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FAKE NEWS, REAL POLICY: COMBATting FEAR AND MISINFORMATION IN CRIMINAL JUSTICE

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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 found 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...¹

1. President Richard Nixon, "Remarks at the Opening Session of the Governors' Conference at the Department of State," The Department of State: Governors' Conference, Dec. 3, 1969. <https://www.presidency.ucsb.edu/documents/remarks-the-opening-session-the-governors-conference-the-department-state>.

CONTENTS

Introduction	1
How Misinformation Influences Decision-Making and Policy	2
Debunking Modern Criminal Justice Myths	4
The "Juvenile Superpredator" Myth	4
The Crack is Powder Cocaine's More Destructive Brother Myth	5
The Private Corrections Industry is Driving Mass Incarceration Myth	7
The Incurability of People Convicted of Violent Offenses Myth	8
The Moving Away from Cash Bail and Pretrial Detention is Bad for Communities Myth	10
Policy Solutions to Discourage Misinformation and Fear Mongering	12
Ensure Transparent and Robust Data Collection	12
Support Research Funding and Evaluation	12
Utilize Public Information Campaigns	13
Align Incentives with Policy Innovation and Efficacy	13
Conclusion	14
About the Authors	14

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.² 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.³

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.⁴ Indeed, many American youth continue to use illicit drugs at high rates.⁵ 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

2. Matthew Lassiter, "Impossible Criminals: The Suburban Imperatives of America's War on Drugs," *Journal of American History* 102:1 (June 2015), p. 126-140. <https://academic.oup.com/jah/article/102/1/126/686691>.

3. For an overview on this topic, See Jennifer Senior, "'Locking Up Our Own,' What Led to Mass Incarceration of Black Men," *The New York Times*, April 11, 2017. <https://www.nytimes.com/2017/04/11/books/review-locking-up-our-own-james-forman-jr.html>; James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America*, (Farrar, Straus, and Giroux, 2017).

4. Dan Werb, "Post-war prevention: Emerging frameworks to prevent drug use after the War on Drugs," *International Journal of Drug Policy* 51 (2018), pp. 160-164. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6042507/>; See, e.g., Lauryn Saxe Walker, and Briana Mezuk, "Mandatory minimum sentencing policies and cocaine use in the U.S., 1985-2013," *BMC International Health and Human Rights* 18:43 (2018). <https://doi.org/10.1186/s12914-018-0182-2>.

5. National Institute on Drug Abuse, "Monitoring the Future Survey: High School and Youth Trends Drug Facts," National Institutes of Health, Dec. 18, 2019. <https://www.drugabuse.gov/publications/drugfacts/monitoring-future-survey-high-school-youth-trends>.

largely over-stated.⁶ 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.⁷

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 aggravated assaults rose by about 5 percent.⁸ 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 as early prison releases due to the COVID-19 pandemic, and civil unrest.⁹ 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.¹⁰

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 dra-

matic or weighted incidents.¹¹ 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.¹² On top of this, the media, more often than not, focuses on policy failures rather than policy successes.¹³

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.¹⁴ When a fear response occurs, the nervous system is also activated, hormones like adrenaline are released and one's breathing and heart rate increase.¹⁵ 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.¹⁶ Indeed, fear is

6. See, e.g., Hans Olav Melberg et al., "Is cannabis a gateway to hard drugs?", *Empirical Economics*, 38:3 (2009), p. 601-602. <https://link.springer.com/article/10.1007/s00181-009-0280-z>; National Institute of Drug Abuse, "Marijuana Research Report," U.S. Dept. of Health and Human Services, pp. 5-24. <https://www.drugabuse.gov/download/1380/marijuana-research-report.pdf?v=d9e67cbd412ae5f340206c1a0d9c2bfd>.

7. Yu-Wei Luke Chu, "Do Medical Marijuana Laws Increase Hard-Drug Use," *Journal of Law and Economics* 58 (2015), pp. 511-512. <https://www.jstor.org/stable/10.1086/684043>.

8. See, e.g., Richard Rosenfeld and Ernesto Lopez, "Pandemic, Social Unrest, and Crime in U.S. Cities," National Commission on COVID-19 and Criminal Justice, July 2020, p. 3. <https://covid19.councilonci.org/2020/07/28/crime>; FBI National Press Office, "Overview of Preliminary Uniform Crime Report, January-June, 2020," Press Release, Sept. 15, 2020. <https://www.fbi.gov/news/pressrel/press-releases/overview-of-preliminary-uniform-crime-report-january-june-2020>.

9. Carmen George, "Fresno homicides and shootings are growing. Here's what law enforcement is doing about it," *The Fresno Bee*, Oct. 21, 2020. <https://www.fresnobee.com/news/local/crime/article246612438.html>; Kristine Phillips and Kevin Johnson, "Trump emphasizes violence in cities: Are his 'law and order' tactics working?" *USA Today*, Oct. 1, 2020. <https://www.usatoday.com/story/news/politics/2020/09/29/trump-touts-law-and-order-crackdown-violent-cities-working/357089400/>; Sean Kennedy, "You're More Likely to Catch Covid at Home Than in Jail," *The Wall Street Journal*, July 24, 2020. <https://www.wsj.com/articles/youre-more-likely-to-catch-covid-at-home-than-in-jail-11595628804>.

10. Jeff Asher and Ben Horwitz, "It's Been 'Such a Weird Year.' That's Also Reflected in Crime Statistics," *The New York Times*, July 6, 2020. <https://www.nytimes.com/2020/07/06/upshot/murders-rising-crime-coronavirus.html>.

