INTRODUCTION

Over 50 years ago, President Richard Nixon kindled a fire of fear by claiming drug addiction was a rampant problem among white, well-to-do teens. During a 1969 speech to governors across the nation, President Nixon remarked:

“There has been sort of a general thought that so far as drugs were concerned, we fund them in the ghettos, among the deprived, those who are depressed and turn to drugs as a last resort. That may have once been the case. It is not the case today. The primary use, as far as drugs are concerned, has moved to the upper middle class...”

No longer seen as a problem simply relegated to the inner city, Republican and Democrat policymakers enacted policies which attempted to save youth from the perils of marijuana and narcotics by further criminalizing drug use and sales. Yet, while both urban Black leaders and suburban whites supported these changes, the former group did not benefit from investments in efforts to address the root causes of addiction—poverty, trauma and poor educational opportunities, among them—for which they advocated.

Much of the War on Drugs was based on misinformation and fear. Drug users and sellers in America’s urban centers were seen as sources of corruption—their incarceration necessary to prevent more addiction and crime. However, research suggests increased criminal penalties and other policy efforts to fight illicit drug use have had little effectiveness. Indeed, many American youth continue to use illicit drugs at high rates. And while some research suggests marijuana use may bring some harmful side effects, its role as a “gateway” drug to more addictive substances like heroin and cocaine was...
largely over-stated. For instance, at least one recent study suggests that the legalization of marijuana has not been marked with an increase in the use of harder substances.

Currently, opportunities for and examples of misinformation and fear-mongering within the criminal justice system are bountiful. The United States is facing a global health crisis and struggling to productively address long-standing issues of racial injustice. In the first half of 2020, our nation continued to see property crime and most forms of violent crime decrease, while murder and nonnegligent manslaughter rates (although historically still low) rose by nearly 15 percent when compared to the first half of 2019, while aggregated assaults rose by about 5 percent. Although still one of the most crime-free times in our nation's history, many have been quick to blame this increase on policy changes, such early prison releases due to the COVID-19 pandemic, and civil unrest. Yet, as experts have pointed out, the intersecting forces of a global pandemic, economic recession, racial unrest and nationwide protests mean it will take more time, data and intentional analysis to decipher the causal mechanisms of any current crime trends.

In both the past and present, it has been easy for criminal justice policy to be driven by fear and emotional policymaking rather than a sober assessment of the facts. This occurs for somewhat natural reasons, as the consequences of criminal justice policy failures can appear more immediate and visceral: the potential for the death of a loved one, lost property or abuse are far more tangible concepts than cybersecurity threats or green energy. This is likely, at least in part, due to human memory—research shows experiences and events tied to strong emotions are more memorable than less dramatic or weighted incidents. Further, policy success is often measured by recidivism—a zero-sum measure of an individual's return to crime—rather than other metrics which show incremental progress. On top of this, the media, more often than not, focuses on policy failures rather than policy successes.

Yet, fear-based and emotionally-driven policy debates and policymaking are a disservice to the American public. Policymakers and the public may incorrectly deduce or be blind to the collateral consequences of their policies and are prone to letting biases impact their decision-making. As a result, the same problems remain, which cost life, property and liberty in the process.

This paper seeks to address this trend by first examining the relationships between fear, misinformation and policy and then providing illustrative examples of modern criminal justice myths alongside the evidence stacked against them. It will then conclude with a short list of policy solutions to combat misinformation and fear-mongering in criminal justice policy.

### HOW MISINFORMATION INFLUENCES DECISION-MAKING AND POLICY

To understand the consequences of fear and misinformation, we must first understand how the human brain and psyche process and respond to them. The amygdala, an almond-shaped structure in the brain, is thought to be the first step in sensory and internal inputs and beginning to process fear. When a fear response occurs, the nervous system is also activated, hormones like adrenaline are released and one's breathing and heart rate increase. At the same time, the cerebral cortex—which aids constructive reasoning and judgment—is debilitated, meaning that it is harder to have rational thoughts and make good decisions. Indeed, fear is

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16. Ibid.
associated with a greater evaluation of risks and devaluations of potential gains.21 From an evolutionary perspective, these adaptations facilitate quick responses to dangerous stimuli. However, in some instances, strong feelings of fear can create an inappropriate response. Such feelings are particularly memorable long-term, and thus may disproportionately inform future decision-making as individuals seek to avoid potential losses or harm.18

Cognitive susceptibility to misinformation is often a byproduct of reliance on heuristics—mental shortcuts that allow someone to process information faster. For example, to avoid information overload, familiar places or things are often assumed to be safe, previously or recently seen information is often given greater credence and new information is frequently interpreted in ways that align with pre-existing beliefs.22 Unfortunately, jumping to these mental conclusions fails to fully assess the credibility of a source, weigh the information and consider its implications. When that misinformation is accepted as fact, it only makes disproving it in the future more difficult.20

