



## The Growth of Incarceration in the United States: Exploring Causes and Consequences

ISBN  
978-0-309-29801-8

464 pages  
6 x 9  
PAPERBACK (2014)

Jeremy Travis and Bruce Western, Editors; Committee on Causes and Consequences of High Rates of Incarceration; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council

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### The Prison in Society: Values and Principles

**T**he transformation of U.S. punishment policy during the rise in incarceration reflected not just deep changes in society, but also a change in thinking. The country experienced a tumultuous period of economic and political change, rapidly rising crime rates, and changing race relations. The politics of criminal justice policy became much more punitive. Policy makers enacted laws that were meant to send many more people to prison and keep them there longer. These changes reflect a shift in emphasis among competing values. Public and professional discourses moved from a focus on rehabilitation as the predominant purpose of punishment to just deserts, or retribution, as the primary goal. Stated in colloquial terms, “tough on crime,” “do the crime, do the time,” and “adult time for adult crime” became the public narrative.

The preceding chapters of this report assessed the scientific evidence on the causes and consequences of high rates of incarceration in the United States. In the next chapter, the committee considers the policy implications of that evidence. However, questions regarding the appropriate use of prison in a democratic society cannot be resolved solely by reference to evidence, nor can a society decide whether prison rates are too high only by weighing narrowly quantifiable costs against benefits. Accordingly, the committee explored the scholarly literatures on the purposes of punishment, the role of prisons in democratic societies, and the normative principles<sup>1</sup> that have traditionally limited the penal power of the state. This chapter

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<sup>1</sup>Political theorists and legal analysts have often observed that public policy necessarily embodies ethical judgments about means or ends. These judgments are informed by normative principles: basic ideals or values—often embedded in history, institutions, and public

documents important shifts in prevailing ways of thinking that reinforced the growth in the use of prison. An assessment of this literature was an essential step for the committee in addressing its charge to discuss the policy implications of the scientific evidence on high rates of incarceration.

## HISTORICAL DEVELOPMENT

Early in the twentieth century, the goal of rehabilitation of offenders was central to mainstream thinking about the purposes of punishment. Incarceration was widely seen as an opportunity to address the needs and remedy the defects of the criminal offender (Rothman, 1971, 1980; Garland, 1991, 2001). The rehabilitative ideal was regularly compromised in practice and too rarely truly attained. There was nonetheless a positive transformative purpose that was supposed to be central to the institutional design of the prison, the nature of correctional programming, the use of probation and parole, and the day-to-day practices of sentencing judges (Allen, 1981).

In the shifting political climate of the 1970s, however, skepticism about the appropriateness and the effectiveness of rehabilitation grew. From the 1970s on, two sometimes incompatible goals were increasingly invoked: to link the severity of punishments closely to the seriousness of crimes and to prevent crime, principally through deterrence and incapacitation. Andrew von Hirsch (1976), reporting for the Committee for the Study of Incarceration, detailed a theory of punishment based on retribution and deterrence in his book *Doing Justice*, and he added the phrase “just deserts” to the nation’s criminal justice vocabulary. Numerous other philosophers, criminal lawyers, and correctional officials urged that retribution be recognized as the primary purpose of punishment (e.g., Morris, 1966; Morris, 1974; Fogel, 1979). As von Hirsch (1976, 2007) observed, punishment is a blaming institution that censures offenders for criminal conduct. Retribution, for Von Hirsch, was to be moderated by a principle of fairness and by a fundamental commitment to apportioning punishments to offenders’ relative blameworthiness. Others urged a shift away from rehabilitation as a goal and toward crime prevention. In *Thinking about Crime*, James Q. Wilson (1975) channeled public anxiety and anger about street crime, repudiated rehabilitation as an achievable objective, and argued that deterrence and incapacitation should be viewed as the preeminent goals of punishment.

These works signaled a shift in values. The emphasis on rehabilitation was replaced by an emphasis on punishment as a symbol of moral accountability and as a means to control crime.

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understanding—that offer a yardstick by which good governance is measured (see, e.g., Gillroy and Wade 1992).