11. Johns Hopkins Medical Institutions, "Why Emotionally Charged Events Are So Memorable," *Science Daily*, Oct. 7, 2020. <https://www.sciencedaily.com/releases/2007/10/071004121045.htm>; Stuart Soroka et al., "Cross-national evidence of negativity bias in psychophysiological reactions to news," *PNAS* 116:38 (2019), pp. 18888-18892. <https://www.pnas.org/content/116/38/18888>.

12. For further reading on the need for new metrics in criminal justice, see Cecelia Klingele, "Measuring Change: From Rates of Recidivism to Markers of Desistance," *The Journal of Criminal Law and Criminology* 109:4 (2019), pp. 769-816. <https://www.jstor.org/stable/48572943>.

13. See, e.g., Joey Hedger, "Here's the Bad News: Public Trust is Tanking, Negative Media is Growing," *Corrections Today* 79:5 (2017), pp. 40-79; Lars Kai Hansen et al., "Good Friends, Bad News—Affect and Virality on Twitter," *Future Information Technology* 185 (2011), pp. 34-43. https://link.springer.com/chapter/10.1007/978-3-642-22309-9_5.

14. Stefan Schulreich et al., "Fear-induced increases in loss aversion are linked to increased negative-value coding," *Social Cognitive and Affective Neuroscience* 15:6 (2020), pp. 661-670. <https://academic.oup.com/scn/article/15/6/661/5869327>.

15. "Understanding the Science of Fear," *Northwestern Medicine*, 2020. <https://www.nm.org/healthbeat/healthy-tips/emotional-health/5-things-you-never-knew-about-fear>.

16. Ibid.

associated with a greater evaluation of risks and devaluations of potential gains.¹⁷ 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.¹⁹ 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.²¹ 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 per-

ceive 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

17. Joe Pierre, “How Does Fear Influence Risk Assessment and Decision-making?,” *Psychology Today*, July 15, 2020. <https://www.psychologytoday.com/us/blog/psych-unseen/202007/how-does-fear-influence-risk-assessment-and-decision-making>.

18. Johns Hopkins Medical Institutions. <https://www.sciencedaily.com/releases/2007/10/071004121045.htm>.

19. Katy Steinmetz, “How Your Brain Tricks You Into Believing Fake News,” *Time Magazine*, August 9, 2018. <https://time.com/5362183/the-real-fake-news-crisis>.

20. For more information, see Ullrich K.H. Ecker and Li Chang Ang, “Political Attitudes and the Processing of Misinformation Corrections,” *Political Psychology* 40:2 (2019), pp. 241-260. <https://onlinelibrary.wiley.com/doi/abs/10.1111/pops.12494>.

21. Kevin Drakulich, “Social Capital, Information, and Perceived Safety from Crime: The Differential Effects of Reassuring Social Connections and Vicarious Victimization,” *Social Science Quarterly* 96:1 (2015), pp. 184-188. <https://onlinelibrary.wiley.com/doi/abs/10.1111/ssqu.12096>.

22. See, e.g., Alexa Singer et al., “Victimization, Fear of Crime, and Trust in Criminal Justice Institutions: A Cross-National Analysis,” *Crime and Delinquency* 65:6 (2019), pp. 831-839. https://www.researchgate.net/profile/Peter_Lehmann7/publication/326553253_Victimization_Fear_of_Crime_and_Trust_in_Criminal_Justice_Institutions_A_Cross-National_Analysis/links/5cc075e592851c8d2202d955/Victimization-Fear-of-Crime-and-Trust-in-Criminal-Justice-Institutions-A-Cross-National-Analysis.pdf.

23. John Gramlich, “Voters’ perceptions of crime continue to conflict with reality,” Pew Research Center, Nov. 16, 2016. <https://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality>; Christopher Ambrey et al., “Perception or Reality, What Matters Most When it Comes to Crime in Your Neighborhood,” *Social Indicators Research* 119:2 (2014), pp. 891-894. <https://link.springer.com/article/10.1007%2F11205-013-0521-6>.

24. “In Depth: Topics A to Z: Crime,” Gallup, last accessed Nov. 4, 2020. <https://news.gallup.com/poll/1603/crime.aspx>; Maggie Koerth and Amelia Thomson-DeVeaux, “Many Americans Are Convinced Crime is Rising in the U.S. They’re Wrong,” *FiveThirtyEight*, Aug. 3, 2020. <https://fivethirtyeight.com/features/many-americans-are-convinced-crime-is-rising-in-the-u-s-theyre-wrong>; FBI National Press Office, “FBI Releases 2019 Crime Statistics,” Press Release, Sept. 28, 2020. <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-crime-statistics>.

25. See, e.g., Valerie Callahan, “Media Consumption, Perceptions of Crime Risk and Fear of Crime: Examining Race/Ethnic Difference,” *Sociological Perspectives* 55:1 (2012), pp. 105-108. <https://journals.sagepub.com/doi/abs/10.1525/sop.2012.55.1.93>; Luzi Shi, “A Neglected Population: Media Consumption, Perceived Risk, and Fear of Crime Among International Students,” *Journal of Interpersonal Violence* (2018), p. 13-14. <https://journals.sagepub.com/doi/abs/10.1177/0886260518766428>.

26. Gary Kleck and Dylan Baker Johnson, “Does Crime Cause Punitiveness,” *Crime and Delinquency* 63:12 (2017), p. 13. <https://journals.sagepub.com/doi/abs/10.1177/001128716638503>.

