SAVE BLACK LIVES

A call for racially-responsive strategies and resources for the Black community during the COVID-19 pandemic

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Introduction

In many ways, the COVID-19 pandemic is devastating the Black community at alarming rates. Across the country, majority-Black counties are reporting three times the rate of infections and almost six times the rate of deaths as majority-white counties.[1] Black people are more likely than any other racial group to have preexisting conditions, resulting from a historical legacy of socio-political inequities. In addition, the looming economic ramifications of this pandemic are also falling most heavily on Black communities.[2] Coupled with the over-representation of Black people in the criminal legal system and underrepresentation in access to quality healthcare, these frightening statistics paint a very troubling picture for Black America.

Despite this reality for Black communities, the response to the COVID-19 pandemic within the criminal legal system has failed to center on race. The Center for Justice Research and the Black Public Defender Association partnered to issue this report in order to explicitly address the impact of COVID-19 on incarcerated people, and the larger Black community, from the perspective of Black public defenders and Black justice-oriented researchers.

This report aims to highlight the critical role played by Black public defenders and Black researchers in advancing equitable policy solutions to the COVID-19 pandemic within the criminal legal system. It also establishes the need to target COVID-19 resources and strategies to the Black community and to people being released to COVID-19 hot spots. These steps are crucial to ensure that racial disparities do not increase during this crisis. Ultimately, the Center for Justice Research and the Black Public Defender Association implore policymakers, advocates, and other criminal legal system stakeholders to center COVID-19 responses on race and collaborate with experts who identify with the communities most impacted.

The public health crisis in prisons and jails

Each year, approximately 10 million people are processed in and out of local jails, where they spend an estimated 25 days until being released back to their communities.[3] Characterized by close quarters, transient populations, and high prevalence of chronic and infectious diseases, jails and prisons pose a significant public health risk during this pandemic.

Despite canceling visits during the pandemic, jails and prisons remain a hot spot for COVID-19 infections. There are 446 more positive COVID-19 cases per 100,000 people in correctional facilities than in the general U.S. population.[4] And, the prevalence of chronic medical illnesses and infectious diseases remains four to 17 times higher in correctional facilities.[5]

As COVID-19 infection rates in prisons and jails increase, incarcerated people, their loved ones, and the health of surrounding communities are increasingly at risk. Incarcerated people are in daily contact with correctional officers and staff, defense attorneys, and other members of the community. Staff enter and exit correctional facilities each day – spreading the virus between their families, communities, and incarcerated people. In addition, more than 95% of all people who are incarcerated are eventually released. All this adds up to a serious problem.[6]

Despite the fact that the COVID-19 infection rate is higher among incarcerated people than the general population, COVID-19 testing availability remains severely limited in correctional facilities. Approximately 2% of federal prisoners have been tested for COVID-19, and 70% of those tested were positive.[7] This positive test rate has been consistent with the numbers found in local jails around the country. For example, as of late June, the rate of positive COVID-19 cases in the Washington, D.C. jail was 164 per 1,000 people in comparison to 14 per 1,000 people in the community – which means that the COVID-19 infection rate was 11 times higher in the D.C. jail than in D.C.'s general population.[8] Due to a lack of testing, and the fact that approximately 40% percent of incarcerated people have a chronic health condition (e.g. cancer, high blood pressure, or diabetes),[9] these numbers are expected to continue to rise – ultimately impacting the community as a whole.

Combined with the devastation the COVID-19 pandemic is already causing to the Black community, this stark reality has created a health crisis within the criminal legal system that's become a matter of life or death for Black people.

The role of Black public defenders and Black justice-oriented researchers

Important leadership role for Black public defenders during the COVID-19 crisis

The deadly COVID-19 virus has opened the door for a serious conversation about the intersection of race, the criminal legal system, and public health. For example, in Washington D.C., Black residents account for not only nearly half of the COVID-19 confirmed cases and 80% of the deaths, but also for 86% of all arrests.[10] [11] These disturbing disparities in the public health and criminal justice realms are echoed in Black communities across the country.[12] This situation demands a racial equity response, yet there has been little to no discussion in the public defense community, or the broader criminal legal system community, about the urgent need for a racially-responsive approach.

