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### Reflections on the NAS Report: What Are the Prospects For Reducing the US Prison Population?

Jeremy Travis  
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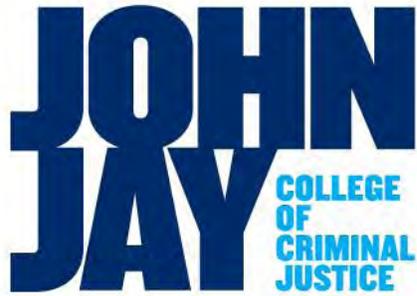
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***“Reflections on the NAS Report: What Are the Prospects  
For Reducing the US Prison Population?”***

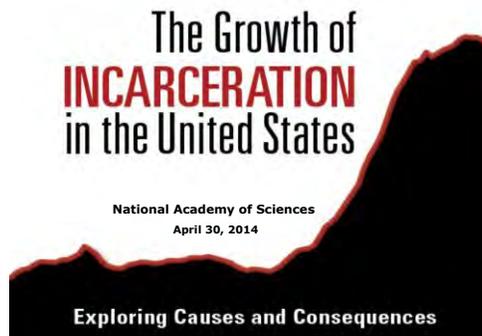
**Lecture by**

**Jeremy Travis**

**President, John Jay College of Criminal Justice, City University  
of New York**

**Delivered at the Hoffinger Colloquium of the  
Center for Research on Crime and Justice  
New York University School of Law**

**February 23, 2015**



Dear Friends:

I am truly honored to be invited to deliver this lecture as part of the Hoffinger Colloquium at New York University School of Law. The list of scholars who have stood at this podium is impressive and, frankly somewhat intimidating. I am humbled to be in their company.

Our topic tonight is the phenomenon of “mass incarceration” – the reality that our country has increased the rate of incarceration more than four-fold over the past generation. The topic of mass incarceration **is a scholar’s delight**. Historians, political scientists and legal scholars are deeply engaged in shedding light on how we got here. Economists, sociologists, and public health academics are helping us understand the realities of this unprecedented level of imprisonment of our fellow citizens. Criminologists, economists and philosophers are assessing the impact of this level of imprisonment on public safety, the national economy and civic participation. Yet before we dive in, I must confess that maintaining scholarly objectivity is difficult for me. I think this is one of the most important moral challenges facing our democracy. Stated bluntly, if this level of incarceration, or anything close to it, becomes our new normal, I am concerned for the future of our democratic experiment, our notion of limited government, and our pursuit of racial justice.

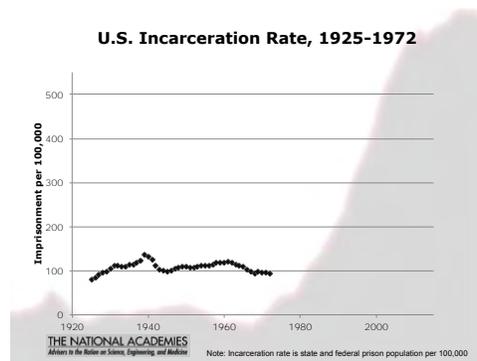
A second admission: although I am an optimist by nature, I am not optimistic that we can figure this out. I fear that the dynamics that led us to this moment are so deeply ingrained in the American psyche, so embedded in our political realities and so central to our discourse on crime, punishment, and race that it is hard for me to imagine an exit strategy. I come to this conclusion in full recognition of the remarkable political consensus, including miraculous right-left coalitions, that we must reduce our reliance on prison as a response to crime. I also come to this with profound respect for the many individuals, advocacy organizations and foundations that are committed to that goal. Stated differently, and bluntly, I believe that reversing course will require something much more profound than our current reform strategies. What is required is a deep cultural change. Tonight I will sketch the outlines of the transformation in our culture that I think will be required.

## I. The Consensus Report of the National Academy of Sciences

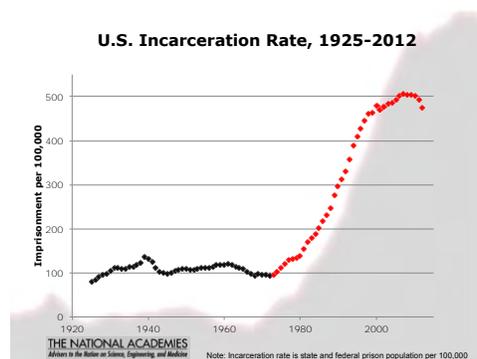
We start tonight's exploration of the phenomenon of incarceration in America by reviewing the findings of the report published last year by The National Academy of Sciences (NAS)<sup>1</sup>. This report reflects the deliberations of a consensus panel of twenty prominent scholars convened by the National Research Council to assess the evidence on the "causes and consequences of high rates of incarceration in the United States." I was honored to be asked to serve as chair, and very fortunate that Harvard Sociologist Bruce Western was named as Vice Chair. For me, the NAS report provides the foundation for a discussion of our future. Tonight, I will not dwell on the findings of the NAS report in depth, but call your attention to the printed materials that have been distributed. **Instead, I will use the key findings to create a narrative of the nation's increased reliance on prison as a response to crime.** Before we construct a new narrative for the exit, we must understand our own history.

