of poor health with amplified racialized impacts, these four pathways into the carceral system threaten the wellbeing of vulnerable individuals and communities, even in the absence of incarceration. Once confined, a dose effect amplifies these preexisting health inequities and layers on new ones, placing BIPOC people and communities in a perpetual cycle of health injustice. Consider, for example, that for people with preexisting mental health conditions—of which the four pipeline systems are strong predictors—the negative health

⁵⁵ Nicolle A. Mode, Michele K. Evans & Alan B. Zonderman, *Race, Neighborhood Economic Status, Income Inequality and Mortality*, 11 PLOS ONE (2016).

⁵⁶ *Id.*

⁵⁷ *High School Graduation Rates by Race and Ethnicity in Maine*, KIDS COUNT DATA CTR. (June 2021), <https://datacenter.kidscount.org/data/tables/10120-high-school-graduation-rates-by-race-and-ethnicity#detailed/2/any/false/574,1729,37,871,870,573/6239,4900,6240,6241,6242,6243,4887,4903,4828/19545>.

⁵⁸ Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 PUB. INT'L L. REP. 137 (2019).

⁵⁹ McLeod et al., *supra* note 50, at 14.

⁶⁰ *Id.* at 18.

threats of solitary confinement (e.g., depression, cognitive disturbances, anxiety, psychosis, self-harm, and suicide risk) can be particularly acute.⁶¹ Not only are people with serious mental illnesses more likely to be placed in solitary confinement, but they are especially susceptible to the effects of extreme isolation and harsh conditions, which can aggravate preexisting mental health problems.⁶² And for people with substance use problems, which are likewise tied to the SDH, lack of appropriate addiction treatment in jails and prisons can be deadly, as it heightens the risk of serious withdrawal symptoms and overdose upon release.⁶³

A public health-minded approach to carceral policy that fails to look upstream misses a critical opportunity to address this deleterious confluence of risk factors and to mitigate, as opposed to exacerbate, racial health disparities. Across poverty, housing instability, the school-to-prison pipeline, and policing, law uniquely mediates health inequities by tying these four social-structural pathways to incarceration. As public health law scholars have argued in other contexts, law has the power to shape SDH and to embed structural discrimination in health-impacting systems.⁶⁴ As forces with both the capacity to harm health when designed and applied inequitably as well as the potential to support health and powerfully remediate health disparities,⁶⁵ law and policy function as “legal determinants” directly influencing health outcomes and health equity.⁶⁶

⁶¹ Sharon Shalev, *Solitary Confinement as a Prison Health Issue*, in WHO GUIDE TO PRISONS AND HEALTH 27, 29 (Stefan Enggist et al., eds. 2017).

⁶² Bruce Arrigo & Jennifer Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 622 (2008).

⁶³ AM. CIV. LIBERTIES UNION, OVER-JAILED AND UN-TREATED 7–8 (2021).

⁶⁴ Leading public health law scholar, Professor Ruqaiyah Yearby, poses a revised SDH framework, within which structural discrimination is located as the root cause of health inequities, and law functions as the tool that operationalizes structural discrimination in the SDH. 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, 520–21 (2020).

⁶⁵ Joel Teitelbaum et al., *Striving for Health Equity Through Medical, Public Health, and Legal Collaboration*, 47 J. L. MED. & ETHICS 104 (2019).

⁶⁶ Daryll Dykes, *Health Injustice and Justice in Health: The Role of Law and Public Policy in Generating, Perpetuating, and Responding to Racial and Ethnic Health Disparities Before and After the Affordable Care Act*, 41 WILLIAM MITCHELL L. REV. 1129 (2015); Lindsay F. Wiley, *Structural Racism, Social Determinants, and the*

Across poverty, housing instability, the school-to-prison pipeline, and policing, the laws and policies that establish these SDH as pipelines to confinement constitute legal determinants of health as well as drivers of mass incarceration. The following examples of poverty, housing instability, the school-to-prison pipeline, and policing, demonstrate this dual function. The laws and policies that establish each of these SDH as drivers of mass incarceration are concurrently legal determinants of health.

For people experiencing economic instability, there is little dispute that laws criminalizing poverty serve as a pipeline to incarceration⁶⁷ with disproportionate harms for BIPOC.⁶⁸ Legal scholars and advocates have identified how laws authorizing fees,⁶⁹ fines,⁷⁰ surcharges, and penalties⁷¹ in the criminal legal system serve as a pathway to deepened system involvement leading many into jails and prisons,⁷² with disparate and racialized outcomes.⁷³ Laws supporting the money bail system also criminalize poverty when those unable to post bail face pretrial detention.⁷⁴ And since BIPOC communities disproportionately face extractive fines, fees,⁷⁵ and high bail amounts,⁷⁶

Contested Scope of Public Health Law, BILL OF HEALTH (Sept. 29, 2020), <https://blog.petrieflom.law.harvard.edu/2020/09/29/structural-racism-social-determinants-health-law/>.

