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### Reducing Mass Incarceration: Exploring the Values of Values

Jeremy Travis  
*CUNY John Jay College*

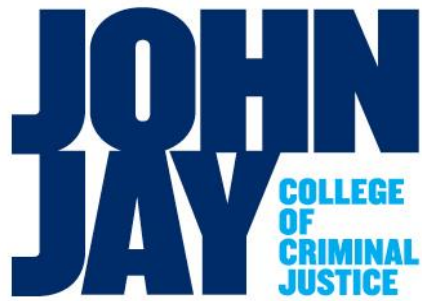
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**Reducing Mass Incarceration:  
Exploring the Values of Values**

**Opening Address**

**By**

**Jeremy Travis**

**President**

**John Jay College of Criminal Justice**

**2015 National Forum on Criminal Justice**

**August 3, 2015**

**Atlanta, GA**

Dear friends:

I am deeply honored that you have invited me to deliver this keynote address at your annual conference. I know and respect so many people and organizations in this room. You have been doing the hard work of criminal justice policy analysis, development and implementation at the state level for many years. From my time at the NIJ, at the Urban Institute, and now at John Jay, I have learned so much from all of you and am deeply grateful for our friendship – and for the honor of this invitation thank, in particular, my friend Cabell Cropper.

I note with considerable humility that I am on the same program today as Governor Deal of Georgia, our host state. I have never had the pleasure of meeting Governor Deal, but I can say that I am a great fan. When we point to states that are taking the lead in developing more rational criminal justice policies and specifically reducing our reliance on prison as a response to crime, Georgia is one of the states that leads the nation. Governor Deal has been the force behind these changes, working with the state legislature. The fact that the executive and legislative branches in Georgia are both Republican has not escaped the attention of pundits and policy wonks. In fact I would offer the observation that conservatives of all types – fiscal conservatives, evangelical conservatives, and libertarian conservatives – have been the indispensable leaders in the new left-right consensus to reverse course and cut back our prison populations. People ask whether this consensus can translate into the necessary concrete policy changes. Georgia provides proof that our elected officials can do the hard legislative work required. For these reasons, Governor Deal is the appropriate person to address this conference at this time.

## **I. A Tale of Two Prisons**

I want to start my remarks this morning with a story.

In early June, I walked into a prison cell in Germany. I was there as part of a US delegation of corrections officials, prosecutors, policy experts and academics on a study tour sponsored by the Vera Institute of Justice and John Jay College. We were visiting prisons in Germany for six days to understand that country's approach to sentencing and corrections to shed light on American policies. What I saw that morning has stayed with me. The cell looked like a college dorm. There were children's photographs on the walls, books and newspapers, bulletin boards with posters, a telephone to call home, a single bed, a separate bathroom, and a computer with DVD access to watch movies. All of this is noteworthy by itself – how many American prison cells have phones? – but what struck me most powerfully was the kitchen utensil holder. When you entered the cell, the first thing you saw was a magnetic strip with four or five kitchen utensils hanging from it. A ladle, a spoon or two, and a spaghetti spoon, the type with teeth on it so you can turn it to hold the spaghetti. You probably have something like this in your home.

My well-honed, perhaps typically American, reflexes kicked in. What is this metal doing in a prison cell? Can't this be turned into a weapon? How did this prisoner get this special privilege? But my second reaction was more telling. I had already realized that in German prisons the

inmates had access to all sorts of materials that would be banned in American prisons. My second reaction was: Why would anyone in prison need a spaghetti spoon?

So I asked the governor – the warden – of the prison. He said, very matter of factly: This man has a spoon because he likes to cook, in the kitchen down the hall; and he likes to invite some friends for dinner of spaghetti mixed with the vegetables he bought at the large prison garden maintained by fellow prisoners with the money he earned working in the welding factory that is part of the vocational program in the prison. Why do you allow these privileges, we asked our German colleagues? The answer was simple and bracing: Because we know these men are not here forever and will at some point return to their communities, our goal is to make the prison environment as much like life on the outside as possible. We do this because we are committed to preserving their human rights and maintaining their human dignity and if this means cooking meals for their friends, then we allow them to do that.

I knew then – not that I needed a reminder – that I was far from home.