These are the five key findings of the NAS report:

1. **We have never been here before, and we stand apart from the rest of the world.**

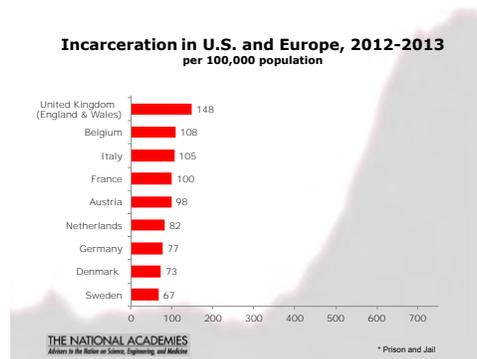


From the 1920s to the early 1970s, our country experienced very stable rates of incarceration (here measured by the state and federal prison population), averaging about 110 per 100,000.

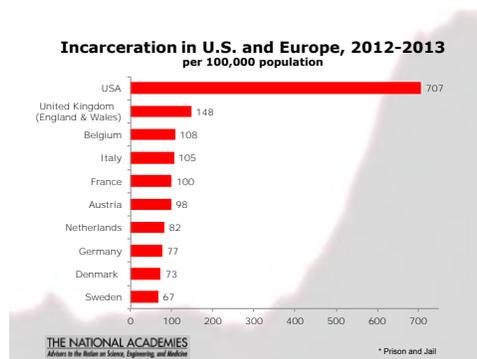


<sup>1</sup> Unless referenced otherwise, all citations can be found in the following report: National Research Council. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press, 2014.

Then the incarceration rate took off, increasing every year until 2009, rising more than four-fold.



The incarceration rate in Europe (here including prisons and jails) is much lower, ranging from 67 per 100,000 in Sweden to 148 per 100,000 in the United Kingdom. By comparison, the US rate, here including prisons and jails, is over 700 per 100,000, five to ten times higher than those in Europe.



The punchy taglines used to capture this reality are well-known. Today, nearly 1 in 100 adults in the United States is in prison or jail. We are home to 5 percent of the world's population, but 25 percent of the world's prison population. No country has a higher incarceration rate. Our committee captured this reality with our first conclusion: "The growth in incarceration rates in the United States over the past 40 years is historically unprecedented and internationally unique."

## 2. We are here because we chose to be here.

How did this happen? How did our democracy embark on a policy journey that has left us so far outside of both our own historical experience and the mainstream of other democratic societies? Our committee had a clear bottom line answer to this question: we are here because we chose to be here. Our high incarceration rates are the result of our policy choices, made on our behalf and in our name by our elected officials. After reviewing the evidence, we concluded that our incarceration rates are only indirectly tied to crime rates. Over the period of the relentless growth in prison populations, crime went up and went down. Yet crime did play an important role in the prison build-up.

### **Underlying Causes: Crime, Politics, and Social Change**

- Crime rates increased significantly from the early 1960s to the early 1980s (e.g., murder rate doubled from 1960 to 1980)
- Decline in urban manufacturing, problems of drugs and violence concentrated in poor and racially segregated inner city neighborhoods
- Rising crime combined with civil rights activism, urban disorder, heightened public concern and tough-on-crime rhetoric from political leaders

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The rapid increase in crime rates in the 1960s and 1970s, which occurred in a period of social upheaval, racial strife and political unrest, changed the politics of crime in America. **“Tough on crime” strategies became winning political platforms, for district attorneys, judges and most importantly for legislators.** The balance of power between the branches of government on matters of punishment shifted as legislatures exerted more control, judicial discretion was weakened, and executive branch agencies such as parole boards were stripped of power.

### **Direct Causes: Changes in Sentencing and Law Enforcement**

- In the 1980s states and the federal government adopted mandatory guidelines and expanded mandatory prison sentences
- Drug arrest rates increased significantly and drug crimes were sentenced more harshly
- In the 1990s longer sentences were set particularly for violent crimes and repeat offenders (e.g., three-strikes, truth-in-sentencing)

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As a result, our state and federal legislators, who ran on “tough on crime” platforms, delivered on their campaign promises by enacting **“tough on crime” sentencing legislation.** In our report (see chapter 3), we document decade by decade the changes in sentencing policy, all of which had the result of putting more people in prison, and keeping them in prison longer.

### **Tough Sentencing Increased Incarceration and Contributed to Racial Disparity**

- Growth of state prison populations, 1980 – 2010, is explained in roughly equal proportion by (a) the increased rate of incarceration given an arrest and (b) longer sentences
- Although incarceration rates increased across the population, racial disparities yielded high rates among Hispanics and extremely high rates among blacks

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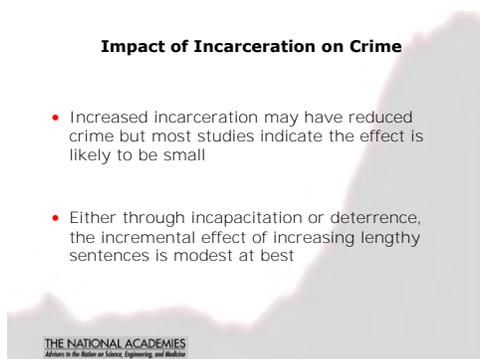
We found that the increase in incarceration rates is roughly equally divided between two drivers – the increase in incarceration rates per arrest, basically through mandatory minimums, and the imposition of long sentences, mostly for people already sentenced to prison. Of all crime

categories, the increase was greatest for drug offenses. For these crimes, the rate of incarceration increased ten-fold. An important theme running through our report is the far-reaching impact of the war on drugs, particularly on racial minorities.