The notion that punishments should aim to prevent crime dates from the work of Cesare Beccaria (1764) and Jeremy Bentham (1830, 1970), who pioneered the modern theory of deterrence in the late eighteenth and early nineteenth centuries (see Chapter 5). Early in the twentieth century, positivist thinkers, typified by Enrico Ferri (1921) in Europe and by Jerome Michael and Herbert Wechsler (1937) in the United States, laid preventive foundations for what came to be called indeterminate sentencing. In this sentencing framework, offenders should be imprisoned if they threatened public safety and should be released when they ceased to do so (Pifferi, 2012). Otherwise, they should be kept in prison and thereby incapacitated until they ceased to present an unacceptable safety threat.

The retributive and crime control mission of punishment gained renewed emphasis beginning in the 1970s. Research on incapacitation and deterrence burgeoned (Greenwood and Abrahamse, 1982; National Research Council, 1978a). Among policy makers and practitioners, deterrence, incapacitation, and offender accountability became the predominant objectives of punishment. Proponents of legislative proposals to make sentencing laws more punitive invoked theories of deterrence and incapacitation. Crime control was a key goal for measures such as mandatory minimums, three-strikes, truth-in-sentencing, and sentences of life without parole.

As the goals of crime control and offender accountability ascended, however, long-standing principles that limited harsh punishment receded from political debate and crime policy. The magnitude of the increase in incarceration rates after 1972 and the speed with which it occurred demonstrate the transformation of the purposes of punishment.

In both classical and contemporary retributive theories, punishments may or must be imposed because they are deserved, but to be just they must be closely apportioned to the seriousness of the crime. In both classical and contemporary consequentialist theories,<sup>2</sup> punishments may or must be imposed if doing so will achieve valid preventive goals, but to be just they must be no more severe than is needed for them to be effective.

Many recent sentencing laws sought to be punitive, and were, but failed to assure that punishments were apportioned to the seriousness of offenders' crimes. Many recent sentencing laws sought to prevent crime through deterrence and incapacitation, but failed to ensure that punishments were no more severe than was necessary to achieve their aims. Today, with little evidence of a sizable reduction in crime that is attributable to a more than 4-fold increase in incarceration over nearly 40 years, and with the possibility of real social harm from excessive use of incarceration, old principles of restrained punishment need to be reemphasized.

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<sup>2</sup>Utilitarian, positivist, and other theories that justify actions by reference to their effects, or consequences, are called "consequentialist" theories.

Principles for the restrained use of punishment—similar to the values of crime control and offender accountability—have deep roots in normative theories of jurisprudence and social policy. Some emerge from historical and contemporary efforts to justify the imposition of pain on convicted offenders. Others emerge from broader concerns about the nature of citizenship in a free society. These principles of restraint can curb the rush to punish by appealing to ideas of fairness and by underlining the steadfast mutual obligations that arise from citizens' common membership in the social compact.

The following sections trace the scholarly literature and the intellectual lineage of the principles that should inform the use of incarceration and the role of prison in U.S. society. Each section distills a core principle that acts as a constraint on the power of the state to punish individuals who have violated the law. These principles provided guidance to the committee as we weighed the evidence of the causes and consequences of high rates of incarceration in the United States. Taken together, these normative principles describe a broad conception of justice to which the nation's public institutions should aspire:

- *Desert and proportionality*: Punishments are said to be deserved, and therefore just, only to the extent that their severity is apportioned to the seriousness of the crimes for which they are imposed. Because of myriad differences in the circumstances of offenses and offenders, punishments may sometimes justly be less severe than is maximally deserved but should never be more severe.
- *Parsimony*: Punishments for crime, and especially lengths of prison sentences, should never be more severe than is necessary to achieve the retributive or preventive purposes for which they are imposed.
- *Citizenship*: The conditions and consequences of punishments for crime, especially terms of imprisonment, should not be so severe or so enduring as to violate an individual's fundamental status as a member of society.
- *Social justice*: Prisons should be instruments of justice. Their collective effect should be to promote, and not to undermine, society's aspirations for a fair distribution of rights, resources, and opportunities.

