UNIFIED CRIMINAL JUSTICE REFORM

BRANDON L. GARRETT*

I

INTRODUCTION

Few topics have been more polarizing than the criminal system in America. A well-known, if simplified view of two Americas in criminal justice was encapsulated by two competing models famously described by Herbert Packer: (1) the crime control model, emphasizing the need to repress criminal conduct and an outright “presumption of guilt,” and (2) the due process model that emphasizes the presumption of innocence, avoiding the risk of convicting the innocent, and procedural protections for the accused.1 For decades, it seemed as if one model had emerged as dominant: the crime control model.

In the space of four decades, from the early 1970s to the 2000s, the prison population of the United States rose from about 200,000 to over 2,000,000 persons, or about a quarter of the entire world’s prison population.2 During the same period, the United States experienced a similar growth in jail populations and other forms of detention, with a total of eleven million persons now detained annually. Most of those incarcerated were Black or Hispanic, and mainly men, often low-income, with pre-existing health, including behavioral health, needs.3 This period of “unprecedented” and “extraordinary” growth in incarceration followed a rise in crime in the 1960s, and the severe policing and sentencing approaches that lawmakers adopted in response.4

Despite this narrative, that Americans who embrace crime control had succeeded, the political climate seemed to reach a tipping point in the summer of 2020, as the largest protests in American history responded to police brutality, racialized policing, and incarceration.5 Polling suggested Americans no longer...
shared anything like a consensus belief that the crime control model was the best approach towards criminal justice; instead, polling suggested that: “Americans are largely united behind the idea that action is required.”6 Indeed, public opinion had already been gradually shifting. Earlier surveys had found that large majorities of Americans believed that criminal justice reforms were needed, including to focus on rehabilitation and not punishment.7 Surveys have shown strong support for new rules regarding police use of force, rehabilitative alternatives for non-violent offenders, and alternatives to imprisonment for the mentally ill.8 Perhaps a due process model is now attracting greater support. Indeed, legislative and executive efforts at the local, state, and federal levels, have begun to implement such approaches. Complicated cross-currents have blunted some of the momentum behind these changes, including shifting politics and an uptick in gun violence during the pandemic. Nevertheless, strong majorities continue to support shifting police budgets to community policing and social services budgets.9 Strong majorities continue to support banning abusive police tactics and penalizing police for racially biased conduct.10

Is America now united around a new due process-oriented vision for criminal justice? This article questions a two-Americas framing of criminal justice. To be sure, few topics have been as polarized and polarizing as crime policy. Nevertheless, this article suggests that American attitudes have long been far more complex, but also more unified, than often supposed. Most people in fact care about both criminal control and due process. As a result, a range of reform approaches may bridge social, partisan, and identity-based divides to accomplish

lasting change. I first discuss a two Americas narrative in criminal justice, focusing on the rise of mass incarceration. Second, I discuss three of the areas that have attracted some common ground focus in recent years: accuracy and prevention of wrongful convictions; equity and reduction of unfairness and racial disparities; and needs, including behavioral and physical health. Relatedly, I discuss a false dichotomy in our understanding of public attitudes towards criminal law outcomes, which disguises our deep common ground. Most people support both fairness and public safety, and fortunately, meaningful reforms can help to accomplish both goals.

II

A TWO AMERICAS NARRATIVE IN CRIMINAL JUSTICE

The criminal justice system has been a central character in the saga of changing American democracy. Early Colonial America sought to be a model of leniency, sending a democratic message to the world that light punishment was Enlightened, if one could only remain blind to the systematic and cruel punishments visited routinely upon enslaved people. Post-Civil War, any skeptics of the reality of American structural racism need only familiarize themselves with the history of the racialized use of the death penalty, replacing lynching as a tool to subordinate Black Americans in the South.11 While during Reconstruction, there were brief efforts to dismantle that system, post-Reconstruction criminal justice mobilized the tools of the state to fine, incarcerate, and obtain coerced labor from poor and Black people.12 When segregation was legally and publicly challenged, the criminal system was used to punish civil rights protesters, like union demonstrators had been targeted before them.13