Black public defenders are on the frontlines of this crisis. Working with clients facing the threat of incarceration or those who are already incarcerated, and returning home to communities impacted the most severely by this current health crisis, Black public defenders have a unique perspective and are crucial to shaping the criminal legal system's response to COVID-19. At this pivotal moment in history, those who are closest to the problem must be leaders in shaping the solutions.

Policymakers and criminal legal system stakeholders must understand the unique value that Black public defenders offer and give them a seat at the table. Their advocacy work often goes beyond the walls of the courtroom and can help shape the reforms necessary to address racial inequity in the criminal legal system.

Black public defenders understand the impacts of incarceration on their clients, their families, and their communities. In particular, they understand what's happening to Black clients who suffer from the highest rates of chronic conditions, which make them more susceptible to death. They can work with policymakers to highlight the institutionalized racism that is driving the disparities within the public health and criminal legal system. They can assist fellow public defenders and other system stakeholders in understanding the complexities and nuances of the Black community – particularly when it comes to barriers

to access to adequate healthcare – and help develop effective solutions. Ultimately, the perspectives and lived experiences of Black public defenders are crucial if the criminal legal system is going to change the underlying conditions that have created vast racial disparities – and develop culturally-responsive solutions, instead of blanket policies that fail to account for the role that race plays in this current crisis.

While there are many criminal legal experts, the voice of Black public defenders, who fight for justice daily and come from the communities most harmed, must be the leading voice in shaping solutions.

> **Patient-focused" and "community-level" health interventions, which tend to be subject areas studied by Black researchers, don't receive the same level of funding."**

A call for more Black researchers

Much like Black public defenders, Black researchers are critical to ensuring that the research being conducted at the nexus of the criminal legal system and public health actually advances Black lives.

Initially, preliminary COVID-19 findings were presented from a race-neutral standpoint – hiding behind notions of pre-existing conditions – which were then revised as race-specific realities. This is an example of a lack of understanding about the racial/ethnic dimensions of social phenomena, which creates a bias in favor of majority populations. In fact, COVID-19 research that overlooks minorities and vulnerable communities only serves to exacerbate the existing racial inequities in both criminal legal systems and healthcare systems. While catastrophically disastrous in many ways, this pandemic also presents an opportunity to highlight the need for researchers who are culturally-competent, and are key to understanding what it will take to reduce the direct and indirect effects of the COVID-19 pandemic on those entwined in the criminal legal system.

Studies have shown that Black and white researchers examine different topics, and that white research topic choices are more likely to receive funding.[13] "Patient-focused" and "community-level" health interventions, which tend to be subject areas studied by Black researchers, don't receive the same level of funding as "hard/lab science" oriented projects, according to a National Institutes of Health study that controlled for educational backgrounds, previous research awards, and publication records.[14] Research involves identifying a problem, creating a narrative, applying methodologies, and suggesting recommendations. Saving lives and improving communities should not be governed by research topic favoritism.

Federal, state, and local funds must be created to support all areas of research on COVID-19 and the criminal legal system at the intersection of race. These funds must support Black researchers and/or culturally-responsive researchers. The funds must also sustain support for community-based and patient-driven inquiries. And, in order to create a pipeline for the next generation of researchers sensitive to community-level needs, any funding in this space should also provide training and mentorship for the development of more Black and culturally-responsive researchers.

In addition, any meaningful approach must also engage the Black community in the dissemination of culturally-responsive research in order to foster successful community-academic relationships. This would help to increase community engagement, while promoting trust and involvement in the research process, on issues that directly impact the Black community.

Implicit racial bias has been proven to lead to unequal health and criminal legal outcomes.[15] While exclusion of early research examining the link between COVID-19, the criminal legal system, and race may have been unintentional, the fact remains that there is a disparate rate of deaths related to COVID-19 in Black communities. Increasing the number of Black researchers is essential for saving lives, especially for those who are dying at disparate rates across the United States.

Decarceration

The COVID-19 crisis presents an opportunity to fight for decarceration measures that address racial disparities in the criminal legal system, and transfer resources back to Black communities to address public health emergencies.