Each of these principles recognizes that the forcible deprivation of liberty through incarceration is an awesome state power that is vulnerable to misuse, threatening the republican values that underpin the legitimacy of the prison and of the state. These principles of restraint are complements, not alternatives, to recent emphases on offender accountability and crime control. Offender accountability and crime control are unquestionably important values but, unbalanced by principles of restraint, they have

precipitated unconstrained growth in incarceration. The principles of restraint help set limits on the scale of incarceration and point toward new approaches.

### DESERT AND PROPORTIONALITY

The principle of proportionality should guide the distribution of punishment across the full range of crimes. Proportionality requires that crimes be sentenced in relation to their seriousness and the extent of the offender's moral culpability. Ideas about proportionality are as old as humankind. Plato and Aristotle wrote about them. In modern times, they are developed most fully in philosophical writing on retribution and desert. That literature dates from the eighteenth and early nineteenth century writings of Immanuel Kant (1965 [1798]). Kant believed that respect for the moral autonomy of human beings requires that offenders be held accountable for their wrongdoing in strict proportion to its seriousness. He proposed a "principle of equality" under which harms brought into the world by offenders would be returned to them as punishment in "like kind." That is not now and never has been practicable in absolute terms. No one can make a compelling case for why any particular crime deserves to be punished to a uniquely appropriate degree. However, that has not significantly inhibited the development of retributive theories of punishment.

Modern writing makes the case not for absolutely deserved but for relatively deserved punishments (e.g., von Hirsch 1976, 1992; Duff 1986, 2001; Robinson 2008). What is seen as important is that comparably serious crimes are punished in comparable ways, and that more serious ones are punished more severely than less serious ones (and, of course, vice versa). Proportionality thus provides guidance in setting relative levels of punishment across the full range of offenses, not the absolute level of severity of punishment for any particular offense. Once crimes have been ranked according to their seriousness, the principle of proportionality offers a benchmark by which severity can be calibrated. There is wide public agreement about the relative seriousness of various crimes (Roberts and Stalans, 1997; Darley 2010; Robinson, 2013).

At this time, the committee believes, most people—including legislators, judges, and practitioners—share and support common intuitions about deserved punishments and proportionality. However, this has not always been true in the United States, as we show in Chapter 3. During the half century when indeterminate sentencing systems were ubiquitous, many people believed that punishments should be individualized to take account of offenders' rehabilitative prospects and to reflect public safety needs for their incapacitation. The existence of widely held intuitions about retributive punishment were acknowledged but disparaged as old-fashioned and

unseemly. Retributive ideas had little influence (e.g., Michael and Wechsler, 1937). Proportionality in the contemporary sense was simply not seen as important.

That view changed in the 1970s when rehabilitation lost credibility and support as a primary aim of punishment. Indeterminate sentencing fell from favor. Partly by default and partly because they fit with contemporaneous concerns for individual rights, procedural fairness, and transparency and accountability in government, retributive ideas became much more influential. Absence of proportionality underlay major critiques of unwarranted disparities in indeterminate sentencing. Proportionality was seized upon as a plausible and principled basis for setting standards for sentencing by the developers of determinate sentencing laws and newly invented guidelines systems.

Sentencing guidelines were widely adopted by state and local U.S. jurisdictions during the 1970s and 1980s. Ideas about proportionality provided a framework for creating comprehensive systems for setting sentences for criminal offenses. Guidelines typically took the form of two-dimensional grids that specified sentences according to the severity of the offense and the offender's criminal history. (See Chapter 3 for a discussion of these developments and the social science evidence concerning their largely positive effects.) Well-designed, well-managed systems successfully reduced disparities, made sentencing predictable, made the system more transparent, and held judges accountable. They also provided important tools for rational and economic policy making. Early guidelines systems in Minnesota, Washington, and Oregon not only made sentencing more consistent, predictable, and transparent, but also enhanced financial planning and correctional management (Tonry, 1996).