### **3. The public safety benefits of the prison build-up are, at best, modest.**

Can we say that the ramp up of prison has had a significant public safety benefit? After all, if our elected officials promised lower crime rates by putting more people in prison and holding them longer, and we observe a significant decline in crime rates, **then hasn't the promise been kept?** Can we justify the means of mass incarceration as having delivered the ends of public safety? **Isn't this a criminal justice program that worked?**

Our committee recognized that answering this question presents nearly insurmountable methodological challenges. Put simply, we concluded that there were too many other things going on during this four decade period to isolate the effect of the prison build-up on crime rates. Having noted this inevitable lack of scientific precision, we reviewed the studies that have tried to answer this question.

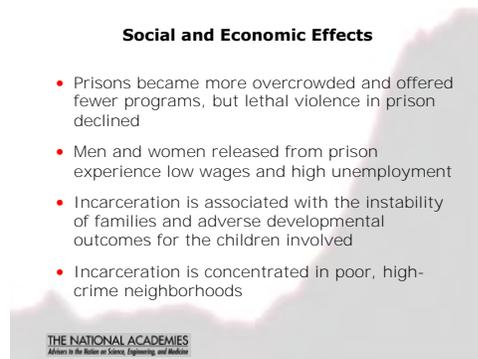


Most of those studies show that increased incarceration rates may have reduced crime, but that the aggregate effect is likely to have been small. We were more definitive in our assessment of the evidence on the public safety benefits of the principle drivers of the incarceration boom. The research on the impact of long sentences is quite clear: either through incapacitation or deterrence, these sentences likely had only modest impact on public safety. Similarly, the literature on mandatory minimum sentences shows that this use of prison yields very little public safety benefit. Finally, we looked at the literature in the drug policy area. The country does not have a measure of drug offending rates, but we do track the price of drugs and the levels of drug use. Neither of these indicators moved in the expected directions. Drug prices have generally dropped not increased, and drug use has remained relatively constant as the punishments for drug offenses sky rocketed. Thus, our committee found after a review of the evidence that the public safety benefit of this enormous investment of money, and this unprecedented deprivation of human liberty, has been modest at best.

### **4. The financial and social costs of the prison build-up are likely significant.**

**The investment in the expansion of the nation's prisons** has been enormous, now reaching approximately \$53.2 billion a year for state prisons and close to \$90 billion a year if jails and

federal prisons are included (see chapter 11). Given this enormous policy shift and the investment of billions of taxpayer dollars, one might expect a proportionate investment in research to assess the impact of this undertaking. Our panel was struck by the paucity of research on the consequences of the prison build-up.



Yet the early findings are troubling. We devoted two chapters to the impact of our policy choices on those incarcerated in **the nation's prisons**. The nation clearly did not build enough prisons to accommodate our policy choices as our prisons are now much more overcrowded. The psychological consequences of prolonged incarceration, particularly in solitary confinement, can be devastating. Nor did we invest commensurate resources in programs and services. We have also extended the reach of prisons to a new generation of children who have a parent behind bars and the evidence points to increased levels of family instability and adverse developmental outcomes for those children. The post-release employment prospects for those sent to prison are poor: compared to others like them, formerly incarcerated individuals experience lower wages and higher rates of unemployment. Finally, the high rates of incarceration are concentrated in a small number of poor neighborhoods, mostly communities of color, that are already struggling with poor schools, housing shortages, high crime and high rates of unemployment. Now these communities are also bearing the brunt of **society's** unprecedented policy choice to send more of their residents to prison than ever before, keep them in prison for longer than ever before, in more crowded conditions, provide fewer programs and prepare them less well for their eventual return home.

By definition, our ability to assess the long term impact of a four-fold increase in incarceration rates will take more than a generation. Hopefully twenty or thirty years from now, the body of research reviewed by our successor NAS panel will be much more robust. But our committee strongly urged the federal government, the nation's **universities and private funders of research** to start now to support research so we can better **understand the life inside our nation's prisons**, the individual experience of being incarcerated, and the ripple effects through families and communities who are feeling the after-**shocks of our nation's decision to incarcerate so many** people. If this were any other policy domain, we would know so much more about the human, financial and social consequences of our choices.

Based on our assessment of the evidence, our committee reached this conclusion:

### Main Conclusion

**The U.S. has gone past the point where the numbers of people in prison can be justified by any potential benefits.**

According to the best available evidence:

- The crime reduction effect is uncertain; most studies show small effects
- The social and economic consequences may have been far-reaching

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The United States has gone past the point where the numbers of people in prison can be justified by any potential benefits.

### 5. We have lost sight of important normative principles.

Notwithstanding the power of our conclusion that the public safety benefit is likely modest and the costs are likely significant, the NAS committee did NOT view an assessment of the growth of incarceration in America solely as a simple matter of cost-benefit calculation. We recognized that sentencing policy – or more broadly, the policy response to crime – necessarily involves normative questions. We concluded that the public discourse of the past generation paid insufficient attention to certain normative principles and, going forward, we recommended that these principles **should guide our nation’s deliberations** regarding the use of prison as a response to crime.

Chapter 12 (if you read only one chapter of our report, this is the one) traces the intellectual lineage of four principles that are relevant to these policy deliberations. Each recognizes that the forcible deprivation of liberty through incarceration is an awesome state power that should be exercised with care.