27. “Texas police department slams Tucker Carlson for ‘absolutely inaccurate’ report about protest response,” *CBS News*, June 16, 2020. <https://www.wivb.com/news/top-stories/texas-police-department-slams-tucker-carlson-for-absolutely-inaccurate-report-about-protest-response>; Terence Trouillot, “How a Trained Journalist is Using Public Art to Expose Media Racism,” *ArtNetNews*, June 1, 2017. <https://news.artnet.com/art-world/alexandra-bell-public-artwork-965666>; Tanya Serisier, “Sex Crimes and the Media,” *Oxford Research Encyclopedia of Criminology and Criminal Justice*, January 2017. https://www.researchgate.net/profile/Tanya_Serisier/publication/335563976_Sex_Crimes_and_the_Media/links/5d6d1936a6fdcc547d72c36/Sex-Crimes-and-the-Media.pdf; Hunter Pauli, “Why I quit: Local newspapers can needlessly ruin lives for empty clicks,” *The Guardian*, Aug. 8, 2017. <https://www.theguardian.com/media/2017/aug/08/local-news-crime-reporting-quitting-journalism>.

28. For an overview of racial perspectives on crime and how they correspond with support for punitive policies, see Nazgol Ghandnoosh, “Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies,” *The Sentencing Project*, Sept. 3, 2014. <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies>.

Democratic Presidential candidate Michael Dukakis.²⁹ 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.³⁰

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.³¹ 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.³² 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.³³ 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.³⁴

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.³⁵ 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.³⁶ 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.³⁷

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.³⁸ 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 DiIulio, Jr. described the coming of the “superpredators.”³⁹ 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.”⁴⁰ After publication, this notion of juvenile superpredators slowly seeped into the common lexicon, famously making

29. Allyson Chi, “Trump revives ‘Willie Horton’ with ad linking illegal immigrant killer to Democrats,” *Chicago Tribune*, Nov. 1, 2018. <https://www.chicagotribune.com/nation-world/ct-trump-immigration-ad-20181101-story.html>.

30. David Eitle and John Taylor, “Are Hispanics the new ‘Threat’? Minority Group Threat and Fear of Crime in Miami-Dade County,” *Social Science Research* 37:4 (2008), pp. 1102-1115. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4221266>; Justin Pickett et al., “Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites’ Perceptions of Violence: Do Racial Stereotypes Matter,” *Criminology* 50:1 (2012), pp. 151-153, 169-172. <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.2011.00255.x>.

31. For a brief overview of the literature on the fear of crime and policy preferences, see Alexa Singer et al., “Victimization, Fear of Crime, and Trust in Criminal Justice Institutions: A Cross-National Analysis,” *Crime and Delinquency* 65:6 (2019), pp. 825-828. https://www.researchgate.net/profile/Peter_Lehmann7/publication/326553253_Victimization_Fear_of_Crime_and_Trust_in_Criminal_Justice_Institutions_A_Cross-National_Analysis/links/5cc075e592851c8d2202d955/Victimization-Fear-of-Crime-and-Trust-in-Criminal-Justice-Institutions-A-Cross-National-Analysis.pdf.

32. Arnaud Philippe and Aurélie Ouss, “‘No Hatred or Malice, Fear or Affection’: Media and Sentencing,” *Journal of Political Economy* 126:5 (2018), pp. 2136. <https://www.journals.uchicago.edu/doi/abs/10.1086/699210>.

33. Ibid, pp. 2136, 2153-2158.

34. Kleck and Johnson, p. 20. <https://journals.sagepub.com/doi/abs/10.1177/001128716638503>; Jonathan Itravia, “Investigating the Influence of Social Media Consumption on Punitive Attitudes Among a Sample of U.S. University Students,” *International Journal of Offender Therapy and Comparative Criminology* 63:2 (2019), pp. 4-8. <https://journals.sagepub.com/doi/abs/10.1177/0306624X18786610>.

35. Matthew Lassiter, “Impossible Criminals: The Suburban Imperatives of America’s War on Drugs,” *Journal of American History* 102:1 (June 2015), p. 126-140. <https://academic.oup.com/jah/article/102/1/126/686691>.

36. Ibid.

37. Dan Baum, “Legalize it All: How to win the war on drugs,” *Harper’s Magazine*, April 2016. <https://harpers.org/archive/2016/04/legalize-it-all>.

38. Kelly Welch and Allison Ann Payne, “Racial Threat and Punitive School Discipline,” *Social Problems* 57:1 (2010), pp. 36-41. https://www.researchgate.net/profile/Kelly_Welch4/publication/249985619_Racial_Threat_and_Punitive_School_Discipline/links/54356dc00cf2bfff1f2b0343/Racial-Threat-and-Punitive-School-Discipline.pdf.

39. John DiIulio, “The Coming of the Superpredators,” *Washington Examiner*, Nov. 27, 1995. <https://washex.am/2SX0tmB>.

40. William J. Bennett et al., *Body Count: Moral Poverty—and how to Win America’s War Against Crime and Drugs* (Simon & Schuster, 1996).

an appearance on national television when then-First Lady Hillary Clinton made mention of “superpredators [with] no conscience; 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 perverse 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 policy.

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-

41. Hillary Clinton, “Hillary Clinton Campaign Speech,” *C-SPAN*, Jan. 25, 1996. <https://www.c-span.org/video/?69606-1/hillary-clinton-campaign-speech>.

42. Elizabeth Becker, “As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets,” *The New York Times*, Feb. 9, 2001. <https://nyti.ms/34Whq8a>.

43. Criminal Justice Information Service, “UCR Publications,” Federal Bureau of Investigations, last accessed Nov. 3, 2020. <https://bit.ly/2SQU5z9>.