The gains in justice, rationality, and cost-effectiveness that proportionality ideas fostered ultimately proved short-lived. The core ideas about justice and equal treatment that motivated support for proportionality were eroded by the adoption of mandatory minimum sentences, three-strikes laws, and other measures that readily imposed incarceration. Such laws often disconnected the severity of punishments from the seriousness of crimes. Low-level drug crimes often were punished as severely as serious acts of violence. Under three strikes laws, some misdemeanors and minor property felonies were punished as severely as homicides, rapes, and robberies. In other Western countries that enacted mandatory minimum sentence laws, judges were almost always authorized to disregard the minimums in the "interest of justice." By contrast, U.S. laws almost never give judges that discretion (Tonry, 2009b).

## PARSIMONY

“Parsimony,” like proportionality, is an old idea but one that is salient in the current debate. Jeremy Bentham (1830, 1970) believed that the measure of a good law or policy is whether it maximizes human happiness. He regarded all infliction of pain, including on offenders, as an “evil” but as justifiable if its imposition prevented greater pain for others. If that test could not be satisfied, a principle of parsimony (sometimes he used the term frugality) forbade imposition of the punishment. Immanuel Kant was, of course, not a utilitarian and did not believe moral matters could be evaluated by weighing costs and benefits (1965 [1798]). However, an idea akin to parsimony is central to classical retributive theories and to contemporary ideas about proportionality in punishment. By all such accounts, and by definition, any punishment that is more or “disproportionately” severe than is deserved is unjust. The word parsimony is not used by retributivists but the underlying concept is the same: Any punishment that is more severe than is required to achieve valid and applicable purposes is to that extent morally unjustifiable. It is excessive. During the indeterminate sentencing period, the term “least restrictive alternative” was used to express the concept, for example, in the *Model Sentencing Act* of the Advisory Committee of Judges of the National Council on Crime and Delinquency (1972).

The idea of parsimony as a restraint on punishment expresses the normative belief that infliction of pain or hardship on another human being is something that should be done, when it must be done, as little as possible. The late University of Chicago law professor Norval Morris likened it to a “Hippocratic criminal justice” oath according to which criminal punishments should do no harm beyond that which is minimally required in order to achieve valid social purposes (Tonry, 1994, 2004). The legitimate social purposes served by punishment have come to be defined as retribution, deterrence, incapacitation, and rehabilitation. Retribution reflects “society’s official view of what a criminal deserves,” and Morris (1982, p. 161) adds, “it is not finely tuned.” Deterrence, incapacitation, and rehabilitation are more utilitarian, intended to promote public safety.

Morris (1974) offered a highly influential account of punishment that takes parsimony seriously. Called “limiting retributivism,” Morris’s theory posits that for every crime, wide agreement can be reached that some punishments would be unjustly severe and others would be unduly lenient. He described unjustly severe and unduly lenient punishments as “undeserved” and possible punishments that lay between them as “not undeserved.” The phrasing is awkward but it is based on the view that it is unlikely that widespread agreements can be reached about punishments that are uniquely “deserved” for particular crimes but highly likely that wide agreements



can be reached that particular punishments are unjustly severe or unduly lenient.

The range of allowable “not undeserved punishments” is however only the starting point. Within that range, Morris said, any punishment could in theory be appropriate, but the presumptions in a free society, consistent with Bentham’s notion of parsimony, should favor liberty. Thus the presumption in every case should be that punishments should be imposed at the bottom end of the allowable range. Overcoming the presumption would require that good evidence be available to show that a more severe punishment would achieve demonstrable preventive effects. The American Law Institute (2011) explicitly adopted Morris’s limiting retributivism as the theoretical basis of the *Model Penal Code—Sentencing*. It is reflected in the laws of states that have adopted systems of presumptive sentencing guidelines (Frase, 2013).

Parsimonious use of criminal punishments may have benefits larger than sparing offenders unnecessary suffering and saving public monies. Greater restraint in the use of punishment could, for example, advance public safety. When punishments are unduly severe and affect large numbers of people in particular communities, crime may flourish as justice institutions lose legitimacy, time in prison becomes a predictable feature of young men’s lives, and the deterrent effect of prison is dulled (Muller and Schrage, 2014; Nagin, 1998).