### From Evidence to Policy: Guiding Principles

To draw implications from the empirical research we elaborate four principles of jurisprudence and good governance:

- Sentences should be proportionate to the seriousness of the crime
- Punishment should not exceed the minimum needed to achieve its legitimate purpose
- The conditions and consequences of imprisonment should not be so severe or lasting as to violate one’s fundamental status as a member of society
- As public institutions in a democracy, prisons should promote the general well-being of all members of society

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The first two principles limit that power. The principle of proportionality, well known to every law school student, holds that sentences should be proportionate to the seriousness of the crime. The second, the principle of parsimony, my favorite of these, holds that the state is not authorized, in our name, to impose pain on a member of our society beyond that required to **achieve a legitimate purpose**. Law school students will also recognize this as the “**least restrictive alternative**” principle of the Model Penal Code. In our committee’s view, in our

**country's rush to be tough on crime** – by enacting statutes that made long sentences longer, imposed mandatory minimums for minor offenses, and launched the war on drugs – these principles failed to serve as constraints on the reach of state power.

The third principle recognizes an aspiration that we should respect the human dignity of individuals sent to prison and the conditions of confinement should not be so severe as to violate their status as members of our society when they return. This value statement is reflected in the Eighth Amendment jurisprudence of the Supreme Court, the mission statement of corrections professionals, and the declarations of international human rights organizations. Finally, our panel traced the literature of the principle of social justice and recommended that our society view prisons as pillars of justice, as public institutions that promote the broader well-being of our society. Stated differently, prisons should not serve to diminish the status of a particular segment of our society. More specifically, our panel recommended that prisons be opened to public inquiry and accountability for results, including access for journalists, researchers, and legislative oversight, consistent with the operational requirements of the institution. In short, our panel strongly advocated that we recognize that policies that result in deprivation of liberty should be informed, and guided by, a normative framework and subjected to independent inquiry.

**Policy Recommendation**

**The United States should take steps to reduce incarceration rates**

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This requires changes in:

- **Sentencing Policy:** Reexamining policies for mandatory minimum sentences, long sentences and enforcement of drug laws
- **Prison Policy:** Improving the conditions of incarceration, reducing the harm to the families and communities
- **Social Policy:** Assessing community needs for housing, treatment, and employment that may increase with declining incarceration

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With these guiding principles in hand, and reflecting our assessment of the evidence, our panel then recommended that the United States should reduce incarceration rates. Specifically, we recommended reforms to the policies that drove the prison-build up, mandatory minimums, long sentences, and drug enforcement. We also recommended that the nation improve conditions for those incarcerated and reduce the harms experienced by their families and communities. Finally we took a broad look and recommended that the country recognize that with fewer people in prison there would be an increase in service needs in those communities.

## **II. Looking Beyond the National Academy of Sciences Report**

Now, let's switch gears, gaze into our collective crystal ball, and ask ourselves whether we can reasonably expect that these reforms will happen. I have already previewed my answer to this question, but let me explain. Certainly there are reasons to be optimistic. The rate of incarceration has been dropped slightly over the past few years. We are seeing a new left-right coalition that has embraced the common goal of reducing the size of the prison population. The

emergence of a new organization – cleverly called Right on Crime – with signatories that include Grover Norquist, Newt Gingrich, Jeb Bush and Pat Nolan – is making waves all across the country by advocating sentencing reform.<sup>2</sup> Solidly conservative states such as Texas, Georgia, Mississippi and Alabama, with Republican governors and Republican legislatures, have taken steps to cut back on their prison populations. An impressive array of major national foundations – including the Open Society Foundations, the Laura and John Arnold Foundation, the MacArthur Foundation, the Koch Brothers, Pew Charitable Trusts, the Public Welfare Foundation and the Ford Foundation – have taken dead aim at reducing our reliance on incarceration.

In recent years, a number of organizations and individuals have embraced a specific goal of reducing the prison population by half. Elsewhere, I have written that the time is ripe for a **“brave governor” who will step forward to embrace the goal of cutting the prison population in half.**<sup>3</sup> Glenn Martin, the visionary founder of JustLeadershipUSA has cleverly coined the phrase **“50 by 30”**, setting his sights on 2030<sup>4</sup>. The American Civil Liberties Union has received \$50 million in funding to achieve this goal by 2020<sup>5</sup>; Van Jones of Rebuild the Dream has provided his support for a 50 percent reduction in ten years.<sup>6</sup> Just last month, Dannel Malloy, the Democratic governor in Connecticut, called the prison build-up a **“failed experiment” and pledged to reduce his state’s prison population.**<sup>7</sup> Bruce Rauner, the new Republican governor of Illinois, **set a specific goal of reducing his state’s incarceration rate by 25 percent by 2025, sounding much like a “brave governor”.**<sup>8</sup> Add to this the fact that states like New York have experienced significant prison declines and one can understandably become not just optimistic but positively giddy about the prospects for reducing our prison population.

So why the pessimism? In my assessment, the euphoria occasioned by the slight down-turn in incarceration rates is premature and the reforms that we celebrate are nibbling around the edges. **The nation’s prison population has remained high.** Much of the recent decline can be attributed to the court-ordered population reductions in California. Marc Mauer of the

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<sup>2</sup> Right on Crime; (retrieved from the World Wide Web on February 20, 2015: <http://rightoncrime.com/the-conservative-case-for-reform/>).