Advocates and public health experts have called for massive decarceration efforts to protect the health of people behind bars since the beginning of the pandemic. Governors, sheriffs, corrections department leaders, and other system actors with authority to grant early releases are rightly under pressure to respond with the bold efforts this crisis requires.

The COVID-19 pandemic has forced a national dialogue about depopulating prison and jails. However, a recognition of the disproportionate burden placed on Black communities, who are both overrepresented in carceral systems and bearing the brunt of this public health crisis, is often missing from this discourse. Calling for general decarceration measures without recognizing and addressing the ways in which specific communities are harmed the most could actually produce greater racial disparities. For example, an analysis of Illinois' early release efforts to slow the spread of COVID-19 inside prisons shows that "white people are being released from prison at much higher rates—and much earlier—than their Black and Latino peers," even though Black people account for a larger share of the state's prison population.[16]

As COVID-19 continues to ravage prisons and jails across the country, we have to confront and dismantle the policies responsible for caging nearly 2.3 million people nationwide,[17] thus rendering them defenseless against this deadly virus. Decarceration measures within the current context of the COVID-19 crisis, and other pushes for depopulation in the future, need to consider the well-established fact that the system doesn't harm everyone equally. Now is the time to reexamine and correct our harsh and overly-punitive sentencing laws. Both advocates and policymakers have a responsibility to ensure that the depopulation measures they are supporting are equitable in their outcomes.

The following recommendations are proposed for policymakers in order to both reduce prison populations and racial disparities in incarceration. These recommendations alone will not eliminate all racial disparities within the criminal legal system. Black people are impacted disproportionately in every step of the system – from policing and sentencing to release decisions – by policies and the actions of people who work within the system.

1. Provide opportunities for a "second look" at long sentences

There are too many Black people serving excessively long sentences in prisons across the nation with little to no opportunity to return home. In fact, Black people account for nearly half of all people serving life and "virtual" life sentences (sentences of 50+ years).[18] Black parents, siblings, and community members are languishing in prisons for decades, despite their rehabilitation. Policymakers should create "second look" mechanisms to allow judges to review past sentences after a specific period of incarceration (e.g. 10 years) and release people early. The goal of creating "second look" mechanisms should be to significantly depopulate prisons while also ensuring second chances are granted equitably.