⁶⁷ *Criminalization of Poverty as a Driver of Poverty in the United States*, HUM. RIGHTS WATCH (Oct. 4, 2017), <https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states#> [hereinafter HUM. RIGHTS WATCH].

⁶⁸ U.S. COMM’N ON CIV. RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 22 (2017) [hereinafter TARGETED FINES AND FEES]; MADELINE BAILEY ET AL., *supra* note 36, at 8.

⁶⁹ *See, e.g.*, ALA. CODE § 15-22-2(a)(1) (2021); 725 ILL. COMP. STAT. 5/124A-5 (2021); *see also* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 8 (2010) (examining how extractive fees create paths to prison for those unable to pay their debts).

⁷⁰ *See, e.g.*, CAL. GOV’T CODE § 25132 (West 2021); *see also* TARGETED FINES AND FEES, *supra* note 68, at 71 (discussing the growing prevalence of punitive fines and fees that criminalize poverty).

⁷¹ *See, e.g.*, CAL. PENAL CODE § 1214.1(a) (West 2021).

⁷² HUM. RIGHTS WATCH, *supra* note 67; Beth Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 5 (2018).

⁷³ TARGETED FINES AND FEES, *supra* note 68, at 38–39. While courts are required to consider an individual’s economic circumstances before incarcerating them for failure to pay a fee or fine, many jurisdictions lack adequate mechanisms to meaningfully assess ability to pay. BANNON ET AL., *supra* note 69, at 20.

⁷⁴ HUM. RIGHTS WATCH, *supra* note 67; *see, e.g.*, FLA. STAT. § 648 (2021). Failure to post bail can seriously harm a defendant’s ability to defend their case, thereby heightening the risk of future incarceration. HUMAN RIGHTS WATCH, *supra* note 67.

⁷⁵ TARGETED FINES AND FEES, *supra* note 68, at 22.

⁷⁶ MADELINE BAILEY ET AL., *supra* note 36, at 8.

these laws further operationalize patterns of systemic oppression. Analogously, laws criminalizing homelessness establish a pathway to incarceration. Anti-homeless laws ban life-sustaining behavior, such as sleeping in public,⁷⁷ begging in public,⁷⁸ loitering,⁷⁹ sitting or lying down in public,⁸⁰ and sleeping in vehicles.⁸¹ The racialized costs of such criminalization are clear—Black people comprise 40% of all people who are unhoused yet only 13% of the total population.⁸² Research shows disparities exist, with more frequent police searches of and issuance of citations to unhoused BIPOC individuals as compared to unhoused white people.⁸³ In conjunction with police surveillance and anti-poverty measures, these laws create a cycle between homelessness and incarceration that accelerates poor health.⁸⁴

In education, laws operate at federal, state, and local levels to form a punitive system⁸⁵ with long-standing racial and gender disparities.⁸⁶ Disciplinary laws unnecessarily criminalize youth behavior, increasing the risks of suspension, expulsion, pushout, arrest, referral to the

⁷⁷ See, e.g., MANCHESTER, N.H., CODE OF ORDINANCES tit. XIII § 130.01(A) (2021).

⁷⁸ See, e.g., MOBILE, ALA., CODE OF ORDINANCES, §§ 55-101 to 105 (2021).

⁷⁹ See, e.g., AUSTIN, MINN., CODE OF ORDINANCES, § 10.23 (2021).

⁸⁰ See, e.g., OAKLAND, CAL., CODE OF ORDINANCES, § 9.08.160 (2021).

⁸¹ See, e.g., L.A., CAL., MUNICIPAL CODE, ch. VIII § 85.02 (2021).

⁸² MEGHAN HENRY ET AL., U.S. DEP'T OF HOUS. & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2019).

⁸³ Chris Herring et al., *Pervasive Poverty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 1, 5–6 (2019).

⁸⁴ Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFFS. REV. 41, 42–44 (2017); COALITION ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 33, 38 (2015).

⁸⁵ MEGAN FRENCH-MARCELIN & SARAH HINGER, AM. CIV. LIBERTIES UNION, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 10–12 (2017); see, e.g., CAL. EDUC. CODE § 38000 (2021) (granting school districts authority to develop school police departments); TEX. EDUC. CODE § 37.081 (2021) (delineating school police powers, including power to take children into custody); *Compendium of School Discipline Laws and Regulations*, NAT'L CTR. ON SAFE AND SUPPORTIVE LEARNING ENV'TS, (2019), <https://safesupportivelearning.ed.gov/school-discipline-compendium> (last visited August 5, 2021).