This, of course, has direct relevance to criminal justice policy. Fear—whether it is well-founded or not—and incorrect information can shape judgments and policy decisions. In some cases, fear of crime may be a logical result of one’s direct or vicarious experience with victimization.23 This fear, in turn, can impact one’s perception of the criminal justice system and different actors within it, often reducing one’s perceived trust in these institutions.22

In other cases, fear and information may be adopted from external depictions of the world around us and not tied to personal reality or facts. Both in the United States and abroad, research and polling has found that people often perceive crime to be higher than it is in reality.23 In October 2019, almost two-thirds of Americans surveyed in a Gallup poll believed that crime rates had increased over the last year; however, in reality, both violent and property crime rates dropped to historically low levels in 2019.24

Media coverage of crime is one well-studied mechanism for this trend. Watching television news has been associated with both an increased fear of crime as well as increased perception of the risk of crime occurring in one’s neighborhood.25 It has also been found to have a direct influence on punitive attitudes, even when controlling for fear of crime.26 Media outlets on both the right and left have been accused of misreporting, miscasting or over-emphasizing information around crime and criminal justice policy, with potentially devastating effects.27

Unfortunately, throughout both history and modernity, racial constructs have often played an important role in public misinformation, fear-mongering and policy outcomes.28 Individuals alive during the 1990s would be remiss not to recall the infamous “Willie Horton” political ad which stoked racial fears about black crime and ultimately aided the defeat of


R STREET POLICY STUDY: 2020 FAKE NEWS, REAL POLICY: COMBATTING FEAR AND MISINFORMATION IN CRIMINAL JUSTICE 3
Democratic Presidential candidate Michael Dukakis. Multiple studies have found that individual perceptions and fear of crime increase alongside a real or perceived relative increase in the local “minority”—generally defined as the Black and/or Latino—population.

In many studies, fear of crime has been associated with more punitive attitudes; however, this finding is far from universal. Some research has argued that fear of crime may play a lesser or nonexistent role in shaping punitive preferences in light of other factors such as one’s political ideology or education. For example, a study analyzing the perceptions of French citizens found that individuals reported feeling less secure in their neighborhood after news coverage about a felony aired the previous day. The same study found that news coverage of crime the day before a jury verdict was associated with an increase in the length of the sentence by almost three months; this finding was not affected by real changes in daily crimes and did not hold if the new coverage occurred more than a day prior to the verdict. In contrast, some research suggests that preferences for punitive policies are higher among whites when they live within localities with higher Black and Latino populations and among those who “typify” Blacks or Latinos as criminals.

Fear-mongering and support for punitive policies often translates into real-life consequences. During the “War on Drugs,” white youth and adults were often cast as the “impossible criminals” and victims of addiction, while Black and Latino individuals were portrayed as their tempters or as criminal addicts. As penal policy evolved, sympathetic white drug users and addicts were often given opportunities to escape the carceral state while the new laws ensnared a disproportionate share of Black users. Comments reported to have been made by President Nixon’s domestic policy advisor, John Ehrlichman, suggest this bifurcation may have been overtly nefarious rather than ignorant:

We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities.

Today, schools with a larger percentage of Black children are more likely to rely on “zero-tolerance” and punitive discipline policies, even when controlling for factors such as student delinquency and drug use. In addition, mischaracterizations of criminal offending patterns by race have only seemed to solidify during the present day.

DEBUNKING MODERN CRIMINAL JUSTICE MYTHS

Beyond the ways that fear and misinformation can impact policy, there are several, particularly potent, modern criminal justice myths which have, at best, distracted from the search for real solutions to reduce crime and increase community health and safety and, at worst, led to policy conclusions which directly undermined those very efforts. The following sections detail each of these myths and provides information that refutes them.

The “Juvenile Superpredator” Myth

On Nov. 27, 1995, an op-ed by political scientist John DiLulio, Jr. described the coming of the “superpredators.” This long-form article and its associated book predicted an America in the near future that would be dominated by “elementary school youngsters who pack guns instead of lunches.” After publication, this notion of juvenile superpredators slowly seeped into the common lexicon, famously making

32. Arnaud Philippe and Aurélie Ouss, “‘No Hatred or Malice, Fear or Affection’: Media
33. Ibid, pp. 2136, 2153-2158.
34. Kleck and Johnson, p. 20.
35. Matthew Lassiter, “Impossible Criminals: The Suburban Imperatives of America’s slowl seeped into the common lexicon, famously making
36. Ibid.
an appearance on national television when then–First Lady Hillary Clinton made mention of “superpredators [with] no conscious; no empathy” at a 1996 New Hampshire campaign event.\(^{41}\) However, just six years after he had constructed the archetype, DiLulio attempted to explain how he had tried “to put the brakes on the superpredator theory.”\(^{42}\)

As it turns out, the prediction of an oncoming wave of juvenile superpredators never came to fruition, and by the time the first piece on superpredators was published in 1995, crime rates across all age groups were beginning what would eventually become a decades-long decline.\(^{43}\) Using these trends and other publicly available data, the academic community discarded the superpredator theory entirely by the 2000s.\(^{44}\)