<sup>3</sup> The “brave governor” idea holds that, with crime rates at record lows, prison costs straining state budgets, and a new consensus that we must reverse course on sentencing policy, now is the time for a brave governor to step forward and pledge to enact legislation that will reduce his or her state’s prison population by half in ten years. I first framed this concept in a speech in Milwaukee in 2009, and again in an article in *Criminology and Public Policy*. Jeremy Travis, *Building Communities with Justice: Overcoming the Tyranny of the Funnel* (Keynote address delivered at the Marquette Law School Public Service Conference on the Future of Community Justice in Wisconsin on February 20, 2009). Travis, J. (2014), *Assessing the State of Mass Incarceration: Tipping Point or the New Normal?* *Criminology & Public Policy*, 13: 567–577. doi: 10.1111/1745-9133.12101

<sup>4</sup> About Mission Statement, *JustLeadershipUSA* (retrieved from the World Wide Web on February 20, 2015: <https://www.justleadershipusa.org/about-us/>)

<sup>5</sup> American Civil Liberties Union, *“ACLU Awarded \$50 Million by Open Society Foundations to End Mass Incarceration”* (November 7, 2014).

<sup>6</sup> The Dream Corps, *“Sacramento Bee: Finally, a Movement to Roll Back the Prison Industry”* (February 12, 2015).

<sup>7</sup> The Wall Street Journal, *“Connecticut Gov. Dannel Malloy Proposes Changes to Drug Laws”* (February 3, 2015).

<sup>8</sup> “Executive Order Establishing the Illinois State Commission on Criminal Justice and Sentencing Reform” (retrieved from the World Wide Web on February 20, 2015:

[https://www.illinois.gov/Government/ExecOrders/Pages/2015\\_14.aspx](https://www.illinois.gov/Government/ExecOrders/Pages/2015_14.aspx)).

Sentencing Project calculated that based on the 3-year prison decline through 2012, it would take 88 years to get back to the prison population level (number, not rate) of 1980.<sup>9</sup> Even the recent decline may be illusory. The Pew Charitable Trust has in fact predicted that the incarceration rate is expected to rise three percent by 2018.<sup>10</sup>

This sobering realization should not surprise us. As Michael Tonry points out in the most recent issue of *Criminology and Public Policy*, **“No state has repealed a three-strikes, truth-in-sentencing, or LWOP [life without parole] law..... No statutory changes have fundamentally altered the laws and policies that created the existing American sentencing system, mass incarceration, and the human, social, and economic costs they engendered.”**<sup>11</sup> Is it possible that mass incarceration is the new normal?

Recall the first finding of the NAS report: we are here because we chose to be here. The four-fold increase in incarceration rates was caused by long sentences made longer, mandatory minimums, and the war on drugs. Which politician is willing to stand up to say that prison terms for violent offenders should be cut back, or that people now sentenced to mandatory minimums should no longer go to prison, or that severe punishments for drug sales should be cut back? Which prosecutor or judge running for office will take a principled stand saying that we have too many people in prison? If tough on crime rhetoric has been so successful, and the public believes that high incarceration rates have produced record low crime rates, why would anyone running for office undo this winning formula? And if one of the arguments for reducing the prison population is the damage being done to the minority communities of our country, how will that argument play to the majority who will have the strongest voice in selecting our political leaders?

Some have urged me to be more patient, saying that our democracy will self-correct. I have my doubts, but I would like to imagine a different future for our country when we do not lead the world in the rate of incarcerating our fellow citizens. To get there, we must attack the breeding grounds of the political reality that brought us to this current situation. I think of this in terms of cultural change, which is a necessary precondition to political change. So for the remainder of this talk I would like to imagine a different world. I will set aside my pessimistic analysis and once again look at our glass as half-full.

In my view, achieving this cultural change will require five interrelated activities.

## **1. Understanding American Punitiveness.**

The NAS report traced the origin of the prison build-up to the turbulence of the 1960s and 1970s when rising crime rates, combined with social and racial unrest, provided fertile ground for the **“tough on crime” political strategies. But the panel could not answer a deeper question: why did America become so punitive? Why did our democracy respond to the fears and panic of that era**

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<sup>9</sup> Huffington Post, *"Can We Wait 88 Years to End Mass Incarceration"*, (December 20, 2013).

<sup>10</sup> States Project 3 Percent Increase in Prisoners by 2018. November 18, 2014 (retrieved from the World Wide Web on February 20, 2015: <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/states-project-3-percent-increase-in-prisoners-by-2018>).

<sup>11</sup> Tonry, M. (2014), *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*. *Criminology & Public Policy*, 13: 506. doi: 10.1111/1745-9133.12097

with such an expensive and inhumane policy prescription that ultimately led to a million more people in prison? I think we need to look beyond criminal justice policy – and beyond traditional political and historical analysis – to answer this question.

We need to recognize that this punitive reflex has been evident in other policy domains as well, not just sentencing policy. In our schools, we have substituted school disciplinary processes with criminal proceedings for juvenile misconduct. In our immigration policy, we have decided to detain millions of undocumented immigrants in a network of prisons not counted in our measures of incarceration. In our response to the threats of terrorism, we have enacted policies that significantly constrain the liberty of all Americans and have subjected Muslim-Americans to special scrutiny. We have also seen the evidence of our punitive attitudes in the recent debate on stop-and-frisk policies in New York City when the excessive use of this legitimate police power was justified as necessary to keep crime down.