The mass incarceration era began in the early 1970s, when backlash to the civil rights movement, and reactions to a crime wave, engendered modern mass incarceration, with conservative but also liberal politics driving different aspects of the responses; responses ranged from drug policies, to “truth in sentencing”


reforms, to new policing approaches. Prosecutors and lawmakers pushed for “more and broader crimes.” Racialized and divisive electoral use of fear of crime continued through the 1990s, and in some respects it was bipartisan, with Democrats and Republicans, liberals and conservatives, urban and rural, Black and white voters, pushing for tougher approaches.

Thus, the criminal system can be seen as a mirror in which one can see reflected the state of American democracy. Nor was the American criminal law approach unified at any moment in time. Conflicts were pervasive, criminal justice is highly localized, and the themes just discussed were very broad brush. Returning to the two competing models famously described by Packer, for decades, the conventional understanding was that most Americans, and particularly rural and conservative Americans, embraced the crime control model; it was more liberal Americans, and judges and lawyers perhaps, who tended to focus on due process. There was some evidence to support this two-model view.

The story of the constitutional criminal procedure revolution and backlash to it, also tracks this narrative of an ideological divide. Thus, Justice Harlan’s concurrence in *In re Winship* provides a classic due process-focused statement explaining why the Supreme Court constitutionally requires a high standard of proof at criminal trials: “I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man

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14. Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1364 (2019) (“Between 1975 and 1996, the most frequently enacted sentencing law change was the adoption of mandatory minimum penalties.”).


go free.”19 In contrast, in recent decades, the Court has more closely adhered to crime control prerogatives. The Court has revised criminal procedure rules and post-conviction standards to focus more on ensuring that the guilty not go free, including by prioritizing police officer discretion and narrowing civil and post-conviction remedies for violations.20

III

EMERGING COMMON GROUND

When it seemed like the crime control model had emerged triumphant, with America entrenched as a mass incarceration nation, something changed, and a new, more bipartisan era began.21 From its peak in the mid-1980s, public support for punitive policies steadily declined. For example, 54% of Americans supported the death penalty in 1972, rising to 80% support in 1994, then declining to 60% by 2013.22 What explains this new common ground and accompanying shift in views on crime and punishment?23 Were the two-Americas and Packerian two-models-of-criminal justice a poor description of what had been occurring for many years? Or had the old models and understandings broken down?

Many factors no doubt contributed to this shift towards a more complex politics of crime. Despite decades of investment in incarceration as a tool to control crime, crime rates did not decline in response; “crime rates showed no clear trend,” as the National Academy of Sciences concluded.24 Instead, the rise in incarceration followed “an increasingly punitive political climate,” but without yielding clear gains as a result.25 Then the Great American Crime Decline began.

Many Americans tend to overestimate how much crime occurs,26 but in the mid-

20. See, e.g., Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 MICH. L. REV. 2466, 2468 (1996) (“[T]he Court [since the 1960s] has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order.”).
21. See Steiker, supra note 14, at 1368 (“To a degree unthinkable in previous decades, left–right coalitions at all levels of government began to unite on a variety of criminal justice reforms, agreeing on the fundamental premise that punishments had become too harsh and rehabilitative options too scarce.”).
24. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, supra note 2, at 3.
25. Id. at 4.
1990s, crime began to steadily decline, across the country, and across a wide range of types of crime. A number of other larger changes occurred. Wrongful convictions brought to light just how flawed the criminal system can be. Death sentences plummeted, as I have described, beginning in the late 1990s. The use of criminal tropes in elections faded. Bipartisan calls for reform mounted as even the most “law and order” states began to adopt sweeping reforms of criminal law and sentencing. Conservatives increasingly supported criminal reform, resulting in new organizations, ideas, and strategies, such as Right on Crime, and many others. Criminal reform became a topic for libertarians and Christian groups, as well as celebrities, civil rights groups, and progressive reformers. Philanthropy proliferated from a range of sources, including celebrities, tech-savvy Silicon Valley moguls, the largest corporations and private foundations. Bestselling books, podcasts, movies, and museums have driven public engagement with criminal justice reform. The resulting coalition broadened and deepened reform, with calls for aggressive action, such as cutting incarceration in half.