44. Lara A. Bazelon, “Exploding The Superpredator Myth: Why Infancy Is The Preadolescent’s Best Defense In Juvenile Court,” *New York Law Review*, 75:159 (April 2000). <https://bit.ly/312LUnU>; See, e.g., Kenneth A. Dodge, “Framing Public Policy and Prevention of Chronic Violence in American Youths,” *The American Psychologist* 63:7 (October 2008), pp. 573-590. <https://bit.ly/373980U>.

45. Jesenia M. Pizzaro and Jegg Gruenewald, “Juvenile ‘Super-Predators’ in the News: A Comparison of Adult and Juvenile Homicides,” *Journal of Criminal Justice and Popular Culture* 14:1 (January 2007), pp. 84-111. <https://bit.ly/3k8hyYs>.

46. Franklin D. Gilman Jr. and Shanto Iyengar, “The Superpredator Script,” *The Nieman Foundation for Journalism at Harvard University*, 52:4 (Winter 1998). <https://bit.ly/371knHe>.

47. Howard N. Snyder, “Juvenile Justice Bulletin: Juvenile Arrests 1996,” U.S. Dept. of Justice, November 1997. <https://bit.ly/2SQWV7I>.

48. Patrick Griffin et al., “Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting,” U.S. Dept. of Justice, September 2011. <https://www.ncjrs.gov/pdffiles1/ojtdp/232434.pdf>.

49. Anne Teigen, “Juvenile Age of Jurisdiction and Transfer to Adult Court Laws,” National Conference of State Legislatures, July 1, 2020. <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>.

50. See, e.g., Bennett et al.; John DiLulio, “The Coming of the Superpredators,” *Washington Examiner*, Nov. 27, 1995. <https://washex.am/2SX0tmB>.

51. See, e.g., Shay Bilchick, “1999 National Report Series: Challenging the Myths,” U.S. Dept. of Justice, February 2000. <https://bit.ly/34SaSaB>.

52. See, e.g., “Crime,” Gallop Polling, last accessed Nov. 4, 2020. <https://bit.ly/34SS8b3>; Criminal Justice Information Service. <https://bit.ly/2SQU5z9>.

53. See, e.g., Glenn Muschert, “The Columbine Victims and the Myth of the Juvenile Superpredator,” *Youth Violence and Justice* 5:4 (2007), pp. 351-366. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.557.1686&rep=rep1&type=pdf>.

54. Jacob Jarvis, “Trump Accuses Biden of Using ‘Super Predator’ Term. Here’s What He Actually Said,” *Newsweek*, Oct. 23, 2020. <https://www.newsweek.com/trump-biden-super-predator-debate-1541565>.

55. See, e.g., Keith Harriston and Sally Jenkins, “Maryland Basketball Star Len Bias Is Dead at 22: Traces of Cocaine Found in System,” *The Washington Post*, June 20, 1986. <https://wapo.st/3nXEjRw>; Scoop Jackson, “The Legend of Len Bias,” *ESPN Magazine*, 2006. <https://es.pn/378vZsd>.

ed heart attack just before his wedding.⁵⁶ 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.⁵⁷

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.⁵⁸ This disparity in sentencing was a response to the rising public fear concerning the then-new substance crack cocaine.⁵⁹ 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."⁶⁰

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.⁶¹

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.⁶² 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."⁶³

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.⁶⁴ 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.⁶⁵ 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.⁶⁶

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 18:1.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰

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-

56. Steve Wilstein, "Rogers' Death is a Second Warning Against Drugs," *Associated Press*, June 30, 1986. <https://bit.ly/2Fu7p9G>.

57. Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America*, (Oxford University Press, 2014), pp. 118.

58. The Anti-Abuse Drug Act of 1986, Title I, Public Law 99-570, Oct. 27, 1986. <https://bit.ly/2G3QN8V>

59. Murakawa.

60. Jane Gross, "A New, Purified Form of Cocaine Causes Alarm as Abuse Increases," *The New York Times*, Nov. 29, 1985. <https://nyti.ms/2HFNOiP>.

61. Todd S. Purdum, "The Crime-Bill Debate Shows How Short Americans' Memories Are," *The Atlantic*, Sept. 12, 2019. <https://bit.ly/2TBUsOo>.

62. D. K. Hatsukami and M. W. Fischman, "Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?," *Journal of American Medicine* 276:19, (November 1996), p. 1580. <https://pubmed.ncbi.nlm.nih.gov/8918856>.

63. Diana E. Murphy et al., "Cocaine and Federal Sentencing Policy," United States Sentencing Commission, May 2002. <https://bit.ly/2HvfrQJ>.

64. Ibid.

65. Joseph J. Palomar et al., "Powder cocaine and crack use in the United States: An examination of risk for arrest and socioeconomic disparities in use," *Drug and Alcohol Dependence*, 149 (April 2015), pp. 108-116. <https://bit.ly/2Ty8W1C>.

66. Arthur Rizer and Jonathan Haggerty, "How the FDA's Proposed Menthol Ban Could Harm Black Communities," *Filter Magazine*, Feb. 25, 2019. <https://filtermag.org/how-the-fdas-proposed-menthols-ban-could-harm-black-communities>.

67. The Fair Sentencing Act of 2010, Title I, Public Law 111-220, Aug. 3, 2010. <https://bit.ly/3kCnfy8>; See, e.g., Patti B. Saris et al., "Report to the Congress: Impact of the Fair Sentencing Act of 2010," United States Sentencing Commission, August 2015. <https://bit.ly/2HEy4kK>.