While scholars were producing works that largely refuted the superpredator theory, television sets and newspapers across America were awash with stories that seemed to support its conclusions.\(^{45}\) This was the result of a confluence of media factors that created a “superpredator media frame” that news outlets could easily reproduce at low cost to generate strong viewership or paper circulation numbers.\(^{46}\) This type of lopsided news coverage began to emphasize the largely marginal role that youth violence had at the time, helping to cement the same superpredator theory—that was quickly falling out of academic vogue—in the minds of the public.\(^{47}\) In fact, this increased public attention on youth violence drove lawmakers to pass reforms across the country that made it easier than ever before to charge minors as adults in criminal cases.\(^{48}\) Many of these same laws remain in place today.\(^{49}\)

It is true that there was a spike in youth murder rates between 1987 and 1993—the time period which provided the bulk of the data for the original superpredator theory.\(^{50}\) However, unlike the theory posits, this spike in murders was not the result of a new generation of ultra-violent children devoid of empathy, rather it was linked to a proliferation of easily accessible firearms in communities where these youth-driven murders took place.\(^{51}\) Even though this information was revealed just four years later, the damage to the public zeitgeist had already been done: 71 percent of Americans believing that there was more crime in 1996 than there was the year before—a belief that the data disproves.\(^{52}\) Further, horrific outlier events such as the Columbine and Parkland school shootings have been used to reaffirm this narrative.\(^{53}\) Even in 2020, the echoes of the superpredator rhetoric have been thrown across the Presidential debate stage with President Trump accusing President-elect Biden of calling young Black men superpredators in the mid-1990s.\(^{54}\)

Using current knowledge and nearly three decades of data, it is now clear that a late 1990s generation of superpredators was more myth than anything else. However, due to a combination of insufficient academic rigor and pervasive media incentives, the erroneous superpredator theory was able to enter the mainstream and arguably impact how many Americans still think about both juvenile crime and criminal justice.

### The Crack is Powder Cocaine’s More Destructive Brother Myth

On June 17, 1986, Collegiate All-American basketball player Len Bias was selected by the Boston Celtics as that year’s second overall pick at the National Basketball Association (NBA) draft. Two days later, he was found dead, due to a cocaine-related heart attack.\(^{55}\) Eight days later, Don Rogers, Collegiate All-American football player and recent draftee for the Cleveland Browns, suffered a similar cocaine-relat-

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ed heart attack just before his wedding. While President Nixon’s War on Drugs had already stoked public fear around drug use and crime, these two, high-profile deaths pushed cocaine into the spotlight, prompting a media frenzy, and in response, quick legislative action from Congress.

The resultant Anti-Drug Abuse Act of 1986 is clear in its intent: crack cocaine is to be penalized with much more severity than its powdered variant. To put this in quantifiable terms, two people, one in possession of five hundred grams of powdered cocaine and the other in possession of five grams of crack cocaine, were to both be sentenced to at least five years in prison if convicted. This disparity in sentencing was a response to the rising public fear concerning the then-new substance crack cocaine. Reports before the passage of the Anti-Drug Abuse Act labeled crack cocaine as significantly more addictive than its powdered counterpart, with one New York state official going so far as to say that: “Unlike normal cocaine, people who free-base can’t stop.”

Even in communities of color where crack usage was rampant, constituents were demanding harsh action from their elected representatives. Representative James Clyburn remarked how in the early 1990s his stance against mandatory minimums for drug offenses was met with intense pushback:

> Those people darn near lynched me in that meeting, and there wasn’t a single white person in the room [...] The atmosphere back then—the scourge of crack cocaine and what it was doing in these African American communities—they were all for getting this out of their community.

However, ten years after the onset of the “crack epidemic” medical studies started to show that crack cocaine was no more addictive than powdered cocaine. By 2002, the United States Sentencing Commission also started to take issue with the disparities in how cocaine enforcement was being handled, stating in their report to Congress: “The current penalties exaggerate the relative harmfulness of crack cocaine and apply most often to lower level offenders.”

The Sentencing Commission also noted that, even when comparing relative conviction rates, individuals convicted of these low-level drug crimes were disproportionately people of color, with over 80 percent of federal crack cocaine convictions in 2000 being handed down to Black individuals. While economically disadvantaged, Black Americans as a socioeconomic group do use crack cocaine at higher rates than other comparable Schedule One drugs, the lopsided penalties set against crack cocaine users effectively punished Black individuals more for committing less crime than white individuals who used powdered cocaine. In a different paradigm, we can see similar trends exacerbating racial disparities today in the overcriminalization of menthol tobacco products most often used by communities of color.