More recently, on the heels of the election of Donald Trump as President, disruption came calling, threatening to replace problem solving and progress with polarization. Yet, even in the 2016 election cycle itself, and in all that followed, bipartisan criminal reform remained a force. Indeed, one of the signature legislative accomplishments of the Trump presidency was a criminal sentencing...
reform, the First Step Act of 2018, the first substantial federal sentencing reform in decades. At the local level, moreover, politicians continued to run and win promising radical reform of the criminal system. Support for reform among liberal and conservative organizations also continued. Death sentences declined to record lows. States continued to press forward with reforms. Strong majorities of voters continued to support rethinking priorities in the criminal system. The criminal justice debate seemed to be moving inexorably towards ending the mass incarceration era.

In yet another shock to the system, the pandemic disrupted all of our lives, calling the carceral system into question in another way. First, the COVID-19 virus posed a unique threat to people in custody. American detention facilities have long lacked adequate ventilation, sanitation, and health care, making them ripe targets for the pandemic. Our overcrowded jails, prisons, and detention centers emerged quickly as premier national viral epicenters. The pandemic has infected over 580,000 persons in correctional custody, including staff; about 2,873 of whom have died. Despite Eighth Amendment and other prison-health-related rights, judges were extremely reluctant to provide any relief to persons held in custody and facing the viral risk. Some observers assumed decisionmakers would ease harsh carceral policies given the deadly threat that persons in custody faced, particularly those most vulnerable to the virus. They were wrong. Very little in the way of systematic release occurred, although arrests slowed, and jail populations ebbed in many jurisdictions. Courts did very little, and when some judges acted, they were often reversed on appeal. The U.S. Supreme Court forcefully intervened, twice, to countermand the intervention of lower federal judges who had entered injunctions designed to curb the spread of the virus in detention sites.

38. See Hopwood, supra note 35, at 802 (“Conservative groups such as Right on Crime, the American Conservative Union Foundation’s Center for Criminal Justice Reform, the Texas Public Policy Foundation, and the Charles Koch Foundation have increased their presence in the federal reform arena.”); see also Arthur Rizer & Lars Trautman, The conservative case for criminal justice reform, THE GUARDIAN (Aug. 5, 2018), https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform [https://perma.cc/7NHK-BZKK] (discussing reforms to conservative criminal justice principles).
42. Id.
43. See generally Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (Sotomayor, J., dissenting) (staying a preliminary injunction issued by the district court requiring Orange County Jail to implement COVID prevention measures); Williams v. Wilson, No. 19A1047, 2020 U.S. LEXIS 3042 (2020) (discussing an emergency order to stay a district court’s order permitting plaintiff to transfer to other prison facilities
The American experience of the pandemic produced unpredictable shifts in crime patterns. Homicides increased across the country, in large and small jurisdictions, although rates remained half of what they had been twenty-five years earlier. In an opposing trend, however, other types of crime, including robberies, property crimes, and some violent-crime types declined or remained the same; and further, in 2021, homicide rates and other crime rates declined. Perhaps reflecting these contradicting trends, surveys suggested both growing support for police budgets, improved police responses to gun violence—but also continued strong support for reforming police uses of force—and for other reforms, such as sentencing and behavioral health treatment. Public opinion largely tracked the recommendations of experts, who viewed crime trends during the pandemic as unusual and a “perfect storm” without precedent. I turn next, from this quite unsettled moment in the politics of crime, to three areas in which common ground seems particularly promising.