68. Ibid.

69. Nathan James, *The First Step Act of 2018: An Overview*, *The Congressional Research Service*, March 4, 2019, p. 8. <https://crsreports.congress.gov/product/pdf/R/R45558>.

70. "First Step Act Implementation Fiscal Year 2020 90-Day Report," U.S. Department of Justice, June 2, 2020, p. 3. <https://www.ncjrs.gov/pdffiles1/nij/254799.pdf>.

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 opportu-

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

71. “The Biden Plan for Strengthening America’s Commitment to Justice,” The Biden-Harris Campaign, last accessed Nov. 4, 2020. <https://joebiden.com/justice/#>.

72. See, e.g., Ellen Donnelly, “The Politics of Racial Disparity Reform: Racial Inequality and Criminal Justice Policymaking in the United States,” *American Journal of Criminal Justice* 42:1 (2017), p. 15-20. <https://link.springer.com/content/pdf/10.1007/s12103-016-9344-8.pdf>.

73. Sen. Bernie Sanders, “Sanders, House Leaders Introduce Bill to Ban Private Prisons,” Press Release, Sept. 17, 2015. <https://www.sanders.senate.gov/newsroom/press-releases/sanders-house-leaders-introduce-bill-to-ban-private-prisons>.

74. *Ibid.*

75. Paige St. John, “Gov. Jerry Brown moves ahead with second private-prison deal,” *Los Angeles Times*, Oct. 15, 2013. <https://www.latimes.com/politics/la-xpm-2013-oct-15-la-me-ff-brown-moves-ahead-with-second-private-prison-deal-20131015-story.html>; Kamala Harris (@KamalaHarris), “Private prisons that profit off the incarceration of human beings are morally wrong. Thank you, Assemblywoman @Daniele4NV, for spearheading the push to make Nevada the fourth state in the country to ban private prisons,” May 30, 2019, 1:02 PM. Tweet. <https://twitter.com/kalaharris/status/1134142934905999364?lang=en>.

76. “The Biden Plan for Strengthening America’s Commitment to Justice.” <https://joebiden.com/justice/#>.

77. Lilly Fowler, “Washington could become the next state to ban private prisons,” *Crosscut*, Jan. 23, 2020. <https://crosscut.com/2020/01/washington-could-become-next-state-ban-private-prisons>.

78. Ryan Kish and Amy Lipton, “Do Private Prisons Really Offer Savings Compared With Their Public Counterparts,” *Economic Affairs* 33:1 (2013), p. 93-107. <https://onlinelibrary.wiley.com/doi/abs/10.1111/ecaf.12005>.

79. Megan Mumford et al., “The Economics of Private Prisons,” The Hamilton Project, October 2016, p. 4. https://www.hamiltonproject.org/assets/files/economics_of_private_prisons.pdf; Kara Gotsch and Vinay Basti, “Capitalizing on Incarceration: U.S. Growth in Private Prisons,” The Sentencing Project, Aug. 2, 2018. <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons>.

80. Paul Ashton and Amanda Petteruti, “Gaming the System: How The Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies,” Justice Policy Institute, June 2011. http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf.

81. Office of the Inspector General, “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons,” U.S. Dept. of Justice, August 2016, p. 14. <https://oig.justice.gov/reports/2016/e1606.pdf>.

82. *Ibid.*

83. Laura Marushak and Todd Minton, “Correctional Populations in the United States, 2017-2018,” Bureau of Justice Statistics, August 2020, p. 15. <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf>.

84. *Ibid.*

are driving prison population growth is scant; and arguably, public-sector employees have an even greater incentive to lobby for incarceration growth.⁸⁵

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.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.⁸⁷ Additionally, private facilities had fewer sexual misconduct allegations and positive drug tests among incarcerated individuals.⁸⁸

Up to this point, the literature is not clear on whether public or private facilities are, as a whole, better.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.⁹⁰

85. John Pfaff, "Five myths about prisons," *The Washington Post*, May 17, 2019. https://www.washingtonpost.com/outlook/five-myths/five-myths-about-prisons/2019/05/16/953304ea-7759-11e9-b3f5-5673edf2d127_story.html; Ed Krayewski, "Are For-Profit Prisons, or Public Unions, the Biggest Lobby No One's Talking About?," *Reason*, June 2, 2015. <https://reason.com/2015/06/02/are-for-profit-prisons-or-public-unions>.

86. Civil Rights Division, "Investigation of Alabama's State Prisons for Men," U.S. Dept. of Justice, April 2, 2019, pp. 2-3. <https://www.justice.gov/opa/press-release/file/1150276/download>.

87. Office of the Inspector General, p. 23. <https://oig.justice.gov/reports/2016/e1606.pdf>.

88. *Ibid.* p. 44.

89. See, e.g., Sarah Sayed et al., "Comparing the Rates of Misconduct Between Public and Private Facilities in Texas," *Crime and Delinquency* 66:9 (2020), pp. 1217-1241. <https://journals.sagepub.com/doi/abs/10.1177/001128719897236>; Grant Duwe and Valerie Clark, "The Effects of Private Prison Confinement on Offender Recidivism: Evidence from Minnesota," *Criminal Justice Review* 38:3 (2013), pp. 375-394. <https://journals.sagepub.com/doi/abs/10.1177/0734016813478823>.

90. Andrea Lindsey et al., "The Privatization Debate: A Conceptual Framework for Improving (Public and Private) Corrections," *Journal of Contemporary Criminal Justice* 32:4 (2016), pp. 308-327. <https://journals.sagepub.com/doi/abs/10.1177/1043986216660006>.

