

UNIFIED CRIMINAL JUSTICE REFORM

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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

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1. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9–23 (1964).

2. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

3. *Id.* at 2.

4. *Id.* at 4 (“The unprecedented rise in incarceration rates can be attributed to an increasingly punitive political climate surrounding criminal justice policy formed in a period of rising crime and rapid social change.”).

5. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/A654-WQB8>]

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

(documenting protests in more than 140 cities during the summer and early fall of 2020).

6. Collen Long & Hannah Fingerhut, *AP-NORC poll: Nearly all in US back criminal justice reform*, ASSOCIATED PRESS (June 23, 2020), <https://apnews.com/article/police-us-news-ap-top-news-politics-kevin-richardson-ffaa4bc564afc4a90b02f455d8fd03> [<https://perma.cc/JV7R-PUTF>].

7. See VERA INST. JUST., *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, (Jan. 25, 2018), <https://www.vera.org/blog/overwhelming-majority-of-americans-support-criminal-justice-reform-new-poll-finds> [<https://perma.cc/78JJ-AWSN>] (“[T]he poll found that 85 percent of Americans agree the main goal of our justice system should be rehabilitation, not punishment.”); see also Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (discussing the “urgent need for reform” of the criminal justice system).

8. See Matthew Clarke, *Polls Show People Favor Rehabilitation Over Incarceration*, PRISON LEGAL NEWS (Nov. 6, 2018), <https://www.prisonlegalnews.org/news/2018/nov/6/polls-show-people-favor-rehabilitation-over-incarceration> [<https://perma.cc/V86F-S4PR>] (describing the results of MacArthur Foundation-supported surveys).

9. See Chris Jackson, *As public safety tops the agenda, Americans want both order and justice*, IPSOS (July 8, 2021), <https://www.ipsos.com/en-us/news-polls/usa-today-crime-and-safety-2021> [<https://perma.cc/AQ8W-9AD4>] (describing survey results showing majority support for reallocating some police funds to community policing and plurality support for shifting funds to social services).

10. See William Saletan, *Americans Don’t Want to Defund the Police. Here’s What They Do Want*, SLATE (Oct. 17, 2021), <https://slate.com/news-and-politics/2021/10/police-reform-polls-white-black-crime.html> [<https://perma.cc/2KYU-F7EK>] (describing survey results showing majority support for banning chokeholds and no-knock search warrants, as well as penalizing police supervisors for the racially biased conduct of their officers).

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”

11. See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439–42 (1995) (arguing that the death penalty is the “direct descendant” of lynching in the South); see also David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 198–203 (2003) (documenting substantial race-of-victim disparities in death penalty sentencing in southern jurisdictions post-*Furman*).

12. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 30–35 (2010) (summarizing the criminal laws and convict labor systems that epitomized the post-Reconstruction legal regime).

13. See John G. Stewart, *When Democracy Worked: Reflections on the Passage of the Civil Rights Act of 1964*, 59 N.Y.L. SCH. L. REV. 145, 149 (2015) (describing mass arrests of civil rights protesters).

reforms,¹⁴ to new policing approaches.¹⁵ Prosecutors and lawmakers pushed for “more and broader crimes.”¹⁶ 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.¹⁷

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.¹⁸

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

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.”).

15. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (examining the role of “deep” and “surface” politics in the long-term expansion of criminal law); Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L. Q. 845, 862–63 (2014) (“[L]iberals began to lament the profusion of controlled substances in predominantly poor, black neighborhoods, prompting calls for harsher penalties to protect African American communities.”).