This set of circumstances prompted legislative action in 2010 with the passage of the Fair Sentencing Act, a bipartisan piece of legislation that reduced the weight disparity between crack and powdered cocaine used in sentencing from 100:1 to 18:1. Under this new regulatory regime, courts have been directed to reduce penalties related to cocaine offenses, but as the law explains, such directives are still intended to treat crack as more dangerous than traditional cocaine. In 2018, Congress passed the First Step Act, which allowed for the new crack and powdered cocaine weight disparity in the Fair Sentencing Act to be applied retroactively following a successful petition to the court. As of May 22, 2020, retroactive application of the Fair Sentencing Act has resulted in over 3,000 sentence reductions and the release of over 2,100 individuals.

The myth that crack cocaine is more addictive than powdered cocaine has effectively driven lawmakers to treat the same drug as two entirely separate legal entities. As previ-

67.  Ibid.
ously mentioned, even recent reform measures have only reduced this disparity rather than eliminate it entirely, proving that even now some still buy into the crack cocaine myth. Although, President-elect Joe Biden has made eliminating this disparity a central tenet of his criminal justice reform plan.71

Unfortunately, communities of color are disproportionately impacted by policies guided by misinformation. And scholarship suggests that policy changes to counteract one of the most insidious consequences of biased, misinformed policies—clear racial disparities in our criminal justice system—are more likely to occur only after these racial disparities in arrests and incarceration have grown significantly.72

The Private Corrections Industry is Driving Mass Incarceration Myth

On Sept. 17, 2015, Sen. Bernie Sanders (D-Vt.) along with Representatives Raúl M. Grijalva (D-Ariz.), Keith Ellison (D-Minn.) and Bobby Rush (D-Ill.) introduced legislation to eliminate the use of private prisons in the federal criminal justice system stating: “We cannot fix our criminal justice system if corporations are allowed to profit from mass incarceration.”73 Rep. Grijalva echoed these sentiments: “The result is a corrections industry collapsing under its own weight as the prison industry gets rich and countless innocent men, women and children are ensnared in their trap.”74

In part due to Sen. Sanders’s advocacy, eliminating the private corrections industry has now become a staple of the Democratic platform. Although Vice President-elect Kamala Harris failed to publicly rebuke California’s use of private prisons to reduce overcrowding in the state’s public facilities when she was Attorney General, she has now labeled the practice “morally wrong.”75 President-elect Biden has included its elimination at the federal level in his policy platform and asserted that he will make its elimination at the state level a prerequisite for new federal funding opportunities.76

nities.76 And states like California, Nevada and Illinois have banned the use of private facilities in the criminal and/or immigration context.77

In truth, some research gives credence to arguments against private involvement in corrections. Privatization of prisons is often pitched as a way to quickly reduce overcrowding concerns and lower correctional costs. Yet, the current body of literature suggests that while the private industry has a clear advantage in facility construction and procurement, their utility as a cost-saving intervention is less clear.78 Private facilities have also been critiqued for lower staffing levels and staff wages, with some arguing this undermines the quality of care in search of a short-term profit.79 And others have criticized private prison contractors for lobbying in support of tough-on-crime criminal justice policies which would expand, rather than contract, the carceral state.80 A 2016 report by the U.S. Inspector General found that private facilities contracted to house individuals in Bureau of Prisons custody had more contraband incidents involving cell phones, weapons and tobacco; higher rates of assault and use of force incidents; and more lockdowns compared to similar public facilities.81 The report ended with recommendations for more federal oversight and monitoring.82

Nonetheless, the assertion that the private corrections industry is driving mass incarceration—or that its elimination would end it—is apocryphal. For one, private prisons held just under 11 percent of the federal prison population in 2018, and almost 8 percent of the state prison population.83 These numbers are roughly on par with estimates from a decade prior.84 Further, the evidence that private prisons

82. Ibid.
84. Ibid.
are driving prison population growth is scant; and arguably, public-sector employees have an even greater incentive to lobby for incarceration growth.\textsuperscript{88}

With regards to claims of abuse and mismanagement, public state and federal facilities have likewise been implicit in wrongdoing. For example, Alabama’s adult prison system was infamously the subject of a Department of Justice (DOJ) investigation ultimately finding that Alabama prisons are violating incarcerated individuals’ Eighth Amendment protections against cruel and unusual punishment. The report detailed rampant violence and sexual abuse in the facilities—within one week in September 2017, one individual was stabbed to death, and numerous inmates were physically and sexually assaulted.\textsuperscript{86} And, the aforementioned 2016 Inspector General report found that while individuals in private federal correctional facilities were more likely to file grievances regarding prison staff, food and special housing units—often used for solitary confinement—they filed fewer grievances overall—60 percent of the Federal Bureau of Prisons (BOP) grievance rate—and were more likely to have their grievance granted.\textsuperscript{87} Additionally, private facilities had fewer sexual misconduct allegations and positive drug tests among incarcerated individuals.\textsuperscript{88}

Up to this point, the literature is not clear on whether public or private facilities are, as a whole, better.\textsuperscript{89} Scholars have noted that this debate provides an opportunity for additional research on corrections specifically around:

(1) the extent of need [for private corrections]; (2) the amount and quality of services; (3) impacts on outcomes, both intended and unintended; (4) cost efficiency; (5) development of innovative solutions; (6) impacts on social control; and (7) ethical considerations.\textsuperscript{90}

In the meantime, drastic policy moves grounded in the myth that privatization is the greatest reason for mass incarceration may elicit unintended consequences. When the Denver City Council voted against renewing their contracts for their halfway houses with two private companies in August 2019, the decision meant hundreds of individuals who would typically be placed in the facilities were at risk of being sent to state prisons and county jails.\textsuperscript{91} Fortunately, the council ultimately extended the current contracts to begin phasing out their use of private community corrections more gradually, although their ability to quickly step in for private providers has yet to be seen.\textsuperscript{92} Regardless of one’s opinions around private prisons, it is clear that the private sector is not the driver of mass incarceration. Over-emphasizing the role private corrections plays in our policy problems today can distract us from focusing on solving problems that impact the millions of individuals not in a private facility.

The Incorrigibility of People Convicted of Violent Offenses Myth

In the past decade, the tough on crime era has given way to a smart on crime model in many places in the United States.\textsuperscript{93} This new model recognizes that the vast majority of individuals involved in our criminal justice system will return to society and emphasizes the importance of ensuring individuals not reoffend.\textsuperscript{94} Yet, this more rehabilitative approach is often tossed aside when individuals are convicted for “violent” offenses, under the premise that these individuals are incorrigible and violent for life. Even positive criminal justice reforms continue to inhibit or greatly restrict alternatives to incarceration, early release and relief from some collateral consequences when someone is convicted of a violent offense.\textsuperscript{95} Remedies for some of the harshest collateral consequences—for example, clearance of a felony record—are generally reserved for those who have committed nonviolent offenses, regardless of the time that has elapsed.\textsuperscript{96}


\textsuperscript{88} Ibid. p. 44.


This myth often begins with a misunderstanding of what connotes a violent offense in the first place. When individuals think of a violent offense, they are often prompted to focus on clear instances of severe person-on-person crime, such as rape or murder, with a clear victim and perpetrator. In reality, what constitutes a “violent offense” in statute and in practice is not as clear cut as it may seem. For example, burglary is typically not a person-on-person crime, but in some places it is defined as violent and can carry long minimum sentences as a result.97 Embezzlement and selling drugs near a school are also considered violent in some jurisdictions.98 However context matters, and there are gradations of “violence”; for example, children engaged in school yard fights can still be categorized as felons and violent offenders to their detriment.99 There is clearly a spectrum of behavior, but systems do not adequately respond to nuance. For this reason, relying on broad categorizations of “violent” versus “nonviolent” offenses in our sentencing and rehabilitation policy debates may do more harm than good.

Fear-mongering around those who commit violent offenses also overstates their lifetime recidivism risk and understates individuals’ potential for rehabilitation in and outside of prison, given the appropriate supports. Certainly, some individuals pose a public safety risk and incapacitation for some period of time is necessary to keep communities safe. And there are different criminogenic factors and needs that crimes with aggression and harms to victims might necessitate. However, excessively long sentences and a lifetime of collateral consequences as a “violent felon” often unnecessarily punish individuals long past when they are at risk of reoffending.

One well-known developmental finding is that crime tends to follow a bell-shaped age trend, called the “age-crime curve.”100 While the curve for violence tends to reach its zenith later than that for property crimes and decreases more slowly, it still follows the general pattern—an increase from late childhood, a peak in the late teenage years and a decline in the twenties as the brain matures.101 Individuals incarcerated for violent offenses historically have lower re-arrest rates than those incarcerated for nonviolent offenses, and within six years of release are just as likely to be re-arrested for a violent crime as those incarcerated for property offenses.102

Additionally, there is research that suggests after a certain period of time, a “point of redemption” is reached where an individual has no greater likelihood of committing a crime than anyone in the general population, even with regard to violent crime.103 The older the individual when they commit the offense, the quicker they are likely to reach this point of redemption, which is in line with the age-crime curve.104 Punishing them past this point is often counterproductive. The fate of “The Ungers,” a group of almost 200 elderly life-sentencers who were convicted of homicide or rape, provides a compelling case in point.105 Following their release from prison, their rate of re-offense was lower than 3 percent according to a 2018 analysis.106 Meanwhile, their early releases were estimated to save the state almost $1 million in averted incarceration costs per person.107

These facts suggest there is much to gain from rethinking the current responses to violent offenses. While the violent crime rate has plummeted to half of its early 1990 levels, high rates of incarceration remain the norm, in part due to the large number of individuals serving longer sentences for violent crimes.108 According to the latest estimates published by the Bureau of Justice Statistics, individuals convicted of violent offenses make up 55 percent of state prison populations.109 Thus, we cannot meaningfully decrease our prison populations and improve public safety by focusing on nonviolent offenses only. States which are serious about reforming their criminal justice system and making interventions effective must dismiss the fearmongering and take into account those who have committed violent crimes.