⁸⁶ See, e.g., U.S. DEPARTMENT OF ED. OFF. CIV. RIGHTS, CIVIL RIGHTS DATA COLLECTION (2017) (BIPOC students are punished and policed at higher rates than their white classmates across all categories); GEORGETOWN L. CTR. ON POVERTY & INEQUAL., DATA SNAPSHOT: 2017–2018—NATIONAL DATA ON SCHOOL DISCIPLINE BY RACE AND GENDER 1–4 (2020) (Black girls are 4.19 times more likely to be suspended and 3.66 times more likely to be arrested at school).

juvenile justice system, and ultimately entry into the school-to-prison pipeline.⁸⁷ Finally, as discussed, the laws and policies that allow for systematic and racialized outcomes in policing and police violence in BIPOC communities simultaneously compound existing health harms and serve as a central mechanism of the mass incarceration crisis. For example, federal and state grant programs have continuously funded expansion of police forces and enabled and incentivized increased law enforcement activity.⁸⁸ Evidence consistently shows that the resulting increased police surveillance and law enforcement activity produced by these laws and policies disproportionately impact BIPOC communities,⁸⁹ who experience disparate policing practices including stops, searches, and arrests.⁹⁰ State support for policing BIPOC communities likewise normalizes police violence and legitimizes the surveillance and overincarceration of vulnerable communities. While policing itself operates as an independent SDH, it is important to identify over-policing of BIPOC communities as a fundamental driver of disparities and mass incarceration across the other three pipelines. Policing practices exacerbate the criminalization of poverty,

⁸⁷ See, e.g., MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS, 1, 34 (2016); Matthew T. Theriot, *The Impact of School Resource Officer Interaction on Students' Feelings About School and School Police*, 62 CRIME & DELINQ. 446, 461 (2016); DANIEL J. LOSEN AND PAUL MARTINEZ, LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN THE OPPORTUNITY TO LEARN, 8–20 (2020); U.S. GOV'T ACCOUNTABILITY OFF., K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 1, 7, 20 (2018).

⁸⁸ Lauren-Brooke Eisen, *The Federal Funding that Fuels Mass Incarceration*, BRENNAN CENTER FOR JUSTICE, (June 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/federal-funding-fuels-mass-incarceration>; Lauren-Brooke Eisen et al., *Reforming Funding to Reduce Mass Incarceration*, BRENNAN CENTER FOR JUSTICE (Nov. 22, 2013) <https://www.brennancenter.org/our-work/research-reports/reforming-funding-reduce-mass-incarceration>; Robynn Cox & Jamein P. Cunningham, *Financing the War on Drugs: The Impact of Law Enforcement Grants on Racial Disparities in Drug Arrests*, 40 J. POL'Y ANALYSIS & MGMT. 191 (2021); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000). The laws supporting punitive fines and fees that criminalize poverty discussed *infra* also incentivize over-policing by tying revenue generation to arrests and convictions. NEUSTETER ET AL., *supra* note 38.

⁸⁹ See, e.g., Cox & Cunningham, *supra* note 88; Fagan & Davies, *supra* note 88.

⁹⁰ Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEH. 736 (2020); THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018). For example, while the provision of federal funding supporting state and local law enforcement activity has been shown to increase arrest rates overall, arrest rates have risen disproportionately among Black people, likely as a result of widespread racial profiling. Cox & Cunningham, *supra* note 88; AMERICAN CIVIL LIBERTIES UNION, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES (2009).

housing instability, and school discipline, strengthening the linkages between and across SDH and system involvement. Consider the following examples: an individual experiencing poverty faces a heightened risk of being fined for a minor infraction in a jurisdiction where police routinely penalize disorder. And a student at a school that deploys police is more likely to be arrested and criminally penalized for ordinary youth behavior.

The types of laws and policies discussed above are widely considered harmful because they fuel incarceration of vulnerable communities, threaten basic human and civil rights, and deepen structural inequality; however, this Essay goes one step further by identifying that, in so doing, these laws and policies also operate as drivers of health inequities. If it is now widely accepted that carceral policies are driving a community health crisis, then this logically extends to the upstream laws and policies that establish SDH as pipelines to mass incarceration. This must be the next site of reform for health law and public health advocates.

Conclusion

COVID-19 is one of the greatest health crisis of our time. While increased attention on the adverse individual and population-level effects of the pandemic for incarcerated people has motivated reforms and stimulated scholarly attention on carceral policies as health policies this is only a first step. In this moment of heightened public consciousness around racism and health across all our public systems, this Essay highlights the need for broader, health-justice-centered⁹¹ approaches to mass incarceration along the entire continuum. As new legal reforms emerge in this moment, we challenge the public health law community to work alongside racial justice, economic justice, and criminal justice advocates to expand the vision of health equity. The prevalence,

⁹¹ Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275 (2015).

impacts, and inequities of mass incarceration are clear, and the only question is what will we do next?