I would ask you to contrast this scene with another one, this from the recent issue of the New York Times Magazine. The article, titled, *You Just Got Out of Prison. Now What?*<sup>1</sup> – documents a macabre natural experiment. Because Californians decided to modify their three-strikes law to allow for early release of individuals sentenced to life in prison, we are now witnessing the return of hundreds of men who until recently thought they would die in prison. Not only did they think they would die there, we did too. We had written them off. We certainly did not prepare them for coming home. Each of them has served decades in prison. They have never swiped a credit card, called someone on a cell phone, shared photos with loved ones on Instagram, or bought supplies in a large box store. It has been years since they ordered food from a menu because their meals have been routine: Monday is pancakes day; on Thursdays peanut butter and jelly sandwiches are served with four slices of bread and a Kool-Aid. It has likely been decades since they used a metal spaghetti spoon to cook a meal, let alone invite their friends to join.

How do we justify this treatment of our fellow human beings? Certainly there is a cost argument here: We have to save money on food. This logic also applies to double and triple bunking in cells built for one prisoner: We have to put them somewhere. But these cost arguments are deceiving. We are spending hundreds of thousands of dollars per inmate sentenced under the three-strikes laws – and similar long sentences – for what? And all cost arguments miss the true cost of long sentences – as we are now seeing in California, as these damaged men leave the tightly controlled and debilitating environments we call prison and enter the free society, like men leaving a darkened cave blinded by the sunlight and staggering as they take their first steps of freedom, we see in stark relief the damaging effects of our prisons. These costs are never calculated.

But more fundamentally, this comparison – this tale of two prisons – challenges us to raise questions about the mission of our prisons at home. What are we trying to accomplish when we deprive someone of their liberty? On what basis can we justify this exercise of state power?

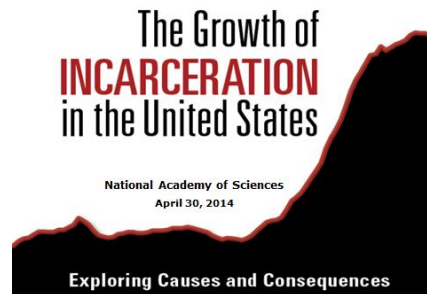
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<sup>1</sup> Jon Mooallem, *You Just Got Out of Prison. Now What?* July 16, 2015. The New York Times, retrieved on August 8, 2015: [http://www.nytimes.com/2015/07/19/magazine/you-just-got-out-of-prison-now-what.html?\\_r=0](http://www.nytimes.com/2015/07/19/magazine/you-just-got-out-of-prison-now-what.html?_r=0).

Certainly there is no scientific basis for concluding that holding thousands of people in prison until they die is a cost-effective crime control policy. So the justification is not utilitarian – not because we see some benefit to offset the cost – it must be based on something more intangible, less amenable to mathematical calculation.

This is what I want to talk to you about this morning – our values as a nation and the role of normative principles in moving the country toward a new reality, now tantalizingly within reach, in which we cut our rate of incarceration significantly. In my view, the momentum for reform is now so powerful that we can achieve the goal of cutting our prison population at least in half by 2030, but only if we have an honest discussion about values.

## II. The NRC Report<sup>2</sup>



We take as our starting point the report of the National Academy of Sciences panel on the Causes and Consequences of High Rates of Incarceration in the US. I was honored to be asked to chair this panel, with Bruce Western of Harvard as the Vice Chair and a distinguished group of twenty scholars and policy experts. We were asked to answer two questions, embedded in the title of the resulting report: First, what were the causes of the four-fold increase in incarceration rates in the US over the past forty years? In essence, we were asked to explain the dramatic changes so clearly visible on the cover of our report. Second, we were asked to review the evidence on the consequences – to public safety, individuals incarcerated, their families and communities, and our democracy – of this unprecedented new reality.

This morning I would like to quickly review the findings and conclusions of our report. The report was published in April 2014 and can be downloaded at that National Academies website. Copies of the policy briefs on most chapters are available at the back of the room. Let's start with some facts, most of which are known to people in this audience. Today:

- One in a hundred adults in America is in prison or jail.<sup>3</sup>

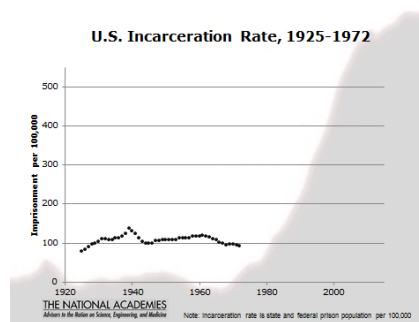
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<sup>2</sup> National Research Council. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press, 2014.