Thankfully, some programs have begun positively re-shaping our seemingly automatic tendency toward assuming a

98. Ibid.
101. Ibid.
104. Ibid.
106. Ibid.
107. Ibid.
109. Ibid.
violent offense necessitates long periods of incarceration. For example, a restorative justice curriculum in Brooklyn, New York for people charged with violent felonies—gunpoint robberies, serious assaults, shootings and other acts of street violence—has proven to be a particularly economical way to reduce recidivism. Less than 10 percent of participants are removed from the program because they commit a new crime. Nine out of every ten survivors of crime prefer this approach over incarceration when given the option, as it gives them an opportunity to be heard, have their pain recognized and potentially prevent others from going through the same suffering.

As this is the current state of affairs, it is natural to assume that both cash bail and pretrial detention are necessary to ensure the effective administration of justice. Some commentators argue that moving away from a reliance on cash bail verges on lunacy. While others have warned against a “staggering increase in homicides” should those in pretrial detention be released. However, in reality, neither of these criticisms ring true.

In the United States, several jurisdictions either place less emphasis on the practice or forego it altogether. In New Jersey, Alaska and Washington, D.C., cash bail has all but disappeared with courts now relying on defendant reporting and in-community supervision, only using pretrial detention as a last resort. In New Jersey, reforms that shifted the State’s focus from a cash bail system and toward a risk assessment process reduced the non-sentenced jail population by over 40 percent in just one year. Alaska’s reforms increased the numbers of detainees released on bail, while also keeping court appearance rates steady and reducing disparate impact on Native Americans in pretrial detention. The District of Columbia was one of the first jurisdictions in the United States to largely eliminate cash bail, and now some three decades later, 94 percent of individuals are released pretrial with 91 percent appearing for their court dates. This is all to say that there are numerous ways other to address the complexities of criminal justice administration.

Recently, additional jurisdictions in the United States have started to experiment with eliminating cash bail in an effort to relieve overcrowded jails. California has outright eliminated bail costs for numerous low-level offenses in order to reduce COVID-19 infection rates in its detention facilities. In response to a consent decree, Harris County, Texas, one of the largest jail systems in the country, has largely elimi-

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117. Ibid.


120. Ibid.


nated cash bail for misdemeanor charges. While cash bail can play a role in criminal justice, one could argue that the United States as a whole has leaned too heavily on its use.

Cash bail also plays a key role in deciding who is placed in pretrial detention. When bail is set higher than an individual charged with an offense is able to pay, the result is often pretrial detention. While the original intention of pretrial detention was to safeguard the public, the process has transformed into one that allows the potentially dangerous wealthy to walk free, but detains the benign poor. Of course there are circumstances where pretrial detention is ordered and bail withheld, but these cases are the exceptions rather than the rule.

However, pretrial detention, even independent of cash bail, still has negative impacts on the lives of those accused of an offense. For one, research suggests those in pretrial detention are more likely to be convicted of their accused offense than those who can afford to post bail. This is compounded with additional findings that, when jurisdictions move away from cash bail, they may see fewer plea deals and convictions. Both of these outcomes can be explained by the immense amounts of pressure that those in pretrial detention face to plead guilty to their charged offense. This pressure largely comes from the prospect that an individual may lose their job while awaiting trial, a period of time that can range anywhere from weeks to months. Should an individual accept a plea deal, they are often allowed to return home immediately until their sentencing hearing. These pleas—agreed to while under economic duress—not only curtail one’s agency to litigate their innocence, but also mark them in the long run as a convicted criminal, a demographic marker that has been proven to reduce lifetime earning potential by over 50 percent. If we truly value the presumption of innocence, then it should not matter whether someone awaits their trial from jail or the comfort of their own home. However, as it stands, we seem to judge those in pretrial detention as guilty before they even walk through the courtroom doors.

A common argument against the de-emphasis of cash bail and pretrial detention is that individuals will commit additional criminal offenses if they are released before trial. However, research on the impact of local bail reform efforts in places like Mecklenburg, North Carolina; Harris County, Texas; and Philadelphia, Pennsylvania, shows that jurisdictions can rethink bail policy without harming public safety. While far from a randomized controlled trial experiment, policy reactions to COVID-19 also support this finding. Municipalities large and small across the country that have placed tight restrictions on pretrial detention have yet to see any causally related spikes in crime. If arguments in favor of pretrial detention were to ring true, then we would be seeing massive spikes in crime among the now-released populations. Indeed, from the 1960s and through the late 1990s, there have been several events that reigned in pretrial detention that have not resulted in any noticeable spike in monitored crime statistics.