In my view, our efforts to reduce mass incarceration will require a deep exploration of why our country embarked on this aberrational experiment in the massive deprivation of liberty. This inquiry will necessarily require us to confront the racial dimensions of mass incarceration and **the thread that connects this era with the nation's unresolved** struggle for equal protection of its laws. In that connection, I am pleased to note that, with financial support from the MacArthur Foundation, my John Jay colleagues David Green, Maria Hartwig, and I will soon be convening an Interdisciplinary Roundtable on Punitiveness in America. We will bring together philosophers, theologians, psychologists, political scientists, criminologists and historians, from America and Europe, for a far-reaching two-day exploration of this topic. In addition to an edited scholarly journal, we will also publish a general reader monograph from the proceedings of the Roundtable. I hope that we find enough fertile ground to continue this discussion and to share our findings with a broader audience of scholars, practitioners and policy-makers.

## **2. Imagining a Different Future.**

One of the missing ingredients in the current debate over mass incarceration is that we do not have an alternate vision for our future. We are so focused on the tactical challenges of coalition building, the hand-to-hand combat of legislative reform, and the concern about short-term victories that we do not take the time to say, simply, it need not be so. I think the new rhetoric of the movement to reduce mass incarceration is powerfully positive: **“Let’s cut the prison population in half!”** Though this rhetoric is welcome, it is not sufficient to overcome the political forces that sustain the status quo.

What might be more effective? For starters I would point to the recent success of Proposition 47 in California, which reclassifies offenses in the penal code for the specific goals of reducing incarceration; takes and reallocates money from corrections budgets; and, provides large-scale opportunity for people convicted of low-level felonies to have these felonies removed from their old records.<sup>12</sup> Many lessons can be drawn from this success. First, the campaign, brilliantly conceived by a group called Californians for Safety and Justice, led with the voices of crime victims – everyday Californians who said that the current system, with its long sentences, did

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<sup>12</sup> Proposition 47: The Safe Neighborhoods and Schools Act (retrieved from the World Wide Web on February 20, 2015L: <http://www.courts.ca.gov/prop47.htm>).

not deliver the justice that they sought.<sup>13</sup> These victims would rather have seen a system that dealt with the conditions that led to the crime – the underlying mental illness, drug addiction, or poor lighting. They would have preferred a system that paid attention to their need to recover from their crimes. Second, the campaign specified alternative investments of the money now spent on prisons. The referendum said that the savings would be re-invested in mental health and drug treatment (65%), K-12 school programs for at-risk youth (25%), and trauma recovery services for crime victims (10%). Finally, because of the unique California ballot initiative process, the campaign was able to bypass the legislative process and directly reflect the will of the people. On November 4<sup>th</sup>, Proposition 47 passed with 60 percent of the vote. Among your handouts you will find a flyer announcing that Californians for Safety and Justice Executive Director, Lenore Anderson, and NY Times journalist Erik Eckholm will be speaking about Proposition 47 at John Jay tomorrow. I invite you to join that conversation.

Only a few states provide for sentencing reform by referendum. So we need other ways to paint a different vision for the future. In recent conversations with colleagues in New York, I have promoted the idea of a community-level conversation that provides direct input into a new **vision for justice. Let's imagine that a community with a high rate of incarceration were** presented with data on the cost of imprisonment. They would see that for some blocks in their neighborhood we now spend over a million dollars a year to incarcerate the individuals, mostly men, from a single block.<sup>14</sup> We would then provide these community leaders with a statistical model showing that, for specified reduction in long sentences those people are serving, hundreds of thousands of dollars could be reinvested. We would then ask them, how should those dollars be reinvested? More importantly, we would ask them, for the crimes leading to those incarcerations, how could our society have responded better? Imagine then that this conversation includes prosecutors, legislators, police officials, service providers, and the community residents then asked their government and civic leaders to find ways to implement this alternate vision. If we were to carry out this exercise at the modest level of a 50 percent reduction in incarceration, we would free up millions and millions of dollars for other public purposes, including promoting lower rates of crime and providing more effective support for victims.

A third idea for creating a different vision for the future involves comparison with the prison systems of other countries. We Americans are notoriously parochial and the frequent response to the systems of other countries is: Well, that would never work here. Or, our criminals are worse than their criminals. Or, our social safety net does not provide sufficient benefits for people involved in criminal activity. Or, we have many more guns and too much gun violence. Or, our racial divide is deeper. Or, ....

I think we need to break through these intellectual blinders and look carefully at the prison systems of other countries. I applaud the Vera Institute of Justice for its decision to take a

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<sup>13</sup> Californians for Safety and Justice (retrieved from the World Wide Web on February 20, 2015: <http://www.safeandjust.org/>).

<sup>14</sup> The work of Eric Cadora of the Justice Mapping Center in documenting the phenomenon of “million dollar blocks” represents one of the most important conceptual and rhetorical breakthroughs in our public discourse on incarceration policy (retrieved from the World Wide Web on February 20, 2015: <http://www.justicemapping.org/archive/26/multi-%E2%80%98million-dollar%E2%80%99-blocks-of-brownville/>).

second group of American policy makers and thought leaders to Europe to study its prisons. Hopefully, this will become a steady flow of American experts trying to understand different approaches. It is ironic that early in our nation's history, Europeans came to the U.S. to learn about progressive sentencing and prison policies. Today, we need to repay the compliment.