IV
THREE AREAS MOVING TOWARD COMMON GROUND

Today, there continues to be real progress in pushing towards a criminal legal system that can serve a united America. Indeed, the common feature of the solutions and approaches being proposed is that they accomplish both public safety and fairness. A lesson from a series of empirical studies of public attitudes, distilled in separate work, is that most people want both and not one at the expense of the other. Below, I explore these competing trends by discussing three unifying themes: accuracy, equity, and needs, including behavioral health, incomes, and housing.

A. Accuracy

America is the world’s premier mass incarceration nation, as well as the world’s leading exoneration nation. No other country in the world has documented such large numbers of wrongful convictions, resulting in exonerations, as the United States. There have been over 375 post-conviction DNA exonerations in the United States, as well as over 3,000 exonerations total, since 1989. That is not to say that wrongful convictions do not occur at higher
rates or in larger numbers in other countries. Rather, the U.S. has been more aggressive in uncovering them. The scale of mass incarceration may also explain why so many errors have also come to light. The work of pioneering innocence projects, as well as early investment in DNA technology, and the comparative resources to invest in innocence work, may also explain the central place of the United States in uncovering and confronting wrongful convictions.

In the United States, the initial response to wrongful convictions was often litigious, combative, and fraught, but over time, innocence has become a matter of bipartisan concern. The innocence movement and the rise in awareness regarding wrongful convictions have generated a body of knowledge regarding the causes of errors in criminal cases. In turn, the rising awareness that criminal prosecutions can go wrong has impacted public opinion and policy in ways that are not driven by partisan views on criminal justice. Indeed, scholars such as Keith Findley have argued the lessons from wrongful convictions and the Innocence Movement suggest a new paradigm for criminal procedure, in which crime control and due process are more complementary than once supposed. Under this new “Reliability Model,” we can safeguard rights of the accused and prevent guilty persons from going free.

A recent body of empirical research sheds light on why this might be so. Many had long divided Americans by whether they embraced a crime control or a due process-based approach. The primary source of evidence on the public’s trial error aversions has been the General Social Survey (“GSS”), a nationally representative survey of adults in the United States conducted periodically since 1972. Since 1985, the survey has asked Americans: “which do you think is worse: To convict an innocent person or to let a guilty person go free?” These surveys seemed to show that “74 percent of Americans think that convicting an innocent person is worse than letting a guilty person go free, while 26 percent hold the opposite view.”

As Gregory Mitchell and I describe in forthcoming work, a series of studies of laypeople suggests that most people in fact view both the crime control and due process models as equally important. Rather than a two-Americas story, what we see is common ground. We find most Americans expressly reject the

53. Id. at 318.
view that convicting the innocent is the most serious risk of error in criminal cases.\textsuperscript{55} We find that sizeable minorities deem false convictions the more serious error or deem false acquittals the more serious error, subscribing to either the crime control or due process camps.\textsuperscript{56} However, the largest group of Americans takes both types of errors equally seriously. Our data comes from national samples that were recruited to be representative of the adult population in the United States with respect to gender, race, ethnicity, age, education, income, regional location, and political identity.\textsuperscript{57}

To be sure, those who adhere to the crime control or due process model, do reflect partisan divides. Those who weigh false convictions more heavily than false acquittals tend to be highly-educated male Democrats who believe that the law does not provide adequate protection for criminal defendants and gives too much weight to victim interests. This cohort believes that the false conviction rate is relatively high while the false acquittal rate is relatively low.\textsuperscript{58} Those who weigh false acquittals more heavily than false convictions tend to be Republicans who believe the false conviction rate is relatively low and the false acquittal rate is relatively high, and who believe the law should give more attention to the interests of victims and less to the interests of criminal defendants.\textsuperscript{59} Those in the middle, who weigh the errors equally, tend to be Independents over the age of 30—especially female Independents over the age of 50—who worry about both being a crime victim and being falsely accused of a crime, and who believe that the law does a good job balancing the interests of criminal defendants and victims.\textsuperscript{60}

