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“Exploring the National Criminal Justice Commission Act of 2009”

**Senate Judiciary Committee
Subcommittee on Crime and Drugs****DATE:** June 11, 2009**TIME:** 03:00 PM**ROOM:** Dirksen-226[WEBCAST](#)**OFFICIAL HEARING NOTICE / WITNESS LIST:**

June 8, 2009

NOTICE OF SUBCOMMITTEE HEARING
TIME CHANGE TO 3:00 p.m.

The hearing on "Exploring the National Criminal Justice Commission Act of 2009" scheduled by the Senate Committee on the Judiciary Subcommittee on Crime and Drugs for Thursday, June 11, 2009 will begin at 3:00 p.m. rather than the previously scheduled time of 2:30 p.m.

Chairman Specter will preside.

By order of the Chairman

Witness List

Hearing before the
Senate Judiciary Committee
Subcommittee on Crime and Drugs

on

"Exploring the National Criminal Justice Commission Act of 2009"

Thursday, June 11, 2009
Dirksen Senate Office Building Room 226
3:00 p.m.

Panel I

The Honorable Jim Webb
United States Senator for the State of Virginia

Panel II

Chief William Bratton
Los Angeles Police Department
Los Angeles, CA

Pat Nolan
Vice President
Prison Fellowship
Lansdowne, VA

Professor Charles J. Ogletree
Harvard Law School
Cambridge, MA

Brian W. Walsh
Senior Legal Research Fellow
Center for Legal and Judicial Studies
The Heritage Foundation
Washington, D.C.

Witness Testimony

[William Bratton](#)[Brian W. Walsh](#)[Pat Nolan](#)[Charles J. Ogletree](#)

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Statement of

The Honorable Jim Webb

United States Senator
Virginia
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Remarks of Senator Jim Webb

Subcommittee on Crime and Drugs U.S. Senate Committee on the Judiciary Hearing on the National Criminal Justice Commission Act of 2009 June 11, 2009

I would like to thank you, Chairman Specter, and Ranking Member Graham for the opportunity to speak today and for cosponsoring the National Criminal Justice Commission Act of 2009. I know full well your own work in this area over many, many years and appreciate your support in this endeavor. I look forward to continuing to work with both the Subcommittee on Crime and Drugs and the Judiciary Committee to move this bill forward.

We find ourselves as a nation in the midst of a profound, deeply corrosive crisis that we have largely been ignoring at our peril.

The national disgrace of our present criminal justice system does not present us with the horrifying immediacy of the 9/11 attacks on the Twin Towers and the Pentagon, which in the end rallied our nation to combat international terrorism. It is not as visibly threatening as the recent crash in our economy.

But the disintegration of this system, day by day and year by year, and the movement toward mass incarceration, with very little attention being paid to clear standards of prison administration or meaningful avenues of re-entry for those who have served their time, is dramatically affecting millions of lives, draining billions of dollars from our economy, destroying notions of neighborhood and family in hundreds of communities across the country, and

- most importantly - it is not making our country a safer or a fairer place.

It is in the interest of every American, in every community across this land, that we thoroughly re-examine our entire criminal justice system in a way that allows us to interconnect all of its different aspects when it comes to finding proper approaches and solutions to each different component part. I am convinced that the most appropriate way to conduct this examination is through a Presidential level commission, tasked to bring forth specific findings and recommendations for the Congress to consider and, where appropriate, enact.

The National Criminal Justice Commission Act of 2009 is a product of thought, research, and reflection as an attorney, a writer, including time as a journalist twenty-five years ago, when I examined the Japanese prison system for a cover story in Parade Magazine, and as a government official.

Here in the Senate I am grateful that Senator Schumer and the Joint Economic Committee allowed us the venue of that committee to conduct hearings on the impact of mass incarceration and drugs policy. I also appreciate working with George Mason University to put together a symposium bringing people in from across the country to talk about drug policy, and collaborating with other institutions working on these issues, such as the Brookings Institution.

Once we started examining this issue over the last year people from all across the country reached out to us -- people from every political and philosophical perspective that comes into play and from all walks of life.

Since I introduced the National Criminal Justice Commission Act of 2009 two months ago, we have seen an even greater outpouring of interest in and support for the bill. My office has engaged with more than 100 organizations, representing prosecutors, judges, defense lawyers, former offenders, advocacy groups, think tanks, victims rights organizations, academics, prisoners, and law enforcement. In the Senate, twenty-eight of my colleagues have joined me on this bill.

The goal of this legislation is to establish a national commission to examine and reshape America's entire criminal justice system, the first such effort in more than forty years.