While the use of cash bail and pretrial detention in our criminal justice system are live issues of debate, one should not be put under the assumption that either are necessary; at least in their current practiced forms. It is clear from observed examples both at home and abroad that there are numerous viable alternatives to how the United States currently administers justice—many with more desirable outcomes.

128. Ibid.
132. Ibid.
133. Ibid.
137. Ibid.
POLICY SOLUTIONS TO DISCOURAGE MISINFORMATION AND FEAR MONGERING

Ensure Transparent and Robust Data Collection

Like many issues up for debate in the public forum, the absence of reliable data makes countering misinformation an exceedingly difficult task. As seen in the superpredator example, data has the potential to completely dispel misinformation in a relatively short period of time. However, this was only possible thanks to a pre-existing data collection framework administered by the federal government. Unfortunately, far too few parts of the criminal justice process benefit from regular, comprehensive and transparent data collection and publication, which makes accurate, timely diagnoses of policy problems and evaluations of policy solutions difficult. Consider that the Federal Bureau of Investigation’s (FBI) new National Use-of-Force Data Collection system only asks law enforcement agencies to report use-of-force incidents resulting in death, serious bodily injury, or the discharge of a weapon at or toward someone. This leaves out other more common, less lethal instances of force including the use of tasers, chemical irritants, batons and other projectiles. Moreover, reporting is voluntary, which leaves the robustness of the data up to the good will of reporting agencies. But incomplete data collection is not just seen in the front-end of the system; there is no national collection effort for juvenile recidivism metrics. And individual demographic information—even if it is collected at various points in the criminal justice process—is rarely published with statistics broken down by intersectional racial, ethnic and gender lines. Latinos, in particular, have often been left behind in state criminal justice data collection and reporting efforts, hampering them from advocating effectively for needed policy changes.

Fortunately, private organizations are pioneering ways to collect, amplify and analyze local and state criminal justice data to empower better advocacy and policymaking. Further, with increased national attention around matters of racial inequality following the death of George Floyd, data collection efforts have come to the forefront of many policymakers’ agendas. For example, while at least 21 states collected demographic data at every police stop in 2017, several more states are considering the creation of similar data collection schemes.

Recently, interest in data collection has extended past the frontline law enforcement officers and into the prosecutor’s office. Prosecutorial Performance Indicators has partnered with several State’s Attorney offices across the country to track and compare new metrics of prosecutorial performance beyond the simple, centuries old measure of raw convictions. These indicators range from “days until victim contact” to “prosecutorial involvement in community events,” which help to paint a more detailed picture of what being a “good prosecutor” truly means. In terms of data transparency, the Iowa Department of Human Rights is helping to lead the way in the criminal justice field by creating the EZAACD—an easily accessible, robust, and detailed data portal containing millions of data points on those who pass through the state’s courts. Such data collection systems can be used to not only address policy issues and devise solutions, but also stem the tide of misinformation. In short, we must be able to identify problems before we can begin to solve them. When we apply this lens of analysis to the issue of misinformation, the solution is data collection.

Support Research Funding and Evaluation

While data can certainly be a powerful tool to combat the spread of misinformation, data alone is useful only to those individuals who can understand it. To broaden the impact of collected data, it is recommended that institutions be better supplied with funding to conduct objective research into topics of public interest. Congress, along with nearly every state legislature, has a dedicated office or agency tasked with conducting empirical analysis of introduced legislation to help inform lawmakers. This governing innovation should be upscaled beyond the walls of the legislative chamber and expanded to benefit all citizens with an interest in civic engagement. Some states like Washington have already moved in this direction with the establishment of their own think tank: The Washington State Institute for Public Policy. This state institution is responsible for providing empirical cost-benefit analysis of both existing and proposed state policies for the public, helping the people of Washington to better understand the impact of their government’s actions. While such brick and mortar investments are encouraged,


140. Ibid.


144. Ibid.


148. Ibid.
they can be cost-prohibitive. For a more measured response, academic partnerships between smaller government agencies can fill many of the same functions as a single unitary policy institute with the added benefit of structural flexibility. In addition, there are always opportunities to pursue research partnerships with universities and other private institutions. While many larger municipalities are able to access such academic partnerships today, rural and smaller criminal justice institutions are in particular need of more academic research support. Moreover, high-quality, rigorous evaluations of local-level programs and services remain rare.

Utilize Public Information Campaigns

When data and analysis discover empirical truths that disprove misinformation, governments can take direct action and combat said misinformation by implementing public information campaigns, as appropriate. While such efforts may seem blunt, they can also be quite effective. When seat belt usage was found to have a strong correlation with the prevention of traffic fatalities, both state and federal governments spent millions of dollars to tell Americans to, “click it or ticket.” This public information campaign is considered a success and largely credited with changing seat belt usage trends in the United States. From 2000 to 2007, seat belt usage climbed 10 percent nationwide, with approval for strict enforcement of seat belt laws also climbing upwards of 70 percent.