16. Stuntz, *supra* note 15, at 510.

17. See generally James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (arguing, *inter alia*, that the “New Jim Crow” model of modern mass incarceration masks the “nature and extent of black support for punitive crime policy.”); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 819 (2015) (“Elected officials responded to this public fear and dissatisfaction [with a ‘too lenient’ justice system] by taking ever-tougher stances on crime. Republicans embraced the strategy first, but Democrats quickly followed. Key interests have also pushed for more expansive and tougher criminal laws, including prosecutors, victims’ rights organizations, rural communities that may depend on prisons for jobs, private prison companies, and corrections unions.”). See also BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 24–28 (2006) (comparing incarceration rates for Black and white males born immediately after World War II and those born between 1965 and 1969).

18. See Justin McCarthy, *Americans Divided on Priorities for Criminal Justice System*, GALLUP (Oct. 14, 2016), <https://news.gallup.com/poll/196394/americans-divided-priorities-criminal-justice-system.aspx> [<https://perma.cc/R6H4-FD5H>] (describing survey results showing that “Americans are almost evenly divided” between those who support strengthening law and order and those who support reforming police and court practices).

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-

19. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

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.”).

22. Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, THE SENT’G PROJECT (Sept. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/> [<https://perma.cc/2M8R-QJ2X>].

23. See generally Mark D. Ramirez, *American’s Changing Views on Crime and Punishment*, 77 PUB. OP. Q. 1006 (2013) (examining polls showing a substantial decline in public support for “get tough” crime policies).

24. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 2, at 3.

25. *Id.* at 4.

26. See John Gramlich, *Voters’ perceptions of crime continue to conflict with reality*, PEW RSCH. CTR. (Nov. 16, 2016), <https://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/> [<https://perma.cc/2GMT-MLSY>] (showing majority of voters say crime

1990s, crime began to steadily decline, across the country, and across a wide range of types of crime.²⁷ A number of other larger changes occurred. Wrongful convictions brought to light just how flawed the criminal system can be.²⁸ Death sentences plummeted, as I have described, beginning in the late 1990s.²⁹ 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.³⁰ Conservatives increasingly supported criminal reform, resulting in new organizations, ideas, and strategies, such as Right on Crime, and many others.³¹ 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.³² Bestselling books, podcasts, movies, and museums have driven public engagement with criminal justice reform.³³ The resulting coalition broadened and deepened reform, with calls for aggressive action, such as cutting incarceration in half.³⁴

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.³⁵ Yet, even in the 2016 election cycle itself, and in all that followed, bipartisan criminal reform remained a force.³⁶ Indeed, one of the signature legislative accomplishments of the Trump presidency was a criminal sentencing

has gotten worse since 2008).

27. See generally BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 7–8 (2017).

28. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: HOW CRIMINAL CONVICTIONS GO WRONG* 5–6 (2011) (“DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system’s accuracy.”).

29. See generally GARRETT, *supra* note 27, at 5–6.

30. Jessica Kelley & Arthur Rizer, *Keep Calm and Carry on With State Criminal Justice Reform*, 32 *FED. SENT’G REP.* 86, 87 (2019) (describing how “‘law and order’ states started to move the rudder on criminal justice reform.”).

31. Michael Haugen, *Ten Years of Criminal Justice Reform in Texas*, *RIGHT ON CRIME* (Aug. 1, 2017), <http://rightoncrime.com/2017/08/ten-years-of-criminal-justice-reform-in-texas/> [<https://perma.cc/F9T5-SZ4P>] (discussing criminal justice reform in Texas during the early 2000s).

32. Steiker, *supra* note 14, at 1391–92.

33. *Id.* at 1389.

34. See generally *Campaign for Smart Justice*, ACLU, <https://www.aclu.org/issues/mass-incarceration/smart-justice/campaign-smart-justice> [<https://perma.cc/NR6L-Y2HR>] (outlining efforts to cut incarceration in half); David Cole, *Turning the Corner on Mass Incarceration?*, 9 *OHIO ST. J. CRIM. L.* 27 (2011) (showing what steps states and Congress have taken to reduce incarceration in response to organized efforts and changing general public opinion on criminal justice).

35. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 *YALE L.J.F.* 791, 798 (2019) (“Given that Attorney General Sessions had been a vocal opponent of criminal justice reform and in light of some of President Trump’s campaign statements, it would have been hard to convince anyone in late 2016 or early 2017 that any federal criminal justice reform was possible.”).

36. Justin George, *Can Bipartisan Criminal Justice Reform Survive in the Trump Era?*, *NEW YORKER* (June 6, 2017), <https://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> [<https://perma.cc/W9GZ-QDFW>].

reform, the First Step Act of 2018, the first substantial federal sentencing reform in decades.³⁷ 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.³⁸ 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.³⁹

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.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³

37. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

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).

39. See Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here’s Why*, N.Y. TIMES (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html> [<https://perma.cc/N6EC-F7DP>] (explaining how the American public has come to accept ideas that were once seen as extreme to solve mass incarceration).

40. THE COVID PRISON PROJECT, <https://covidprisonproject.com> [<https://perma.cc/5A9M-869K>].

41. See Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 109 CAL. L. REV. (forthcoming 2022) (describing the litigation challenging pandemic-related conditions in detention facilities in the United States).

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.⁴⁴ 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.⁴⁵ 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 force⁴⁶—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.⁴⁷ 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 1989.⁴⁸ That is not to say that wrongful convictions do not occur at higher

due to a COVID outbreak in the plaintiff’s current facility).

44. RICHARD ROSENFELD & ERNESTO LOPEZ, PANDEMIC, SOCIAL UNREST AND CRIME IN MAJOR AMERICAN CITIES 3 (2021).

45. *Id.*

46. Saletan, *supra* note 10.

47. *Id.*

48. Brandon L. Garrett, *Wrongful Convictions*, 3 ANN. REV. CRIMINOLOGY 245, 246 (2020); see also THE NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<https://perma.cc/R4XJ-DE6Y>] (providing the current count of exonerations since 1989).

rates or in larger numbers in other countries.⁴⁹ 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.⁵⁰

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 1972.⁵¹ 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?”⁵² 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.”⁵³

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.⁵⁴ Rather than a two-Americas story, what we see is common ground. We find most Americans expressly reject the

49. See Brandon L. Garrett, Larry Helfer & Jayne Huckerby, *Closing International Law’s Innocence Gap*, 109 S. CAL. L. REV. (forthcoming 2022).

50. See Keith Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L.J. 133, 148 (2009).

51. ABOUT THE GSS, GEN. SOC. SURV., <http://www.gss.norc.org/About-The-GSS> [<https://perma.cc/ZKQ7-8K9K>].

52. The question on trial error aversions was included in the 1985, 1990, 1996, 2006, and 2016 iterations of the GSS. See Yehonaton Givati, *Preferences for Criminal Justice Error Types: Theory and Evidence*, 48 J. LEGAL STUD. 307, 318 (2019) (exploring what affects the public’s perception of and preference for criminal justice error types).

53. *Id.* at 318.

54. See generally Brandon L. Garrett & Gregory Mitchell, *Error Aversions and Due Process*, 121 MICH. L. REV. (forthcoming 2022).

view that convicting the innocent is the most serious risk of error in criminal cases.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.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.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.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.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.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.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.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

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.⁶² In recent years, however, there has been growing concern with remedying these longstanding inequities. Progress has been slow, but, for example, there is evidence that racial disparities in sentencing have declined in the United States.⁶³ Arrest rates and prison admissions for Black people have steadily declined, but Black people continue to serve far longer prison sentences than white persons.⁶⁴

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.⁶⁵ There is evidence that whites have long supported punitive policies more than racial minorities.⁶⁶ 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.⁶⁷

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.”⁶⁸ On the other hand, the due process

62. *Id.*

63. See generally Michael T. Light, *The Declining Significance of Race in Criminal Sentencing: Evidence from US Federal Courts*, 100 SOC. FORCES 1110 (2021) (examining factors determining whether racial and ethnic disparities in sentencing have actually and meaningfully declined nationally); Ryan D. King & Michael T. Light, *Have Racial and Ethnic Disparities in Sentencing Declined?*, 48 CRIME & JUST. 365 (2019) (highlighting trends that have led to the declining prominence of race in sentencing).