2. Stop excluding "violent" offenses from reforms

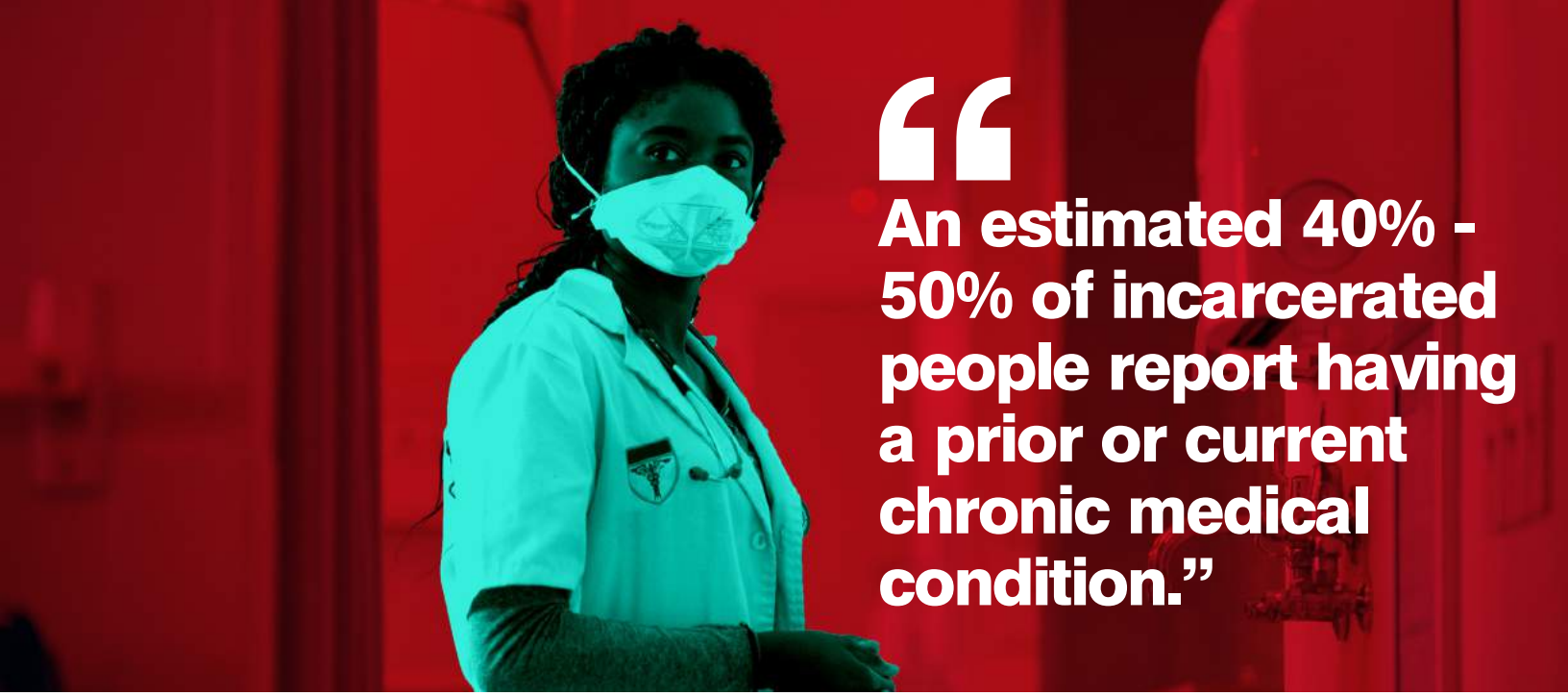
The "violent"/ "nonviolent" dichotomy within the criminal law reform space offers redemption only for people deemed worthy. This is not only morally harmful, but it also supports reforms that barely scratch the surface of solving the problem of mass incarceration. The reality is that four out of five people in prisons and jails are incarcerated for something other than drug offenses, and a majority of people in state prisons are there for "violent" offenses.[19] [20] This is also a matter of racial justice as 61% of Black people in state prisons are incarcerated for violent offenses.[21] Rolling back extreme sentences for violent offenses and extending second chances for people incarcerated for violent offenses are fundamental to achieving equitable decarceration.

3. Eliminate mandatory minimums and other mandatory sentencing laws that are harmful to Black communities

Policymakers should eliminate mandatory sentencing laws that are applied disproportionately on Black communities. So-called "habitual offender" and "drug-free school zone" sentence enhancements have been documented for being disparately applied to Black and brown communities. Prosecutors are also more likely to charge Black people with offenses that carry a mandatory minimum, which keeps judges from exercising any discretion when imposing sentences.[22]

4. Implement racial impact statements for decarceration efforts

In recent years, some states began requiring racial impact statements when a new criminal law legislation is proposed. Often, these statements are used to project the impact of a proposed criminal law on the incarceration rate of people of color.[23] Racial impact statements could also be used whenever a decarceration proposal is introduced in order to determine if it does enough to close the racial gap in jail and prison populations. This tool also could help uncover future reforms needed to ensure that Black people also benefit from depopulation efforts.



Realigning criminal legal system responses with proven public health approaches

The COVID-19 crisis has highlighted the need to shift the traditional punishment paradigm of the criminal legal system to the more established approaches of public health and interdisciplinary perspectives for reducing social problems. Sometimes people commit crimes to meet their basic needs (or survive). A lack of these needs, such as food, clothing, housing, education, and medical care, also impacts people's health. In the absence of these essential resources, some people are left with very few options. Researchers argue that if these essential needs were met, the number of people who commit crimes would be reduced significantly.[24] [25]