Yet, notwithstanding these tendencies, it is important to emphasize that the vast majority of participants view both types of errors as equally serious and are quite consistent across political and demographic groups. This suggests something powerfully relevant to the traditional “two Americas” narratives about criminal justice: perhaps Americans.\textsuperscript{61} Our primary finding is that the majority of Americans agree that convictions of the innocent and acquittals of the guilty are equally important. Americans across the political spectrum want both fairness and safety—they want to avoid convicting the innocent and acquitting the guilty. Fortunately, many criminal justice problems are not zero-sum dilemmas in which fairness and safety are irreconcilable. When an innocent person is convicted, a guilty person goes free. Courts and reform advocates should take these error aversions and twin goals into account when evaluating how our legal system functions and how best to reform it.

\begin{enumerate}
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id.
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\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id.
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B. Equity

The burdens of mass incarceration have never fallen equally. Mass incarceration has disproportionately burdened Black Americans, as well as immigrants, ethnic minorities, poor people, and those with behavioral health needs. In recent years, however, there has been growing concern with remediying these longstanding inequities. Progress has been slow, but, for example, there is evidence that racial disparities in sentencing have declined in the United States. Arrest rates and prison admissions for Black people have steadily declined, but Black people continue to serve far longer prison sentences than white persons.

Attitudes towards equity and criminal justice may account for the deep-rooted racial disparities in the system. Public perceptions of the costs and benefits of incarceration, as well as the costs and benefits of crime, may explain those longstanding fault lines, although not enough is known about the responsiveness of criminal justice policy and practice to factors such as changing public opinion, crime rates, media accounts, and incarceration practices. There is evidence that whites have long supported punitive policies more than racial minorities. Further, media coverage has long fueled racially charged misconceptions about crime. The divisions and lack of consensus regarding crime control and due process may also reflect the value people place on enforcement and outcomes rather than equality or equity with regard to those outcomes. Some polls suggest, for example, that conservatives care more about enforcement than with avoiding racial disparities in that enforcement, while liberals are more concerned with fairness.

The U.S. Supreme Court has recognized, where the vast majority of criminal cases are resolved without a trial, that: “criminal justice today is for the most part a system of pleas, not a system of trials.” On the other hand, the due process

62. Id.
66. Ghandnoosh, supra note 22.
67. See Lafler McCarthy, supra note 18 (“Republicans prioritize law and order, while Democrats are more likely to say reducing bias is more important.”).
68. Lafler v. Cooper, 566 U.S. 156, 170 (2012); see also Missouri v. Frye, 566 U.S. 134, 144 (2012) (“To a large extent . . . horse trading determines [between prosecutor and defense counsel] who goes to jail and for how long . . . It is not some adjunct to the criminal justice system; it is the criminal justice system.”) (quoting Robert Scott & William J. Stuntz, Plea Bargaining as Contract, 101 YALE L. J. 1909,
model generally assumed a system in which trials were common; today, it is widely recognized that plea bargaining does not necessarily occur in the shadow of likely trial outcomes, and that consequently, protections at the plea negotiation stage are far more important than trial protections. Relatedly, many viewed McCleskey v. Kemp as a death knell for efforts to secure equal protection of the laws through the U.S. Constitution, a case which emphasized that prosecutors and other actors have fundamental local discretion to handle criminal cases as they see fit, without further regulation by constitutional criminal procedure, even when racial disparities result.

Again, however, those divisions may mask consensus regarding solutions that are not zero-sum, but rather promote public safety as well as reduction of racial discrimination and unfairness. Indeed, recent surveys suggest that under a quarter of Americans believe that police treat all Americans equally. An analysis of earlier survey results suggested that “the American public is pragmatic in its crime control preferences,” and that people simultaneously support “both punishment and rehabilitation.” The common ground that we document regarding public opinion on error aversions in criminal justice, can also affect a range of broader policy decisions that define our criminal system. We conclude by emphasizing that our criminal system does not operate as a zero-sum game, even if in any given case a decision of whether or not to convict must be made. Convicting the wrong person means a guilty person goes free. Unnecessarily jailing a person can harm the person and the community, with no public safety benefit. From bail reform, to sentencing reform, to protections against wrongful convictions of the innocent, a range of proposed reforms can both improve

1912 (1992)).