Social justice may also be more enhanced by parsimonious use of punishment. The concentration of incarceration mainly among poor and minority men in severely disadvantaged communities means that the negative effects of incarceration, including diminution of the life chances of the children of those incarcerated, are also socially concentrated. Throughout this report, we presented evidence showing that those incarcerated face risks to economic opportunities and well-being, and that family members and neighborhoods may also be affected. Parsimonious use of punishment may not only minimize unnecessary use of penal sanctions including imprisonment, but also limit the negative and socially concentrated effects of incarceration, thereby expanding the distribution of rights, resources, and opportunities more broadly throughout U.S. society.

## CITIZENSHIP

The principle of citizenship is a basic tenet of jurisprudence and constitutional government. Citizenship denotes a core set of fundamental rights accruing to all persons by virtue of their membership in a political community. T.H. Marshall (1950) describes how citizenship establishes basic civil rights to self-expression and recourse to the courts; political rights to the franchise; and in the modern era through social policy, a basic right

to human welfare. Together, the rights of citizenship establish a minimum standard of human dignity and protections against state action that compromises, abridges, or undermines the capacity of citizens to exercise those rights.

Incarceration tests the limits of citizenship. Penal confinement necessarily restricts freedom of action in ways that are experienced by no other citizens. Still, the idea that there are basic standards and rights to which all citizens remain entitled is reflected in two precepts of public policy that are widely although not universally applied: that the restrictions associated with incarceration are temporary, and that the nature of penal confinement must respect human dignity. Underlying measures for the temporary and dignified character of punishment is the concept of what Meyer (2010) describes as human connectedness among the members of a political community that serves to limit the penal power of the state.

The temporary character of incarceration is reflected in the fact that the overwhelming majority of prisoners ultimately will return to free society, and underscores why time spent in prison should not serve to compromise their successful re-entry when they do. The many mechanisms for discretionary release that accelerate the prisoner's return to the community and hasten the full restoration of rights—from parole, through the expiration of collateral consequences, to executive pardons—also underscore the time-limited, temporary nature of the prison experience and the importance given to restoring full citizenship rights as soon as possible.<sup>3</sup>

The need to maintain human dignity for incarcerated individuals is well established by international standards (e.g., United Nations Office on Drugs and Crime, 2006). Many legal and correctional organizations in the United States also openly value human dignity and acknowledge the importance of protecting it during penal confinement. The American Correctional Association takes “humanity” as its first principle of correctional supervision, stating, “The dignity of individuals, the rights of all people and the potential for human growth and development must be respected” (American Correctional Association, 2002). In its Standards on Treatment of Prisoners, the American Bar Association (2010, Standard 23-7.1) endorses a similar principle: “Correctional authorities should treat prisoners in a manner that respects their human dignity, and should not subject them to harassment, bullying, or disparaging language or treatment, or to invidious discrimination based on race, gender, sexual orientation, gender identity,

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<sup>3</sup>For a history of parole release in the United States and its connection to the reforming impulse of the Progressive movement, see Rothman (1980). Office of the Pardon Attorney (1996) catalogs state and federal collateral consequences and mechanisms for the restoration of rights. Meyer (2010) reviews the normative theory of mercy and its connection to Kantian theories of retribution.

religion, language, national origin, citizenship, age, or physical or mental disability.”

Some of the most authoritative statements on this issue can be found in the United States Supreme Court’s Eighth Amendment jurisprudence, which has evolved to embody a standard of basic decency in prohibiting cruel and unusual punishment. Thus in the landmark capital case *Furman v. Georgia*, Justice William O. Brennan famously wrote that “punishment must not by its severity be degrading to human dignity.” More recently, Justice Kennedy echoed these sentiments when, speaking directly about the way that harsh conditions of confinement could adversely and unconstitutionally affect the treatment of prisoners, he wrote that: “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” [*Brown v. Plata*, 131 S.Ct. 1910 (2011), p. 1928].

The legal scholar Robert Cover’s observation that “[t]he experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated” [cited in *Brown v. Plata*, p. 1608] serves as a reminder of the power of imprisonment and a caution against losing sight of the old adage that persons are sent to prison *as* punishment not for (more) punishment. In this context, the principle of citizenship requires that the punishment of prison should not be so severe that it causes damage to prisoners, places them at serious risk of significant harm, or compromises their chances to lead a fulfilling and successful life after they are released.