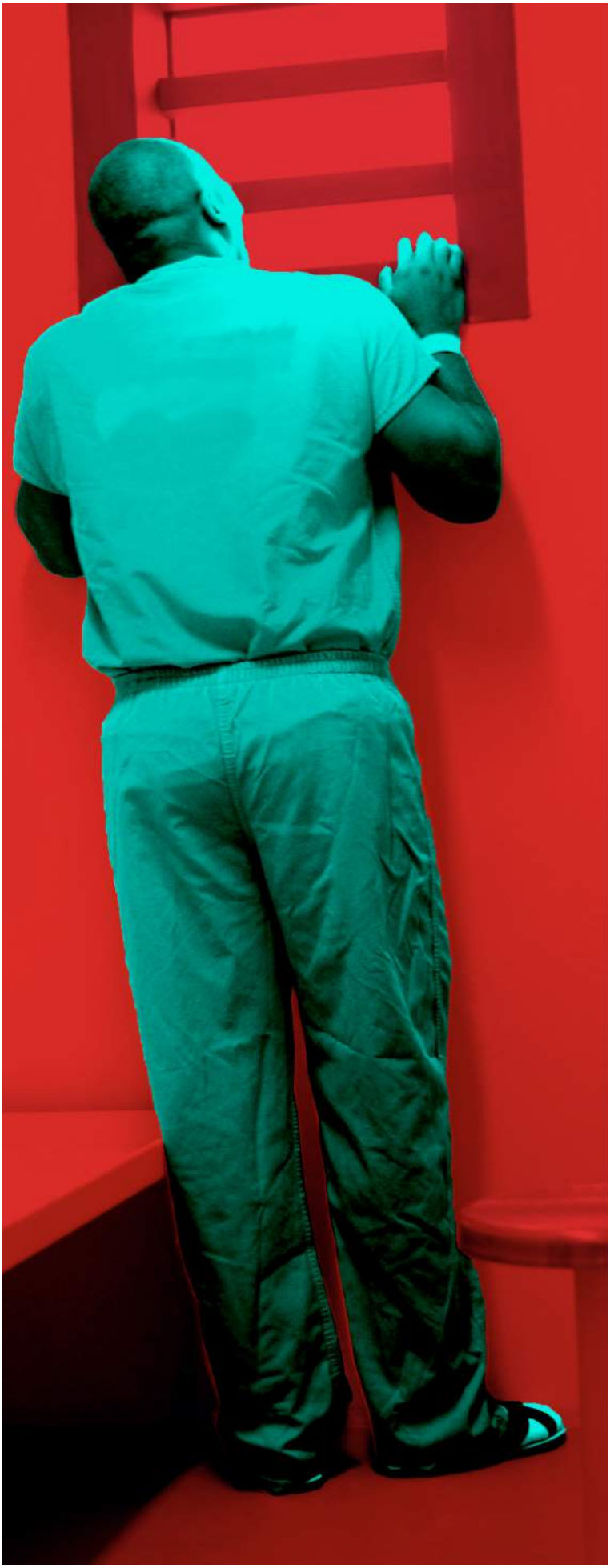
During a pandemic like COVID-19, collaboration between the criminal legal system and public health institutions is a matter of life and death. According to the Centers for Disease Control and Prevention, potential risk factors for COVID-19 infection include heart disease, diabetes, severe obesity, and uncontrolled asthma. An estimated 40% - 50% of incarcerated people report having a prior or current chronic medical condition.[26]

Health inequities in prisons and jails, coupled with policies emphasizing social control over public health, have contributed to a widening racial disparity in the criminal legal system and created a community-level crisis. These healthcare-legal system inequities are even more pronounced during the current pandemic. Following are a few recommendations for mitigating the health disparities in the criminal legal system. These recommendations are presented in order of their perceived need but also can be simultaneously implemented.

1. Increase funding to community-based support resources that help alleviate health disparities for those most likely to come into contact with the criminal legal system upon release.

Returning to communities with record low levels of employment, formerly incarcerated people rely on low-wage, "essential" jobs, especially during the COVID-19 pandemic. Therefore, simply implementing social distancing policies is not enough to prevent the spread of the virus.[27] Additional financial and resource support post-release would allow formerly incarcerated people to maneuver through a challenging environment with fewer stressors, ultimately increasing their chances of success.