70. See id. (discussing that prosecutors prefer the certainty of plea bargains to secure a “win” on their record); see also William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow, 117 HARV. L. REV. 2548, 2549 (2004) (noting that criminal law and the law of sentencing define prosecutors’ options, not litigation outcomes); Darryl K. Brown, Judicial Power to Regulate Plea Bargaining, 57 WM. & MARY L. REV. 1225, 1228 (2016) (noting that federal courts have achieved more than ninety-five percent of all convictions through guilty pleas).


72. Jackson, supra note 9.

73. Ghandnoosh, supra note 22.

74. Regarding the role of wrongful convictions in exposing failure to convict actual perpetrators, as well as convicting the innocent, see, e.g., GARRETT, supra note 28, at 5 (“In 45% of the 250 postconviction DNA exoneration cases (112 cases), the test results identified the culprit.”).

75. For studies finding that cash bail imposition can increase re-offending, while imposing other social and sentencing harms, see, e.g., Paul Heaton, Sandra Mayson & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 STAN. L. REV. 711, 761, 763 (2017) (showing an increase in new misdemeanor charges by pretrial release status during the first thirty days after the bail hearing); Will Dobbie, Jacob Goldin & Crystal S. Yang, The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges, 108 AM. ECON. REV. 201, 224–26 (2018) (finding that the marginal released defendant is 15.6 percent more likely to fail to appear in court).
fairness and improve public safety. This reframing should be attractive to people who value both due process and public safety because then they do not have to choose between them.

A broader conceptualization of public safety and the costs of traditional policing has occurred in recent years, reflecting changing public opinion and policy. In turn, the public may be far more cognizant today that over-policing, pretrial detention, lengthy sentences, and the racial disparities associated with those policies may not accomplish crime control goals, while also raising grave due process concerns.

C. Social Harm

The people with whom law enforcement, corrections officials, and courts come into contact with most often have substantial social needs, including mental health, substance abuse-related needs, or a range of other health needs, as well as economic needs, including housing and employment. One common theme in public opinion surveys is that broad majorities of Americans, across the political spectrum, agree that rehabilitation, and not punishment, should be a greater focus of the criminal system, including for nonviolent individuals and the mentally ill. The criminal system has long been poorly equipped to deliver adequate health care, and further, for people with such needs, involvement in the


77. See, e.g., Barry Friedman, What is Public Safety?, 102 B.U. L. REV. 725 passim (2022) (arguing that because safety requires such elements as access to food, clean water and air, and housing, public safety should be understood much more capiously than at present).

78. See Long & Fingerhut, supra note 6; see also Russell M. Gold & Ronald F. Wright, The Political Patterns of Bail Reform, 55 WAKE FOREST L. REV. 743, 743–44 (2020) (noting that not only is policing the only reform that is on the agenda, but that pretrial detention has consequences, like creating racial disparities, and it makes defendants more likely to plead guilty and face longer sentences); Ekow N. Yankah, Pretext and Justification: Republicanism, Policing, and Race, 40 CARDOZO L. REV. 1543, 1547–49 (2019) (describing how Black and Hispanic men are stopped by police officers at disproportionate rates, and how the color of their skin causes the state authorities to not only treat them differently, but to police those communities differently).

79. See PUBLIC OPINION STRATEGIES, NATIONAL POLL RESULTS, (Jan. 25, 2018), https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-ef82be0001 [https://perma.cc/X959-BZM4] (“By an 85%-13% margin, voters agree that the main goal of our criminal justice system should be rehabilitating people to become productive, law-abiding citizens. Significant majorities of Republicans (79%), Independents (83%), and Democrats (92%) agree with this approach.”).
system often results in a range of socially harmful effects on the individuals and on surrounding communities.