### **3. Breaking the Gordian Knot of Crime Policy and Prison Policy**

The NAS study reached important conclusions about the nexus between our high rates of incarceration and crime rates – first, that the prison build-up was only indirectly caused by crime increases, and second that high rates of incarceration yielded, at best, only modest benefits in terms of public safety. Yet every time we talk about reducing prison populations, that proposition is still cast in terms of public safety. “Look”, we say, “the incarceration rate of a specific state has gone down, without an increase in crime.” I understand the political imperative for making this statement. But even in political terms, it's problematic: what if crime rates go up a few percentage points, should we halt the prison reduction program? But more importantly, it is analytically problematic. After all, it was the promise that more prison would bring about less crime that got us into this mess in the first place. So we are only repeating a false premise if we couch a prison reduction strategy as possible only if crime does not go up.

At the same time that we break the crime-prison nexus, we need to develop other reasons for reducing the number of people in prison. The efforts to reduce mass incarceration are often based in financial imperatives – **we simply can't afford this anymore**. That works to some extent, but beware the return of healthy state economies. I am heartened by the arguments of libertarians that our current prison population represents an unwarranted intrusion of the state on individual freedoms. I resonate with the argument of small government conservatives who point to mass incarceration as a striking example of a government experiment that failed. I value the arguments of constitutional scholars who say that the current conditions of confinement violate the Eighth Amendment's **prohibition against cruel and unusual** punishment. Utilitarian arguments that we need to be cautious to ensure that we do not jeopardize public safety as we reduce the prison population only reinforce the view that we needed to put all these people in prison to produce public safety.

But, to be credible, advocates for reductions in the prison population need to have a position on public safety. It is the height of irony, to say the least, that we have so many people in prison precisely at a time when we have developed a very sophisticated portfolio of effective crime prevention strategies. We are now in a position to question the premise of mass incarceration **itself and to ask, “Why do we need to use prison so extensively to reduce crime? Why not put the intellectual energy and tax payer resources into effective strategies?”**

### **4. Rethinking the Role of the Criminal Sanction.**

**This is a challenge to the orthodoxy of the legal community, so it's appropriate I raise this** challenge in a law school setting. In my view, we have a golden opportunity to reframe crime policy in terms of new ideas about the role of the criminal sanction in producing public safety. Nothing would be a more powerful antidote to the prison-centric realities of our current crime policy than the design and implementation of a suite of effective crime prevention policies that minimize the use of prison. For the past twenty years, I have been an avid proponent of the

concept of focused deterrence developed by my John Jay colleague, David Kennedy. This concept envisions the criminal sanction – including arrest, prosecution, and incarceration – as part of a larger strategy designed to address specific crime conditions. The concept has been successfully implemented to address gang violence, overt drug markets, and domestic violence. Today, over 50 jurisdictions have joined the National Network for Safe Communities, the vehicle for implementing focused deterrence strategies around the country.<sup>15</sup>

One of the principles of the National Network is to reduce the unnecessary use of incarceration while reducing crime. This formulation represents the embodiment of the principle of parsimony. For focused deterrence work, the instruments of formal social control are used only in connection with explicit invocation of the instruments of informal social control, including the moral voice of communities, the persuasion of family members, and the positive examples of formerly incarcerated individuals. Police officers, prosecutors, defense lawyers, probation officers, judges and corrections officials are not accustomed to such an embrace of informal social control that is so explicit and so strategic. They find themselves in unfamiliar terrain, experiencing a form of professional vertigo. We need to learn from these experiences and follow these lessons wherever they lead. These experiences require a rethinking of the role of the law in influencing behavior.<sup>16</sup>

These innovations are conceptually important for what they teach us about deterrence. They are operationally important for what they can deliver in terms of public safety. But they are also politically important because they undercut the notion that we need long prison sentences to produce public safety. But they sit uncomfortably in the orthodoxy of the laws of criminal sentencing and traditional notions of the adversarial process. Consequently, a challenge of the first order for the law schools and legal academics of the country is to take seriously these advances in theory and practice and develop a set of legal principles that reflect their success. This will, in turn, provide policy makers with a counter-argument to those who say we need so many people in prison to keep us safe.

## **5. Pursuing Racial Reconciliation.**

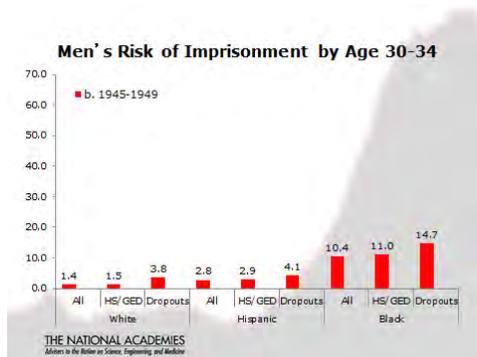
Perhaps the most important task we need to undertake is to come to terms with the implications **of mass incarceration for our country's pursuit of racial justice. We should not be surprised with** the finding of the NAS report that the increase in incarceration rates over four decades was highly concentrated among specific sub-populations. In fact, we found that most of the increase

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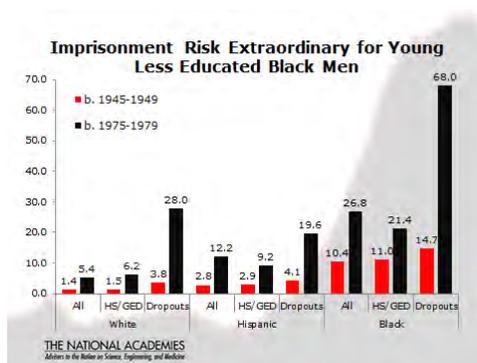
<sup>15</sup> National Network for Safe Communities (retrieved from the World Wide Web on February 20, 2015: <http://nnscommunities.org>).