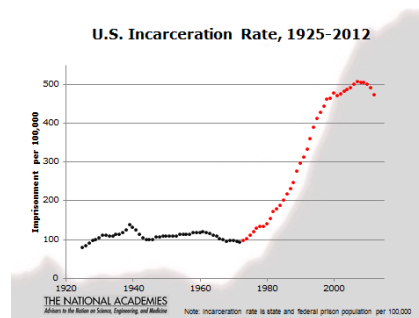
<sup>3</sup> *Ibid.*, p. 13.

- America incarcerates twenty-five percent of the world’s prison population, but is home to only five percent of the world’s population.<sup>4</sup>
- Approximately 3.6 percent of minor children in America have a parent in prison,<sup>5</sup> totaling 2.7 million children.<sup>6</sup>
- We spend nearly \$80 billion a year on prisons and jails.<sup>7</sup>
- We currently house about 2.2 million people in prison and jail, 1.9 million more than we did forty years ago.<sup>8</sup>

We should quickly put these data into the appropriate historical and comparative contexts. Here I will draw on some findings from the NRC report. First, we need to recognize that we have not always lived in an era of mass incarceration. In fact, as this slide shows,



from 1920 to 1972, we had low rates of incarceration, about 110 per 100,000, not unlike the levels of incarceration currently found in the countries of Europe. Then, beginning in 1972,



the rates of incarceration started to increase and rose every year, until they peaked in 2009. Over this period, our rates of incarceration more than quadrupled; using absolute numbers, the number of people in prison increased seven fold. This trend can also be put in a comparative context. In the countries of Europe, as seen on this slide,

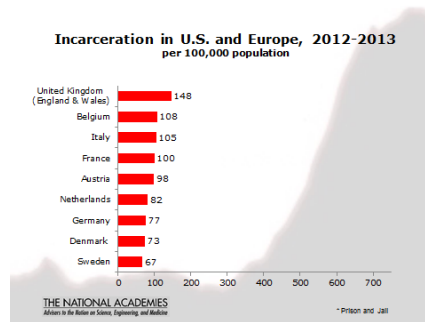
<sup>4</sup> Ibid, p. 335.

<sup>5</sup> Turney, K. & Wildeman, Christopher. (2015). Detrimental for Some? Heterogeneous Effects of Maternal Incarceration on Child Well-being. *Criminology & Public Policy*, 14(1), pp. 125 – 156.

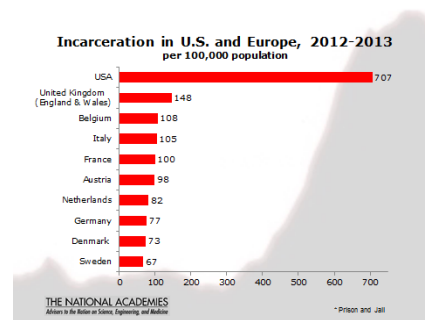
<sup>6</sup> Western, B., and Pettit, B. (2010). Incarceration & social inequality. *Daedalus*, 139(3), 8-19. Western, B., and Wildeman, C. (2009). The black family and mass incarceration. *The ANNALS of the American Academy of Social and Political Science*, 621, 221-242.

<sup>7</sup> NRC, p.317.

<sup>8</sup> Ibid, pp. 2 & 36.



the level of incarceration is in the range of 67 to 148 (here we are talking about both prisons and jails). In the United States, by contrast, the rate of incarceration is over 700 per 100,000:



The consensus panel of the National Research Council reached this bracing conclusion:

**The growth in incarceration rates in the United States over the past 40 years is historically unprecedented and internationally unique.<sup>9</sup>**

How did this happen? How did we arrive at this unprecedented reality?

The answer is shockingly simple: We are here because we chose to be here. We have arrived at the reality of mass incarceration through a series of policy choices. These policy choices have been made in our name by individuals we elected to office – as governors, legislators, judges and prosecutors. The NRC report was also clear that we have not quadrupled our rate of incarceration because of increases in crime – in fact, if you look at the crime rates over those forty years, they went up and down, up again and down sharply. But crime rates did play a role in a different sense – the sharp increases in rates of violent crime in the 1960s and 1970s, combined with a general sense of social unrest and insecurity, created the environment in which “tough on crime” political rhetoric became successful. Politicians promised to crack down on crime, and this typically meant increasing the use of prison as a response to crime. Often, these promises were delivered in highly racialized fear-based messages of the need to control the disorder in urban, minority communities.