64. Weihua Li, *The Growing Racial Disparity in Prison Time*, THE MARSHALL PROJECT (Dec. 3, 2019), <https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time> [<https://perma.cc/WTJ6-N7AM>].

65. See generally Justin T. Pickett, *Public Opinion and Criminal Justice Policy: Theory and Research*, 2 ANN. REV. CRIMINOLOGY 405 (2019) (examining how public opinion affects sentencing, capital punishment policy, and incarceration rates).

66. Ghandnoosh, *supra* note 22.

67. See McCarthy, *supra* note 18 (“Republicans prioritize law and order, while Democrats are more likely to say reducing bias is more important.”).

68. *Lafleur 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,⁶⁹ and that consequently, protections at the plea negotiation stage are far more important than trial protections.⁷⁰ 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.⁷¹

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.⁷² 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.”⁷³ 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.⁷⁴ Unnecessarily jailing a person can harm the person and the community, with no public safety benefit.⁷⁵ From bail reform, to sentencing reform, to protections against wrongful convictions of the innocent, a range of proposed reforms can both improve

1912 (1992)).

69. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) (noting that prosecutors have personal incentives to strike plea bargains).

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).

71. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

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.⁷⁶ 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.⁷⁷ 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.⁷⁸

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.⁷⁹ The criminal system has long been poorly equipped to deliver adequate health care, and further, for people with such needs, involvement in the

76. Scholars and policymakers have been engaged in a rethinking of public safety from a broader perspective, taking into account fairness to defendants, community harm, and more. *See, e.g.*, PHILLIP ABITA GOFF ET AL., RE-IMAGINING PUBLIC SAFETY: PREVENT HARM AND LEAD WITH THE TRUTH 3 (2020), https://policingequity.org/images/pdfs-doc/reports/re-imagining_public_safety_final_11.26.19.pdf [<https://perma.cc/JHL8-LXQG>] (proposing four principles to guide the development of a policy plan for policing in America); Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054, 2066 (2017) (proposing legal estrangement as a corrective to the prevailing legitimacy perspective on police reform); THE POLICING PROJECT & THE JUSTICE COLLABORATORY, REIMAGINING PUBLIC SAFETY: FIRST CONVENING REPORT 2 (2021), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/602d826b6b3233405feabd52/1613595247852/RPS+Session+I+Report.pdf> [<https://perma.cc/2GJ3-BTKY>] (noting that to achieve a new vision of safety, three shifts must occur: (i) ending systemic racism; (ii) decoupling public safety from policing; and (iii) centering community voices).

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 capaciously 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-efff82be0001> [<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.⁸⁰ In the 1960s and the 1970s, in particular, America dramatically reduced the institutionalization of the mentally ill.⁸¹ 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.”⁸² 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.⁸³

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.⁸⁴ 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.”⁸⁵ 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.⁸⁶

80. Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761, 764 (2009).

81. See Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 54 (2011) (noting that the inpatient population in state and county mental hospitals decreased by 59.3% between 1965 and 1975).

82. H. Richard Lamb et al., *The Police and Mental Health*, 53 PSYCHIATRIC SERVS. 1266, 1266 (2002).

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>] (finding 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).

84. See THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, POLICE-MENTAL HEALTH COLLABORATIONS: A FRAMEWORK FOR IMPLEMENTING EFFECTIVE LAW ENFORCEMENT RESPONSES FOR PEOPLE WHO HAVE MENTAL HEALTH NEEDS (2019), <https://csgjusticecenter.org/publications/police-mental-health-collaborations-a-framework-for-implementing-effective-law-enforcement-responses-for-people-who-have-mental-health-needs/> [<https://perma.cc/8XPK-2KW5>] (noting that police departments are increasingly seeking help from the behavioral health system).