While public information campaigns can have a positive impact, they can likewise have a negative or simply inert effect on the issue at hand. South Dakota learned this lesson when the state released an anti-meth campaign that proudly declared: “Meth. We’re on it.” This made South Dakota, and by proxy the state’s meth epidemic, the subject of ridicule instead of directing state citizens to addiction resources, which was the stated goal of the campaign. While the impact of public information campaigns can vary wildly, they should still be seriously considered as they are one of the only tools governments can use to directly combat widespread misinformation.

Align Incentives with Policy Innovation and Efficacy

Poor incentives intermixed with fear and misinformation often result in poor policy. For example, politicians and communities have frequently pitched new criminal justice facilities as a chance for increased economic opportunities for local residents, although these promises do not pan out in practice. For instance, while still promoting some of the same principles as reformers, bail bond industries have galvanized against policy measures that would greatly reduce the use of their services, arguing that they risk public safety.

To combat the impact of misinformation and fear-mongering in criminal justice policy, it is necessary to rethink the incentives faced by criminal justice actors to encourage policy innovation and efficacy rather than the status quo. To gain greater clarity in the private versus public prison debate and potentially improve efficacy in the long-term, scholars have suggested changing contracts with private companies to reward them according to outcomes such as reduced recidivism or increased employment among incarcerated individuals post-release. Similarly, in the public sector, states like California, Kansas and Illinois have used performance-based incentive funding to reduce probation failure rates, recidivism and supervision revocations, with some states saving hundreds of millions of dollars in the process. And many states have participated in the Justice Reinvestment Initiative, a “data-driven approach to criminal justice reform designed to examine and address correctional cost and population drivers to generate cost savings that can be reinvested in high-performing public safety strategies.”

To promote innovation and routine evaluation, policymakers should also consider increasing their use of sunset clauses, which allow legislation or regulatory boards to expire after a certain period of time unless the legislative body acts to reinstate its authority. These clauses can push policymakers to re-evaluate the outcomes of their policy actions and keep, remove or tweak the original policy as needed. Studies around the impact of sunset laws in Nevada and Minnesota

150. Ibid.
suggest these provisions can reap greater state savings.\textsuperscript{159} In addition, they may promote greater legislative oversight of state bureaucracy.\textsuperscript{160}

Finally, reducing the impact of fear and misinformation in public policy requires a shift from the current zero-sum policy framework, particularly in political debates. Policy reform is often evaluated in the public discourse by its biggest failure rather than the sum of its parts. As one example, New Jersey’s bail reform law received pushback after an individual released under the new law killed a man.\textsuperscript{161} Yet, while this event is no doubt catastrophic, scholarly evaluation of New Jersey’s bail reform law suggests it did not have a meaningful impact on crime or court appearance rates, but it did reduce the number of low-risk individuals behind bars and the total incarcerated population by thousands of individuals.\textsuperscript{162} Political leaders should also be rewarded in public discourse for acknowledging the negative consequences of the policies they promoted in the past. Public shaming for policy shifts in light of new information only encourages political actors to disavow such information and thus the need for change. Fortunately, within the criminal justice arena, individuals like President-elect Biden have begun to take steps to acknowledge and rectify the damage done. During an October 2020 Presidential debate, he admitted his tough-on-crime votes in the 90s were a mistake, a move which was well-received by some families impacted by the draconian laws.\textsuperscript{163}

CONCLUSION

We live in a world where public opinion can be swayed by a news cycle that changes minute to minute. In such a highly dynamic media environment, it comes as no surprise that facts can be bent and logic twisted to create fear and misinformation on a mass scale that is instantaneously broadcast to an audience of millions. However, misinformation is not a new problem and members of Congress on both sides of the aisle have contributed to it. Fear-mongering and misinformation have taken hold on the left in debates around menthol laws and regulation, and on the right when in policing reform discussions—often to the disadvantage of Black Americans.\textsuperscript{164}

Fighting misinformation can often be difficult, especially within the criminal justice context. Our psychology predisposes us to believe simple solutions when prompted with fear, and in many life-threatening situations, this quick reasoning can save lives. However, these psychological tendencies are often preyed upon by misinformation that makes weak or unpalatable reasoning seem legitimate. When this thinking is co-opted into legislating criminal justice policy, the consequences are often disastrous.

To fight misinformation on a wide scale, we must utilize every tool at our disposal and attempt to bolster our institutions against its influence. Policymakers should take a renewed interest in data collection, analysis and communication: the frontline tools used to combat widespread misinformation. To protect our institutions, policy debates should focus on empirical outcomes, encourage the use of sunset clauses in legislation and allow politicians to change their views without scorn to encourage more open-minded debate.

With the proliferation of terms like “alternative facts” and “fake news,” clear-headed reasoning in criminal justice is important; now more than ever. When the historical context is understood and the right tools are utilized, misinformation loses its destructive power and ultimately becomes just another bad idea to discard.

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\textsuperscript{159} Ibid. p. 9.
\textsuperscript{160} Ibid. p. 17-19.