The National Research Council panel identified three drivers of the increase in prison rates. First, we chose, through our legislative processes, to make long sentences longer. We followed catchy slogans such as “three-strikes and you’re out”. “Truth in sentencing.” “Life without

<sup>9</sup> Ibid, p. 2

parole.” “Abolish parole release.” “Eliminate good time.” All of these sentencing enhancements meant that people already sentenced to prison are now serving much longer sentences. Second, we enacted mandatory minimum sentences. Through legislative enactments, we removed judicial discretion and required judges to sentence people to prison who would otherwise have been sentenced to a community sanction such as probation. Third, we launched a War on Drugs, imposing criminal penalties and long prison sentences for offenses that would otherwise have been handled in the community or, in the case of addiction and substance abuse, through the health and treatment systems. As the overall incarceration rate quadrupled, the incarceration rate for drug offenses increased ten-fold.

Aside from these three specific drivers of the increase in incarceration rates, the unifying theme that we must keep in mind is this: we live in an era of mass incarceration because we have chosen, through policy choices, to dramatically expand the use of prison as a response to crime. There is a corollary to this finding: If our democracy got us here, it is our democracy that must get us out of here. I will return to this theme in a moment, but ask you to remember that we need a political strategy, not a crime strategy, to reduce mass incarceration.

The NRC devoted seven chapters to reviewing the evidence on the consequences of this unprecedented increase in incarceration rates. Without reviewing each chapter, suffice it to say that we are only now beginning to have a clear sense of the consequences of this massive shift in American criminal justice policy. It will take another generation to fully assess the impact of this unprecedented build-up on the hundreds of thousands of individuals being released each year, on their long-term employment prospects and life-time earnings power, on their health, on their children and families, on the social fabric of the communities to which they return, on our democracy. Yet, even in the absence of definitive evidence, the early indications are very troubling. Let me put the composite picture into words. All indications are that we have done enormous harm. The combined effect of psychological damage caused by the deprivation of liberty, especially during periods of solitary confinement, decreased earnings power following release from prison, poor developmental outcomes for children with a parent in prison, and withdrawal from civic life in the community – all taken together gives us a deeply troubling picture of the harmful consequences of our policy choices. These harmful effects are concentrated in black and brown communities, mostly among men and acutely among male high school drop outs resulting in profound damage to our country’s aspirations for racial justice.

It is against this assessment of the evidence that the NRC panel reached its overarching conclusion.

**Given the small crime prevention effects of long prison sentences and the possibly high financial, social, and human costs of incarceration, federal and state policy makers should revise current criminal justice policies to significantly reduce the rate of incarceration in the United States. In particular, they should reexamine policies regarding mandatory prison sentences and long sentences. Policy makers should also take steps to**



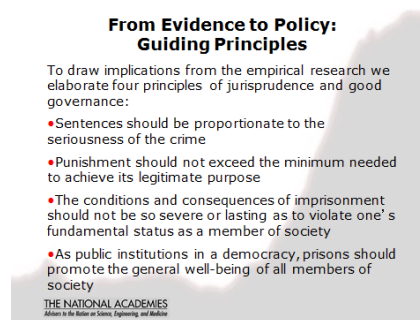
## **improve the experience of incarcerated men and women and reduce unnecessary harm to their families and their communities.<sup>10</sup>**

I think these words are directed at the people in this room. In my view, all of us who have devoted our professional lives to the criminal justice field have a special responsibility to help our country reverse course and undo the damage of mass incarceration.

### **III. The Normative Framework**

When the NRC panel reached this conclusion, we recognized that there was something missing. We knew that society's decisions on the use of prison did not rest solely on a cost benefit analysis. We do not – and should not – simply ask whether the benefits, whatever they might be, outweigh the costs. This would be highly unsatisfying – how does one quantify, after all, the deprivation of liberty? How does one place value on the crime averted by a prison term? But this sort of calculation is particularly inappropriate, the panel concluded, in light of our findings regarding the causes and consequences of the massive building in our prisons. If, as we found, the public safety benefit of the current rate of incarceration is modest at best, and the harmful consequences likely enormous, why should we frame the goal of reducing our prisons in cost-benefit terms?