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.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.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 Incurability 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.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.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.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.⁹⁶

91. Andrew Kenney, "Hundreds in prison limbo after Denver council breaks up with halfway house operators," *The Denver Post*, Aug. 9, 2019. <https://www.denverpost.com/2019/08/07/denver-council-geo-corecivic-contract-immigration>.

92. Elise Schmelzer, "Denver city council to consider extending halfway house contract with private prison company," *The Denver Post*, Feb. 3, 2020. <https://www.denverpost.com/2020/02/03/denver-corecivic-halfway-house>.

93. "35 States Reform Criminal Justice Policies Through Justice Reinvestment," The Pew Charitable Trusts, July 2018. https://www.pewtrusts.org/-/media/assets/2018/07/pspp_reform_matrix.pdf.

94. Timothy Hughes and Doris James Wilson, "Reentry Trends in the United States," Bureau of Justice Statistics, revised Oct. 30, 2020. <https://www.bjs.gov/content/reentry/reentry.cfm>.

95. Alexi Jones, "Reforms without Results: Why states should stop excluding violent offenses from criminal justice reforms," Prison Policy Initiative, April 2020. <https://www.prisonpolicy.org/reports/violence.html>.

96. "Criminal Records and Reentry Search by State," National Conference of State Legislatures, Aug. 14, 2020. <https://www.ncsl.org/research/civil-and-criminal-justice/criminal-records-and-reentry-search-by-state-law.aspx>.

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 low-

er 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 lifers, most of whom 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 reshaping our seemingly automatic tendency toward assuming a

97. “Defining Violence,” Justice Policy Institute, Aug. 23, 2016, pp. 9-13. http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf.

98. *Ibid.*

99. *Ibid.*; See, e.g., Carimah Townes, “Missouri dooms countless children to the school-to-prison pipeline The school-to-prison pipeline is about to get worse,” *Think Progress*, Dec. 21, 2016. <https://thinkprogress.org/missouri-school-felonies-d840e8ec7242>; Eli Hager, “When ‘Violent Offenders’ Commit Nonviolent Crimes,” The Marshall Project, April 3, 2019. <https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes>.

100. National Institute of Justice, “From Juvenile Delinquency to Young Adult Offending,” U.S. Dept. of Justice, March 10, 2014. <https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending>.

101. *Ibid.*

102. Mariel Alper et al., “2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014),” Bureau of Justice Statistics, May 2018, pp. 10-12. <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

103. Alfred Blumstein and Kiminori Nakamura, “‘Redemption’ in an Era of Widespread Criminal Background Checks,” *National Institute of Justice Journal* 263 (2009), pp. 12-13. <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>.

104. *Ibid.*

105. “The Ungers, Five Years and Counting,” Justice Policy Institute, November 2018, pp. 2, 3-4. http://www.justicepolicy.org/uploads/justicepolicy/documents/Unger_Fact_Sheet.pdf.

106. *Ibid.*

107. *Ibid.*

108. John Gramlich, “5 facts about crime in the U.S.” Pew Research Center, October 17, 2019. <https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/>; E. Ann Carson, “Prisoners in 2019,” Bureau of Justice Statistics, October 2020, p. 20. <https://www.bjs.gov/content/pub/pdf/p19.pdf>.

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.¹¹⁰ Less than 10 percent of participants are removed from the program because they commit a new crime.¹¹¹ 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.¹¹²

The Moving Away from Cash Bail and Pretrial Detention is Bad for Communities Myth

Bail—the practice of paying a cash deposit to be released from jail before trial—was an inherited trait from the United Kingdom’s common law system, a legal landscape that still informs many of the judicial traditions we hold today.¹¹³ Currently, cash bail and pretrial detention aim to fulfill two respective goals: to encourage the return of those on trial for their court dates, and the reduction of risk to public safety or court proceedings.¹¹⁴ Unlike the vast majority of countries that also share the common law system, the United States relies heavily on the use of cash bail and liberal application of pretrial detention to meet these two goals.¹¹⁵ In fact, around 470,000 people are currently waiting for their trial in jail, largely due to an inability to post bail.¹¹⁶ These individuals must await trial incarcerated as if they were already sentenced, while still presumed innocent in the eyes of the law.¹¹⁷

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.¹¹⁸ While others have warned against a “staggering increase in homicides” should those in pretrial detention be released.¹¹⁹ However, in reality, neither of these criticisms ring true.¹²⁰

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.¹²¹ 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.¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵ In response to a consent decree, Harris County, Texas, one of the largest jail systems in the county, has largely elimi-

110. For more information, see “Common Justice Model,” Common Justice, last accessed Nov. 4, 2020. https://www.commonjustice.org/common_justice_model.

111. Michelle Alexander, “Reckoning with Violence,” *The New York Times*, March 3, 2019. <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html>.

112. Danielle Sered, “Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration,” Vera Institute for Justice, 2017, p. 16. <https://d3n8a8pro7vhtx.cloudfront.net/commonjustice/pages/82/attachments/original/1506608259/accounting-for-violence.pdf?1506608259>.

113. Matthew J. Hegreness, “America’s Fundamental and Vanishing Right to Bail,” *Arizona Law Review*, 55:4. <https://arizonalawreview.org/americas-fundamental-and-vanishing-right-to-bail>.

114. Tracey Meares and Arthur Rizer, “The Radical Notion of the Presumption of Innocence,” *The Square One Justice Project*, May 21, 2020. <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>

115. Lars Trautman, “Ending The American Bail Racket Forever,” *The American Conservative*, Oct. 4, 2018. <https://bit.ly/3e00zFL>.

116. Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” *The Prison Policy Initiative*, March 24, 2020. <https://www.prisonpolicy.org/reports/pie2020.html#fnref:3>.

117. *Ibid.*

118. Bob McManus, “Cuomo, de Blasio see the light on the lunatic new bail law,” *The New York Post*, Jan. 6, 2020. <https://nypost.com/2020/01/06/cuomo-de-blasio-see-the-light-on-the-lunatic-new-bail-law>.

119. Tim Arango, “In California, Criminal Justice Reform Offers a Lesson for the Nation,” *The New York Times*, Jan. 21, 2019. <https://www.nytimes.com/2019/01/21/us/california-incarceration-reduction-penalties.html>.

120. *Ibid.*

121. James Brooks, “Goodbye bail: Alaska switches to new system of criminal justice,” *Juneau Empire*, Dec. 20, 2017. <https://bit.ly/2TB6dVb>; Mori Rothman, “New Jersey eliminates most cash bail, leads nation in reforms,” *PBS News Hour*, July 22, 2017. <https://to.pbs.org/3ouEns5>; “PSA Programs and Services,” *Pretrial Services Agency of the District of Columbia*, last accessed Oct. 27, 2020. <https://bit.ly/34CUZ9n>.

122. Diana Dabruzzo, “New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In,” *Arnold Ventures*, Nov. 14, 2019. <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/#:~:text=The%20MDRC%20analysis%20found%20that,people%20in%20jail%20awaiting%20trial>.

123. Alaska Criminal Justice Commission, “2018 Annual Report,” *The State of Alaska*, Nov. 1, 2018. <https://s3.amazonaws.com/arc-wordpress-client-uploads/adn/wp-content/uploads/2018/11/02093414/ACJC-Annual-Report-2018.pdf>.

124. Colin Doyle et al., “Bail Reform: A Guide for State and Local Policymakers,” *Harvard Law School Criminal Justice Policy Program*, February 2019, p. 13. http://cjjp.law.harvard.edu/assets/BailReform_WEB.pdf.

125. Darrell Smith, “Judicial Council of California approves \$0 bail for low-level suspects,” *The Sacramento Bee*, April 8, 2020. <https://bit.ly/31KTQe0>.

nated cash bail for misdemeanor charges.¹²⁶ 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.¹²⁷ Of course there are circumstances where pretrial detention is ordered and bail withheld, but these cases are the exceptions rather than the rule.¹²⁸

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.¹²⁹ This is compounded with additional findings that, when jurisdictions move away from cash bail, they may see fewer plea deals and convictions.¹³⁰ 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.¹³¹ 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.¹³² Should an individual accept a plea deal, they are often allowed to return home immediately until their sentencing hearing.¹³³ 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.¹³⁴ 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.¹³⁵ 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.¹³⁶ 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.¹³⁷ 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.¹³⁸

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.

126. *Maranda Lynn O'Donnell, et al. v. Harris County Texas*, et al. U.S. District Court for the Southern District of Texas Houston Division, Nov. 21, 2019. <https://bit.ly/37LRAXJ>.

127. Tracey Meares and Arthur Rizer, “The Radical Notion of the Presumption of Innocence,” The Square One Justice Project, May 21, 2020. <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>.

128. *Ibid.*

129. Arpit Gupta et al., “The Heavy Costs of High Bail: Evidence from Judge Randomization,” Columbia University, Aug. 18, 2016. <http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf>.

130. Cindy Redcross et al., “Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment,” MDRC Center for Criminal Justice Research, March 2019. https://www.mdrc.org/sites/default/files/PSA_Mecklenburg_Brief1.pdf.

131. Will Dobbie et al., “The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” Princeton University, July 2016. https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf.

132. *Ibid.*

133. *Ibid.*

134. Terry-Ann Craigie et al., “Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality,” The Brennan Center for Justice, Sept. 15, 2020. <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal#:~:text=People%20who%20have%20spent%20time,an%20average%20of%2022%20percent>.

135. Redcross et al., https://www.mdrc.org/sites/default/files/PSA_Mecklenburg_Brief1.pdf; Brandon Garrett and Sandra Guerra Thompson, “Monitoring Pretrial Reform in Harris County,” Sept. 3, 2020, p. 27-29. <https://www.courtlistener.com/recap/gov.uscourts.txsd.1360805/gov.uscourts.txsd.1360805.722.1.pdf>; Aurelie Ouss and Megan Stevenson, “Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors,” SSRN, June 20, 2020, pp. 21-24, 31. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138.

136. Samantha Max, “Jail Releases Early On In COVID-19 Pandemic Didn’t Spike Crime, Data Shows,” *WPLN News*, July 28, 2020. <https://bit.ly/3jAgHyI>; Prison Policy Initiative, “Responses to the COVID-19 Pandemic,” last accessed Oct. 27, 2020. <https://bit.ly/3it2jbc>.

137. *Ibid.*

138. Peter Wagner, “Large scale releases and public safety,” Prison Policy Initiative, April 9, 2020. <https://bit.ly/2HyIT74>.

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.¹³⁹ 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.¹⁴⁰

Fortunately, private organizations are pioneering ways to collect, amplify and analyze local and state criminal justice data to empower better advocacy and policymaking.¹⁴¹ 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.¹⁴²

139. FBI National Press Office, "FBI Releases 2019 Participation Data for National Use-of-Force Data Collection," Press Release, July 27, 2020.