Looking at mental health as an equally pressing problem, as many as two million people with serious mental illness are jailed each year. In the 1960s and the 1970s, in particular, America dramatically reduced the institutionalization of the mentally ill. Thus, “[w]ith deinstitutionalization and the influx into the community of persons with severe mental illness, the police have become frontline professionals who manage these persons when they are in crisis.” At the same time, people incarcerated have substantial medical needs. Jailed persons are five times more likely to have a serious mental illness and approximately twelve times more likely to have a substance use disorder than those in the general population.

In recent years, there has been a far greater focus on other approaches. One area of engagement with this problem has been deeper police-mental health collaboration. The newly established JustCare coalition suggests that “[d]ecreasing police involvement in the management of behavioral health issues may be the single most effective method for reducing the overall number of daily police interactions with vulnerable populations.” Models to accomplish that goal include pre-arrest diversion programs, such as the Law Enforcement Assisted Diversion or Let Everyone Advance with Dignity initiative (LEAD). Preliminary research suggests these programs are having positive impacts on rearrest rates and on social outcomes, but the programs are not easy to evaluate.

83. See JENNIFER BRONSON & MARCUS BERZOFSKY, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, (2017), https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf [https://perma.cc/X2V4-3GWZ] (findings in jail inmate survey that 26% reported experiences that met threshold for serious psychological distress and 44% had been told in the past they had a mental disorder).
86. See IACP / UC CENTER FOR POLICE RESEARCH AND POLICY, ASSESSING THE IMPACT OF LAW ENFORCEMENT ASSISTED DIVERSION (LEAD): A REVIEW OF RESEARCH, at iv (2020), https://www.theiacp.org/sites/default/files/IDD/Review%20of%20LEAD%20Evaluations.pdf [https://perma.cc/9LGZ-6P65] (“Several studies report statistically significant reductions in misdemeanor and felony arrests among LEAD participants when compared to similarly situated individuals who are
More broadly, the relationship between healthcare and the criminal system must be reconsidered. As Christy Lopez points out, “[o]ne of the things that has been missing from the conversation until quite recently is that it’s still no replacement for an adequate mental health care system in a community.”87 Many localities have outsourced healthcare in jails to private companies.88 But reconsidering that privatization of jail health instead, collaborating with non-profits, is another approach. A national Stepping Up Initiative is such a collaboration to reduce the prevalence of persons with mental illness in local jails.

Just as jails are not the right place to deliver health care, they are not the right place to house people who are homeless. The lack of affordable housing can result in higher arrest rates of unhoused persons.89 Further, persons who are homeless face greater likelihood of rearrest and barriers to court appearances, like representation by counsel.90 Conversely, arresting and jailing a person may make her ineligible for public housing upon release.91 Some police programs focus on linking individuals with housing at the point of arrest, but a lack of adequate housing options is a common limitation of such programs.92

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89. See BAILEY, CREW & REEVE, NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 1 (2020), https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf [https://perma.cc/LKQ4-C3C3] (“[H]omelessness is between 7.5 and 11.3 times more prevalent among the jail population, and in some places the rate is much higher . . . .”).

90. Id. at 6 (describing challenges of providing notice to homeless persons); see also id. at 7 (“Prosecutors may choose to advocate for higher bail for people without a residential address, traditional family support, or stable employment, under the argument that the absence of these ties lessens the likelihood that they will return to court when ordered.”).

91. A federal rule defines someone as no longer “chronically homeless” and eligible for Section 8 housing if they are detained in a facility for more than ninety days, see 24 C.F.R. § 91.5 (2022) (stating that “chronically homeless” includes someone who has been residing in a jail or other similar facility for fewer than ninety days and meets the rest of the criteria in the definition); 24 C.F.R. § 578.3 (2022) (notes the same definition as described in 24 C.F.R. § 91.5 (2022)).