Our panel decided we needed to speak in a normative voice, to articulate well-established principles that could guide the country's deliberations as we enter this historic new era of a national consensus that we must reduce the prison population. As we documented in Chapter 12 of our report, we traced the scholarly lineage of four normative principles that should guide the use of prison in a democratic society. I want to discuss each of these briefly and ask you to include these in your discussions here in Atlanta and at home as you undertake the challenging work of justice reform in your states:



#### **A. Proportionality**

The first principle that should guide our policies is the principle of just desert, or proportionality. Dating to the eighteenth century and the writings of Immanuel Kant, this

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<sup>10</sup> Ibid, p. 9.

principle basically holds that offenders should be held accountable for their crimes in strict proportion to the seriousness of their crimes. This principle also applies to comparisons among crimes. Comparably serious crimes should be punished in ways that are comparable. As you listen to this venerable formulation – or recall the playground (or Gilbert and Sullivan) version of this, that “the punishment should fit the crime” – I hope you realize how far we have strayed from this principle. The “three-strikes” inmates now being released in California were sentenced in violation of this principle. Their third strike was often trivial – for example, Lester Wallace who was arrested on the first day of the three strikes law for stealing a pair of socks and was sentenced to life in prison.<sup>11</sup> Most of our penalties for drug offenses violate this principle as low level drug offenders are punished as severely as offenders convicted of serious acts of violence.

## **B. Parsimony**

The principle of parsimony also occupies a place of honor in our theories of punishment. According to Jeremy Bentham, writing in the early 1800s, it is possible to justify the infliction of pain – and sending someone to prison is obviously an infliction of pain – only if this is necessary to achieve a legitimate social purpose. Anything beyond this – in other words, any punishment that extends beyond the minimum necessary – is tantamount to state cruelty. It simply cannot be morally justified. The principle of parsimony can also be viewed as expressing a moral preference for liberty.

This concept is captured in more recent times by the phrasing of the Model Sentencing Act, which called for sentencing judges to impose the “least restrictive alternative”.<sup>12</sup> Again, as with the principle of proportionality, I hope that when you consider the principle of parsimony you realize that this value statement has also lost its power during the last four decades. Just think of the rapidly growing phenomenon of geriatric prisons where the people we now sentence to very long terms are living out their last days. We have created nursing homes behind bars, as the New York Times called these prisons,<sup>13</sup> with prisoners suffering from Alzheimers, sustained on dialysis machines, unable to remember their names and when they come up for parole hearings, so impaired by dementia, they cannot recall the crime that resulted in their imprisonment and therefore cannot express the obligatory remorse. I cannot look at this new phenomenon without invoking the principle of parsimony and asking whether this is not tantamount to state cruelty.

These two principles – proportionality and parsimony – represent limitations on the power of the state. In imposing criminal sanctions, the state acts in our name, but the state’s power must be constrained. In order to move into the next phase of the campaign to reduce incarceration rates, we must find ways to breathe new life into these important principles.

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<sup>11</sup> Jon Mooallem, *You Just Got Out of Prison. Now What?* July 16, 2015. The New York Times. Retrieved on August 1, 2015: [http://www.nytimes.com/2015/07/19/magazine/you-just-got-out-of-prison-now-what.html?\\_r=0](http://www.nytimes.com/2015/07/19/magazine/you-just-got-out-of-prison-now-what.html?_r=0).

<sup>12</sup> National Council on Crime and Delinquency. (1972). *Model Sentencing Act*. 2nd ed. Hackensack, NJ: National Council on Crime and Delinquency.

<sup>13</sup> The Editorial Board. *Nursing Homes Behind Bars*. September 28, 2014. The New York Times. Retrieved on August 1, 2015: <http://www.nytimes.com/2014/09/29/opinion/nursing-homes-behind-bars.html>.

### C. Citizenship

The third principle that should inform our use of prisons is the principle of citizenship. We recognize that a prison sentence is by definition a limitation on one's full citizenship in the sense that a prisoner is not free to exercise the basic liberties we take for granted such as freedom of movement and association. But here our trip to Germany is highly instructive. Germans embrace the concept of "normalization," meaning that they try to create environments in prison that resemble as closely as possible the environment in free society.<sup>14</sup> Sentences are short, so that people can return to their communities as soon as possible. Therapy and skill development are intensive so that individuals can get back on their feet quickly. Solitary confinement is available, though rarely used and can never be imposed longer than four weeks.<sup>15</sup> You heard me correctly. The maximum duration for solitary confinement is four weeks! Some American prisoners have been in solitary for decades!