140. Sarah Eppler-Epstein et al., "The Alarming Lack of Data on Latinos in the Criminal Justice System," Urban Institute, December 2016. <https://apps.urban.org/features/latino-criminal-justice-data>.

141. See, e.g., "About Us," Measures for Justice. <https://measuresforjustice.org/about/>; "About," Recidiviz. <https://www.recidiviz.org/about>.

142. Amanda Essex, "State Trends in Law Enforcement Legislation: 2014-2017," National Conference of State Legislatures, Aug 2018, p. 3. https://www.ncsl.org/documents/cj/StateTrends_LawEnforcement_final.pdf; See, e.g., 2019 NY S 1830 and 2019 OH S 338.

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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ While such brick and mortar investments are encouraged,

143. "The Prosecutorial Performance Indicators," Prosecutorial Performance Indicators, last accessed Nov. 10, 2020. <https://prosecutorialperformanceindicators.org/#publications>.

144. Ibid.

145. "Easy Access for Adult Criminal Data (EZAACD)," Criminal and Juvenile Justice Planning, last accessed Nov. 10, 2020. <https://disposedcharges.iowa.gov>.

146. National Conference of State Legislatures, "State Legislative Fiscal Offices Sites," last accessed Oct. 29, 2020. <https://www.ncsl.org/research/fiscal-policy/state-legislative-fiscal-offices-sites.aspx>.

147. "Home," Washington State Institute for Public Policy, last accessed Oct. 29, 2020. <https://www.wsipp.wa.gov>.

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.”¹⁴⁹ 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.¹⁵⁰

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.”¹⁵¹ 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.¹⁵² 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.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶ 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.”¹⁵⁷

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.¹⁵⁸ 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

153. Ryan King et al., “Big Prisons, Small Towns: Prison Economics in Rural America,” *The Sentencing Project*, February 2003, pp. 12-13, 19. <https://www.sentencingproject.org/wp-content/uploads/2016/01/Big-Prisons-Small-Towns-Prison-Economics-in-Rural-America.pdf>.

154. See, e.g., “No on Prop 25,” American Bail Coalition, last accessed Oct. 28, 2020. <https://stopprop25.com>; Cleve Wootson, Jr., “Chris Christie claimed a reform was ‘good government.’ A grieving mother says it killed her son,” *The Washington Post*, Aug. 5, 2017. <https://www.washingtonpost.com/news/post-nation/wp/2017/08/05/why-a-grieving-mother-blames-chris-christie-for-her-sons-killing>.

155. Megan Mumford et al., “The Economics of Private Prisons,” *The Hamilton Project*, October 2016, p. 6. https://www.hamiltonproject.org/assets/files/economics_of_private_prisons.pdf.

156. See, e.g., “Summaries of Performance Incentive Funding Programs,” *Cicero Institute*, last accessed Oct. 28, 2020. <https://www.ciceroinstitute.org/performance-incentive-funding-programs>.

157. Samantha Harvell and Jeremy Welsh-Loveman, “Justice Reinvestment Initiative State Data Tracker,” *Urban Institute*, July 2017. <https://apps.urban.org/features/justice-reinvestment>.

158. Brian Baugus and Feler Bose, “Sunset Legislation in the States: Balancing the Legislature and the Executive,” *Mercatus Center*, August 2015, p. 3. <https://www.mercatus.org/system/files/Baugus-Sunset-Legislation.pdf>.

149. Julie Tison and Allan F. Williams, “Analyzing the First Years of the Click It or Ticket Mobilizations,” *National Highway Traffic Safety Administration*, January 2010. <https://www.ems.gov/pdf/811232.pdf>.

150. *Ibid.*

151. Mihir Zaveri, “‘Meth. We’re on It’: South Dakota’s Anti-Meth Campaign Raises Eyebrows,” *The New York Times*, Nov. 18, 2019. <https://www.nytimes.com/2019/11/18/us/south-dakota-meth.html>.

152. “Meth Addiction is Everyone’s Problem. Here’s How to Fight It,” *OnMeth*, last accessed Oct. 29, 2020. <https://onmeth.com>.

suggest these provisions can reap greater state savings.¹⁵⁹ In addition, they may promote greater legislative oversight of state bureaucracy.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.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.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.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.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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159. *Ibid.* p. 9.

160. *Ibid.* p. 17-19.

161. See, e.g., Wootson, Jr. <https://www.washingtonpost.com/news/post-nation/wp/2017/08/05/why-a-grieving-mother-blames-chris-christie-for-her-sons-killing/>.

162. Glenn Grant, “2018 Report to the Governor and the Legislature,” New Jersey Courts, April 2019, pp. 1-8. <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf>.

163. Mandy Velez, “My Uncle Was Imprisoned Because of Joe Biden's Tough-On-Crime Votes. Here's What I think of His apology,” *The Daily Beast*, Oct. 25, 2020. <https://www.thedailybeast.com/my-uncle-was-imprisoned-because-of-joe-bidens-tough-on-crime-votes-heres-what-i-think-of-his-apology?ref=scroll>.

164. Arthur Rizer and Jonathan Haggerty, “No more George Floyds: Interactions over minor offenses too often spiral out of control,” *USA Today*, June 4, 2020. <https://www.usatoday.com/story/opinion/2020/06/04/george-floyd-eric-garner-died-for-minor-offenses-column/312556200/>; Joanna Schwartz et al., “Don't let Tucker Carlson scare you: reform won't hurt good cops,” *The Orange County Register*, July 8, 2020. <https://www.ocregister.com/2020/07/08/dont-let-tucker-carlson-scare-you-reform-wont-hurt-good-cops/>.