Yet during the past decades of high rates of incarceration, as we have noted, the growth of incarceration strained fidelity to the principle of citizenship. Under pressure to accommodate and manage truly unprecedented and rapidly increasing numbers of prisoners and a multitude of other challenging problems, the limiting principle that acknowledges and protects the essence of human dignity inherent in all prisoners was at times compromised. Moreover, although the goal of rehabilitation may have been rarely attained, it nonetheless served as a kind of restraining edge against the worst excesses of imprisonment. If, at least in theory, prisoners were supposed to be released from prison better off than they entered, then there were some implicit limits to what prison administrators and officials could knowingly tolerate or practice. When the nation relinquished its commitment to rehabilitation, this implicit limit was relaxed.

To be sure, there were some measurable positive changes that occurred in the nature of imprisonment, even during these otherwise challenging times. As we have noted earlier in this report, lethal violence has significantly declined overall in U.S. prisons, and that many prisons and entire prison systems continued to be well managed and adequately staffed and supported. As we have also noted, however, although systematic and

comprehensive research on the quality of life and other more subtle indices of the experience of incarceration is limited, evidence of problematic practices, conditions, and forms of treatment persists.

The principle of citizenship—and respect for human dignity—would require review of certain conditions of confinement. Our review suggests, for example, that lengthy periods of isolation or administrative segregation can place prisoners at risk of significant psychological harm (see Chapter 6). Other evidence suggests that, partly as a result of serious overcrowding, prisoners have experienced reduced access to educational, vocational, and rehabilitative programs; and little or no adequate preparation for the return to free society. Prisoners who return to free society emotionally damaged, socially marginalized, or unprepared to obtain gainful employment may never be able to become fully functioning and participating members of the community, violating the most basic tenets of the principles of citizenship.

## SOCIAL JUSTICE

The legal and political theory of punishment is largely silent on the social context in which criminal behavior arises. Criminal punishment is treated as a state-sanctioned blaming of offenders for moral failure, with limits imposed on the state to preserve core rights of citizenship. Justice is served by the equal treatment of suspects, defendants, and the incarcerated. This view of criminal punishment typically neglects the social or economic circumstances of crime, or the social inequality that often grows as cases move from arrest, to conviction, and then incarceration. The equation of justice with equal treatment in the courts is striking since the authorities deal overwhelmingly with the poor. We have seen from our review of incarceration statistics that, in the period of high incarceration rates, imprisonment has become commonplace for recent birth cohorts of men, particularly minorities, with very little schooling. Pervasive incarceration among poor men raises the question: What is the significance of poverty and social inequality for the U.S. system of punishment as an instrument of justice?

Classical conceptions of justice took little notice of the social inequalities that frequently divided the citizenry. Liberal justice of the eighteenth century insisted on a basic equality among men, in the language of the Declaration of Independence. Still, the liberal justice of equal rights failed to deliver citizenship to enslaved populations in the United States, and widely failed to deliver the franchise to women. Other deep social and economic inequalities persisted through the liberal revolutions of the eighteenth and nineteenth centuries.

By the early twentieth century, normative theorists—deeply concerned by the problems of poverty and social inequality—advocated for social

policy to help redress unequal life chances produced by the rapidly industrializing economies of Western Europe and the United States. In 1912, R.H. Tawney's treatise on *Equality* reflected on the inadequate education and slum housing of the English working class, leading him to call for not merely "an open road, but . . . an equal start" (Tawney 1912, p. 143). Nearly 40 years later, T.H. Marshall (1987 [1950]) described how public education, health care, and income assistance were establishing a dignified standard of living as a basic social right. Political philosophers explicitly made the connection between poverty and injustice. John Rawls (1971) in his monumental *Theory of Justice* argued that a just society would provide for the fair distribution of "primary goods," which included not only wealth and income, but powers and opportunities and the social bases of self-respect. Amartya Sen (1992) went further, arguing that justice demanded not only a fair distribution of the means to freedom, but freedom itself in the form of human capabilities. The central thread running through all this writing surpassed the idea of equal treatment to include the alleviation of poverty and inequality, not as a matter of charity, but as a matter of justice.<sup>4</sup> In this account, the state played a central role in promoting the opportunities of the most disadvantaged.