<sup>16</sup> The principles of focused deterrence have been applied in other settings. The success of Project HOPE in Hawaii is based on similar principles, and also involves minimal use of the criminal sanction. Angela Hawken and Mark Kleiman. *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*. S.I.: U.S. Department of Justice, 2009. In Chicago, the Project Safe Neighborhoods initiative applied focused deterrence ideas with a group of individuals returning from prison, with a 37 percent reduction in homicides during the observation. Tracy L. Meares, Andrew V. Papachristos, and Jeffrey Fagan. *Project Safe Neighborhoods in Chicago - Review of Research. In Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program*, 2009.

came from one subpopulation: minority male high school drop outs. This finding is very sobering. Let me illustrate it this way.



For African-American high school dropouts born between 1945 and 1949, the likelihood that they would serve at least a year in prison before age 34 was 14.7 percent.



For those born a generation later between 1975 and 1979, who came of age during the prison boom, the risk of imprisonment is now a staggering 68 percent. Think about it. This analysis does not reflect the probability of arrest, spending time in police lock up, being on probation, being suspended from school, or spending time in jail. This analysis isolates the most severe interaction between African-American male high school dropouts: being sent to prison. For this group of our fellow citizens, there is a 68 percent probability of spending at least a year in prison. If we add the likelihood of other, less severe interactions with the justice system, we recognize that it would be rare for a male African-American high school drop-out to be untouched by the enforcement apparatus of the state.

Remember our earlier conclusion: We have these high rates of imprisonment because we chose them, because we elected officials who responded to crime by increasing the use of prison. Against that backdrop, how can we explain to ourselves that we have chosen to create a reality in which an African-American man who drops out of high school faces a 68 percent chance of **going to prison before he turns 35? Certainly we can't place the total blame on these men. Do** we have evidence that the offending rate of this group of our fellow Americans has increased more than four-fold over forty years? Absolutely not. On the contrary, we know that we have witnessed a historic decline in crime rates in all communities, including inner city African-American communities. I am not saying that these communities do not have crime problems.

Rather I point out the simple statistical fact that the crime decline has been a widely shared benefit. But this creates a conundrum: In light of the historic good news of low crime rates, how can we reconcile ourselves to the historic high rates of imprisonment – with all the attendant damage for individuals, families and communities? How can we conclude this this state of affairs represents our aspirations for justice?

For me, these data lead to only one conclusion: our incarceration policies – and, more broadly, our criminal justice policies – have done enormous harm. For young men growing up today who are living in our inner cities, in communities that are struggling with poor school systems, poor housing, poor health care, who are not able to complete high school, their life course most likely includes time in prison. What have we wrought? How can we possibly justify this large scale deprivation of human liberty? In whose name have these policies been adopted? Given that we have the lowest crime rates in a generation, **shouldn't** the residents of communities struggling with the consequences of mass incarceration be entitled to demand a peace dividend? Can this really be the new normal for our democracy, that large numbers of our fellow citizens will be confined to a permanently diminished status, long after they pose any elevated risk of criminal behavior, but still earn less, vote less, suffer the trauma of incarceration, at higher risk of morbidity, while too often alienated from family and friends? At this point in my thinking I **hear in my mind the echo of Alan Paton's book about apartheid in South Africa, "Cry, the beloved Country."**<sup>17</sup>

So when I said at the outset that I feel a moral obligation to find ways to reduce mass incarceration, it is because of this reality. We can nibble around the edges, work with politicians to change sentencing laws, deepen our understanding of punitiveness in America, even adopt new crime prevention strategies, but one imperative – a moral and historical imperative – remains: We need to come to terms with the racial damage caused by the era of mass incarceration. We need to imagine and then carry out a program of racial reconciliation. We need to admit our government – acting in our name – has done great harm. We need to accept responsibility for that harm, and find ways to alleviate the consequences.

I do not pretend to know the way forward toward reconciliation. Yet I am heartened by the decision of the Department of Justice, under the inspired leadership of Attorney General Holder, to provide funding for the creation of a National Initiative for Building Community Trust and Justice, to be led by a consortium including John Jay College, Yale Law School, UCLA and the Urban Institute.<sup>18</sup> One of the key activities of the National Initiative will be to work with five pilot sites across the country to explore the pathway toward reconciliation, with a focus on the police and communities of color. We will soon convene at John Jay a group of national and international experts who have experience with reconciliation processes in other contexts and cultures. Perhaps we will find a way to apply these lessons to the phenomenon of mass incarceration. What I do know is that we must find the way, and must find it together.

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<sup>17</sup> Alan Paton. *Cry, the Beloved Country: A Story of Comfort in Desolation*. New York: C. Scribner's Sons, 1948.

<sup>18</sup> Eric Holder, Attorney General, Press Release: *Justice Department Announces National Effort to Build Trust Between Law Enforcement and the Communities They Serve* (September 18, 2014).

So the road ahead is long. In my pessimistic moments, I fear we may never be able to find an exit strategy from the era of mass incarceration. But the optimist in me says we have a chance of success – if we dig deep, look in the mirror, recognize the damage we have done, and commit ourselves to doing the truly hard work of our democracy: ensuring that our society lives up to its ideals.

Thank you.