Prior to confinement, the median annual income for the incarcerated is 42-52% lower than the general population.[28]



Research shows that poverty and the lack of funds for essential needs like water, food, clothing, housing, and healthcare create incentives for criminal behavior.[29] Creating public health funds for people returning to their communities after incarceration can reduce future contact with the criminal legal system.[30]

2. Eliminate prison medical copays and increase employee wages for incarcerated people.

In most states, incarcerated people pay medical copays for physician visits, medications, dental treatment, and other health-related services. Earning 14 to 63 cents per hour and being required to pay a $2 to $5 medical copay makes access to healthcare inside of prisons and jails virtually impossible.[31] Therefore, funding for health insurance is especially important during this COVID-19 pandemic to ensure access to healthcare inside of prisons and jails. Only two states have not suspended medical copays for people in state prisons: Nevada and Hawaii.[32] To date, there has been no data provided on this issue in local jails.

3. Collaboration between public health institutions and criminal legal system stakeholders.[33]

To effectively manage the intersection of the criminal legal system and public health, healthcare personnel, law enforcement, policymakers, formerly incarcerated people and their family members must be equal stakeholders at the decision-making table. It is critical that all key stakeholders be involved equally at every step of the process to mitigate the risk of the COVID-19 virus on communities and the incarcerated population.

4. Reducing the prison and jail population is in the interest of public health.

Public health needs can be met by reducing the high number of people incarcerated.[34] Nearly 2.3 million people are incarcerated in prisons and jails across the nation,[35] which makes it almost impossible to protect incarcerated people (and the general public) from an outbreak. Therefore, if policymakers are going to effectively protect public health, they must enact criminal law reform that includes reducing incarceration numbers and making necessary changes to protect incarcerated people, probationers, and parolees.

Reentry: Intersection of public health and incarceration in Black communities

The overrepresentation of Black people in prisons and jails, combined with the alarmingly high rates of infections and deaths in the general Black population, shows the importance of proper reentry support to prevent the additional spread of this deadly disease.

Without a doubt, decarceration is critical to saving lives within prison walls, but it must also be coupled with proper reentry planning and support for disproportionately-impacted communities. If states are issuing early release orders for incarcerated people "without [providing] adequate transportation, support services, or housing once they get out,"[36] they could make outbreaks worse in communities already hit hard by the COVID-19 pandemic.

Even in the best of circumstances, reentry is difficult. People returning home from prison and jail face incredible challenges and barriers in securing housing, employment, and public assistance. This current pandemic undoubtedly creates additional challenges as people come home earlier than anticipated and return to communities where social services have been shuttered or altered to follow stay-at-home and social distancing guidelines. This is even more challenging for Black and low-income communities, which are both overrepresented in prisons and jails, and tend to reside in neighborhoods that are COVID-19 hot spots with poor public health systems.

Congress and state leaders have a responsibility to ensure reentry programs are adequately funded because the safety and health of people returning home from prisons and jails, and their communities, depend on it. Releasing people from correctional facilities with proper reentry support would protect the safety and health of all community members and reduce the threat of COVID-19 outbreaks in correctional facilities from spilling over into the broader community. People must be released with proper support and connection to community-based services, especially healthcare, during this time.

Policymakers must adopt the following recommendations in order to promote the physical, emotional, and economic well-being of people released from prisons and jails:

- Provide direct cash assistance to people released from prisons and jails;
- Cancel all incarceration-related debts;
- Expand safety net programs like Medicaid, SNAP, TANF, and federally subsidized housing to be inclusive of those with criminal records;
- Ensure people with criminal records are not excluded from forthcoming COVID-19 emergency stimulus payments or programs;
- Provide additional funding to state and local public defender programs that play a critical role in connecting low-income clients to housing, healthcare, and food and income support.

Conclusion

As reflected in the infection and death rates from the COVID-19 pandemic, Black communities are the most vulnerable to a crisis of this proportion because of routine disadvantages and institutional racism. The COVID-19 crisis is also unfolding within the context of mass incarceration, which creates additional risks for Black people in prisons and jails, and the communities to which they return. Collaboration between public health institutions and the criminal legal system is particularly important in this moment. The COVID-19 responses within the criminal legal system must be centered on race and include input from Black professionals who have unique perspectives as system actors and members of a community that has been impacted the most severely by this pandemic. Policymakers can no longer turn a blind eye to the racial injustices embedded in both the criminal legal system and public health system.

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