The normative theory of social justice developed in parallel with the modern social policy instruments for poverty reduction and equal opportunity. Throughout the twentieth century, public health and education systems, cash assistance programs, and social insurance were all charged with improving the well-being and life chances of the disadvantaged and the unfortunate (Esping-Andersen 1990; Katz 1996).

Key elements of the modern criminal justice system also shared in this policy history. David Rothman (1980) has shown how, in the United States, indeterminate sentencing, the juvenile court, and and parole release and supervision all had their roots in the same progressive movement of the early twentieth century that also championed public sanitation and secondary school education. David Garland (2001) called this perspective on correctional policy, "penal welfarism," underlining its aspirations to affirm citizenship and provide opportunity to society's most marginal members. This perspective was eclipsed as incarceration rates increased. Sentencing guidelines replaced indeterminate sentencing, discretionary parole release was widely abandoned and incarceration was used more readily.

Although correctional policy clearly changed as incarceration rates increased, the over-representation of the poor in the criminal justice system did not. The challenge to penal policy of advancing social justice thus

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<sup>4</sup>The language of social justice came to be widely adopted by legal philosophers and political theorists (e.g., Ackerman 1980; Nussbaum 1998; Miller 1999; Barry 2005).

remains no less urgent than when penal welfarism first emerged as a policy philosophy in the early twentieth century.

In this context, the principle of social justice requires that a penal system avoid adding to social inequality or reduced opportunity. This goal of limiting penal harm recognizes that the power of incarceration is vast and may be socially damaging to those who are incarcerated, their families, and their communities. Minimizing penal harm is imperative because of the severe social and economic disadvantage of those at greatest risk of incarceration.

Reducing the negative effects of incarceration, however, is a minimal goal. More ambitiously, by helping to provide order and predictability in daily life and by reducing violence and other crime in the poorest communities, the criminal justice system can be expected to contribute positively to social justice. In this case, social justice is served by improvements in public safety. More than a general reduction in crime, however, social justice is particularly advanced where crime is reduced among poor and marginal populations. Improving public safety most for the poorest, for whom crime rates are highest, provides for a fairer distribution of rights, resources, and opportunities. Because rates of violence tend to be highest in the poorest communities, the goal of public safety is closely aligned with the value of social justice. Public safety consistent with social justice goes beyond the traditional focus on the detection, apprehension, and prosecution of crimes to also encompass prevention, and the mitigation of the social and economic conditions in which crime tends to flourish. In contrast, if the criminal justice system preserves or exacerbates racial, economic, and other inequalities, social justice is compromised.

Incarceration not only is associated with race, poverty and their correlates, incarceration has also become highly prevalent in the nation's poorest communities. Incarceration and social inequality are closely entwined. Our review of the evidence on the effects of incarceration suggests that the most troubled communities have not clearly become safer as a result of the growth of incarceration, and they may have suffered significant negative effects. In this respect, high incarceration rates have likely failed to deliver social justice. Through its intimate connection to social inequality, the criminal justice system also risks losing its legitimacy, particularly in the communities where its effects are felt most deeply.

## CONCLUSION

In the domain of justice, empirical evidence by itself cannot determine public policy. Tacit conceptions of fairness and human welfare can remain hidden in the sober accounting of costs and benefits. Even more challenging, the social science evidence is often incomplete and uncertain. Moreover, an

explicit and transparent account of normative principles has been notably missing from the significant policy shifts that propelled the rise in incarceration rates over the last four decades. As a committee, we worried that respect was lost for incarceration as an awesome state power in a liberal society. In this chapter, we have elaborated a set of key normative principles with deep roots in jurisprudence and theories of governance. These principles help supplement the large body of empirical evidence we have reviewed, indicating future directions for policy and research.

**CONCLUSION:** In the domain of justice, empirical evidence by itself cannot point the way to policy, yet an explicit and transparent expression of normative principles has been notably missing as U.S. incarceration rates dramatically rose over the last four decades. Normative principles have deep roots in jurisprudence and theories of governance and are needed to supplement empirical evidence to guide future policy and research.