When we asked our German hosts to explain these practices, they proudly referred to their constitution. The first article of the German constitution states, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority".<sup>16</sup> This commitment to human dignity is vigorously enforced by the German constitutional courts, which in turn protect the prison system from the vagaries of public opinion. The NRC panel recommended that the concept of citizenship be elevated in our criminal justice policy discussions. We should make prisons humane and supportive environments. We should ensure, in the words of our report, that "The conditions and consequences of imprisonment should not be so severe or lasting as to violate one's fundamental status as a member of our society."<sup>17</sup>

The value of citizenship or human dignity resonates with American traditions. Our Constitution prohibits cruel and unusual punishment, guarantees equal protection of the laws, and protects the individual from unwarranted intrusion by the state. In the landmark decision *Brown v. Plata*, upholding judicial orders to cut the California prison population, Justice Kennedy wrote "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."<sup>18</sup> One of our challenges in the new era is to elevate the principle of citizenship, breathe new life into our constitutional traditions, and recognize the humanity of those in prison. Following his recent visit to the federal prison in Arizona, President Obama struck the right note by referring to those incarcerated there as "Americans" and "citizens."<sup>19</sup> He has set the right example but much more needs to be said and done.

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<sup>14</sup> The Prison Act (*Strafvollzugsgesetz*) of 1977 § 2&3. März 1976; <http://www.gesetze-im-internet.de/bundesrecht/stvollzg/gesamt.pdf>.

<sup>15</sup> *Ibid*, § 103(1). <http://www.gesetze-im-internet.de/bundesrecht/stvollzg/gesamt.pdf>.

<sup>16</sup> The German Constitution, Article 1. [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic_law-data.pdf).

<sup>17</sup> NRC, p. 8

<sup>18</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011).

<sup>19</sup> The White House, Office of the Press Secretary. Remarks by the President at the NAACP Conference. Pennsylvania Convention Center Philadelphia, Pennsylvania. Retrieved August 1, 2015: <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

## **D. Social Justice**

The fourth principle in the normative framework is the principle of social justice. The concept of social justice requires us to view all social institutions – prisons included – against a demanding yardstick: Does the institution add to social inequality or reduce opportunity in our society? This principle takes the goal of reducing penal harm found in the parsimony principle and applies it widely to a societal understanding. We should ask whether our criminal justice system, and in particular our current use of prison as a response to crime, exacerbates racial, economic or other inequalities in our society. If the answer is yes, then we have violated the principle of social justice. Measured against this yardstick, our current level of incarceration fails miserably. The increase in the prison population is predominantly drawn from one group – high school drop outs – individuals, mostly men, who are by definition struggling to take advantage of society’s opportunities. Because the high rates of incarceration are concentrated in communities of color, the modern use of prison also exacerbates racial inequalities. When one views today’s prison rates against our nation’s pursuit of racial justice, we should clearly be deeply troubled. It is hard to imagine how we can move forward on this unfinished business when so many black and brown citizens, mostly men, are held behind bars and struggle to get back on their feet with the weight of criminal records hanging around their necks.

The NRC panel discussed these normative principles in Chapter 12 both to point out that we had lost sight of them over the past half century as we went on our prison building binge, but also to recommend that they serve as guideposts to the public and policy makers as we reimagine our use of the prison as a social institution in the future. If you believe, as I do, that we can meet the goal of reducing our rate of incarceration by half by 2030, then we need to have a robust national conversation about why we would do that, how we would justify shorter sentences, and what long-standing American values should guide our new policies.

This is the role of a values discussion. This is the high ground on which right and left, conservative and progressive, libertarian and activist can meet. We have very difficult work ahead of us. We can easily get lost in the hand-to-hand combat of cutting a bit here, snipping a bit there, tinkering with mandatory minimums, recalculating good time and changing dates of parole eligibility. In my opinion, as important as they are, these discussions will never lead to the significant reduction in our prison population that is possible and desirable. Instead, we need to return to basics. How best should we respond to crime? How best can we respect and support the human dignity of victims of crime? How can we express the appropriate societal condemnation of violations of our laws without ruining the lives of those who engaged in those violations? How can we achieve a new understanding, common across all political views, that the state must be constrained lest we lose our liberties? How can we use prisons sparingly, accelerating the successful and swift return to society of those who must spend some time in our prisons? How can we agree that the boundaries between prison and free society need not be characterized solely by razor wire but can be crossed by furlough programs, work release, halfway houses, conjugal visits, and yes even phones in the cells?

We need to reimagine our prisons. We need to invest in our prisons. We need to downsize our prisons. We need to humanize, not demonize, the men and women incarcerated in our prisons. We need to create new relationships between those who work in our prisons and those who are

held in our prisons. Maybe someday we can imagine a prison where the prisoner cooks a spaghetti dinner for his friends using the spaghetti spoon he keeps on his wall and an American visitor does not think this is so noteworthy.