85. KATHERINE BECKETT ET AL., JUSTCARE: THE DEVELOPMENT AND IMPACT OF A MULTI-FACETED COLLECTIVE IMPACT MODEL 6 (2021).

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

not engaged with a LEAD program. However, this finding is not universal.”); *see also id.* at 12–13 (noting that LEAD programs can be successful in decreasing encounters with the criminal justice system). One challenge is that given the discretion involved in such programs and the manner in which they have been implemented, “[r]elatively few evaluations of LEAD have appeared in peer-reviewed publications. While randomized controlled trials provide the strongest evidence of program impact, it is not possible to use these methods in evaluations of LEAD.” *Id.* at vi.

87. Eric Westervelt, *Mental Health and Police Violence: How Crisis Intervention Teams are Failing*, NPR (Sept. 18, 2020), <https://www.npr.org/2020/09/18/913229469/mental-health-and-police-violence-how-crisis-intervention-teams-are-failing> [<https://perma.cc/UZ92-X8RC>].

88. *See* Rupert Neate, *Welcome to Jail Inc: how private companies make money off US prisons*, THE GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit> [<https://perma.cc/72A6-CNG5>] (describing that more state prisons and county jails outsource healthcare to for-profit entities). For an overview, *see* Micaela Gelman, *Mismanaged Care: Exploring the Costs and Benefits of Private vs. Public Healthcare in Correctional Facilities*, 95 N.Y.U. L. REV. 1386, 1389 (2020) (“The proliferation of private companies, despite major lawsuits and allegations of misconduct, continues because of failures in the correctional healthcare market. Specifically, the market lacks the factors necessary for successful privatization: choice, competition, and responsiveness to consumer preferences.”).

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.⁹³ Both jails and prisons became national viral epicenters during the pandemic.⁹⁴ The 1976 Supreme Court decision in *Estelle v. Gamble*, requires that under the Eighth Amendment, custodians ensure incarcerated individuals receive “reasonably adequate” healthcare.⁹⁵ The Court defined “deliberate indifference to serious medical needs” of prisoners as the “unnecessary and wanton infliction of pain.”⁹⁶ 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.⁹⁷ 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.⁹⁸ If unnecessary pretrial

housing may reduce recidivism among these individuals. However, identifying enough housing options to support demand is a commonly noted challenge.”).

93. See Editorial, *America is Letting the Coronavirus Rage Through Prisons*, N.Y. TIMES (Nov. 21, 2020), <https://www.nytimes.com/2020/11/21/opinion/sunday/coronavirus-prisons-jails.html> [<https://perma.cc/5WNC-RMHK>] (noting that the American penal system is a breeding ground for COVID-19); MELISSA NEAL, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 3 (2012).

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).

95. *Estelle v. Gamble*, 429 U.S. 97 (1976).

96. *Id.* at 104.

97. See *supra* Part III; see also *Local Spending on Jails Tops \$25 Billion in Latest Nationwide Data*, PEW CHARITABLE TRS. (Jan. 29, 2021), [https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-\\$25-billion-in-latest-nationwide-data](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data) [<https://perma.cc/2ZE9-5YLR>] (examining correctional expenditures and considering strategies that may offer enduring public safety and fiscal benefits).

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://perma.cc/4XQ6-8CTV>] (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.

substantial increases in failing to appear for required court appearances; and that the marginal released defendant is 18.9 percent more likely to be rearrested for a new crime prior to disposition).

99. See Elizabeth G. Janszky, *Defining “Local” in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318, 1320 (2019) (disentangling important differences within the democratization movement); Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1452 (2017) (“Pushing more criminal justice power—legislative, enforcement, adjudicative, and penal—down to directly affected communities and neighborhoods could enhance representativeness and sharpen lines of authority.”).