92. See IACP / UC CENTER FOR POLICE RESEARCH AND POLICY, supra note 86, at iii (“Several studies have found that LEAD successfully reduced homelessness for participants and that securing
The COVID-19 pandemic brought these deep-seated needs to a new urgent level. The pandemic exposed just how vulnerable individuals cycling in and out of jail are to viral exposure and how connected jails are to surrounding communities. Both jails and prisons became national viral epicenters during the pandemic. The 1976 Supreme Court decision in *Estelle v. Gamble*, requires that under the Eighth Amendment, custodians ensure incarcerated individuals receive “reasonably adequate” healthcare. The Court defined “deliberate indifference to serious medical needs” of prisoners as the “unnecessary and wanton infliction of pain.” In response to the unprecedented national health risk posed by the pandemic, however, Eighth Amendment rulings played a sideline role. Many jails decarcerated, but prisons largely did not. State lawmakers and executives took very little action, and judges rarely intervened to protect persons from viral risk; when they did appellate judges reversed and blunted remedies. Those unsatisfying judicial, executive, and legislative responses suggest that local decisionmakers, who consider community needs most directly, are currently most directly capable of responding to health needs in the criminal system.

The needs of people involved in the criminal system cut across partisan divides. People who are victims one day may be arrested and charged the next. There is strong evidence, for example, that detention pretrial has a range of negative effects, on health, but also on public safety. If unnecessary pretrial housing may reduce recidivism among these individuals. However, identifying enough housing options to support demand is a commonly noted challenge.


94. See Garrett & Kovarsky, *supra* note 41 (noting that the COVID-19 pandemic had a real impact on those in jails, prisons and other detention sites).


96. *Id.* at 104.


98. See Heaton, Mayson & Stevenson, *supra* note 75, at 748 (noting the regression estimates of the effect of pretrial detention on other case outcomes); CHRISTOPHER T. LOWENKAMP ET AL., *The Hidden Costs of Pretrial Detention* 3, 22 (2013), [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf) (noting that each category of days spent in pretrial detention had a significant increase in the likelihood of both twelve and twenty-four month new criminal activity post disposition); Dobbie, Goldin & Yang *supra* note 75, at 224–26 (2018) (finding that initially released defendants have significantly better case outcomes than initially detained defendants; that initially released defendants are significantly less likely to be found guilty of an offense, to plead guilty to a charge, and to be incarcerated following case disposition; that the marginal released defendant is 1.2 percentage points less likely to be incarcerated after case disposition; that the initial pretrial release leads to...
detention harms public health and creates negative social impacts—plus increases crime—then reforms could appeal powerfully to most Americans who value both safety and fairness.

V

CONCLUSION

A national shift occurred, following four decades of punitive politics regarding crime in the United States. What explains this emerging common ground and how solid is it? Have the two warring models of the criminal process and the two-Americas narrative been replaced by a new common approach towards crime in America? While some strains of recent scholarship have emphasized local decision making and deliberation regarding the criminal system, these larger trends toward a common ground appear to be national and similarly reflected in a wide range of local and state reforms.99 Further, new approaches have emphasized preventing wrongful convictions, reducing inequities ranging from severity to racial disparities in the system, and focusing on rehabilitation and addressing underlying needs. This common ground is not so much, as I have suggested, a rejection of either of the models that for decades divided Americans. Rather, it is born of hard-learned lessons that these divisions represented a false choice and that criminal justice is not a zero-sum proposition. Fairness and public safety are not irreconcilable. Evidence suggests common ground may continue to deepen if twin benefits continue to be the goal of reform efforts. That said, past experience tells us that viewing public safety and fairness as irreconcilable, can create decades of self-defeating politics and policy. If we can share a common ground, which has been defined more clearly than in years past, perhaps the era of American mass incarceration will finally fade.