The duties of the Commission would include making policy recommendations designed to:

- ? re-focus incarceration policies on criminal activities that threaten public safety;
- ? lower the incarceration rate, prioritizing public safety, crime reduction, and fairness;
- ? decrease prison violence;
- ? improve prison administration;
- ? establish meaningful re-entry programs for former offenders;
- ? reform drug laws;
- ? improve treatment of the mentally ill;
- ? improve responses to international & domestic criminal activity by gangs & cartels;
- ? and reform any other aspect of the criminal justice system the Commission determines necessary.

The Commission will be a blue-ribbon, bi-partisan panel of experts appointed by the President, the Majority and Minority Leaders in the Senate, the Speaker and Minority Leader in the House, and the Democratic and Republican Governors Associations.

The scope of the problem is vast: we have 5% of the world's population but 25% of the world's known prison population. 7.3 million Americans are incarcerated, on probation or on parole. 2.38 million Americans are in prison

- five times the world's average incarceration rate. From early in the last century until the 1980s, the number of people in prison hovered below 500,000. In the 1980s it began to skyrocket. The elephant in the room in many discussions on the criminal justice system is the sharp increase in drug incarceration over the past three decades. Incarcerated drug offenders have soared 1200% since 1980, up from 41,000 to 500,000 by 2008. A significant percentage of persons incarcerated for drug offenses have no history of violence or high-level drug activity.

Four times as many mentally ill people are in prisons than in mental health hospitals, roughly 350,000 compared to 80,000.

African Americans are far more likely to be incarcerated for drug offenses than other groups. African Americans are 12% of the U.S. population, 14% of monthly drug users, yet are 37% of those arrested on drug charges, 59% of those convicted on drug charges, 74% of drug offenders sentenced to prison.

Corrections officers and offenders face dire conditions in many overcrowded and violent prisons. The prison system offers limited opportunities for career progression, inadequate training, potentially violent working conditions, high administrator turnover, and low accountability. In 2007, 60,500 prison inmates reported sexual victimization.

There are an estimated 1 million gang members in the United States, many of them foreign-based. Every American neighborhood is vulnerable. Gangs commit 80% of the crime in some locations. Mexican cartels, which are military-capable, have operations in 230+ U.S. cities. U.S. gangs are involved in cross-border criminal activity, working in partnership with these cartels.

We need to take a comprehensive look at our criminal justice system, including all of these issues. As a nation, we can spend our money more effectively, reduce crime and violence, reduce the prison population, and create a fairer system. It is time to take stock of what is broken and what works and modify our criminal justice policies accordingly.

Once again, I appreciate the opportunity afforded by the Chairman and Ranking Member to speak today. I would also like to thank the distinguished witnesses who have kindly agreed to give their remarks.

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Testimony of

William Bratton

June 11, 2009



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[The Honorable Jim Webb](#)

TESTIMONY OF
WILLIAM J. BRATTON, CHIEF OF POLICE
LOS ANGELES POLICE DEPARTMENT

ON BEHALF OF
MAJOR CITIES CHIEFS ASSOCIATION

BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME AND DRUGS

"Exploring the National Criminal Justice Commission Act of 2009"

June 11, 2009

Senator Specter and distinguished members of the Subcommittee, in my capacity as President of the Major Cities Chiefs Association and Chief of the Los Angeles Police Department, I am pleased to be able to contribute to the discussion and debate on what I view as some of the most important issues facing our society today. I believe that such a debate is long overdue on the national level and I agree that we need a contemporary, widespread and far-reaching review of our entire criminal justice system in order to better serve and protect the public. In a free society, it is incumbent upon the government and its agents to safeguard the rights of the victims of violence as well as the rights of the accused and the incarcerated. It is not enough to continue to churn people through a broken and ailing system with no forethought and no long-term solution. Ongoing reform is a necessary component of democracy that cannot be taken for granted and which requires constant and ongoing attention, focus and prioritization.

It is widely agreed that there has been no truly in-depth or comprehensive study of the entire criminal justice system since The President's Commission on Law Enforcement and Administration and Justice, impeached in 1965, and that many of today's criminal justice components operate based on its findings and recommendations as outlined in The Challenge of Crime in a Free Society published in 1967. It is my view that while there are many laudable and long lasting results attributable to The President's Commission on Law Enforcement and Administration and Justice, including the federally funded college education of thousands of young police professionals (myself included), the virtual dismantling of traditional organized crime and the introduction of automated fingerprint identification systems and other technology, the Commission was not as prescient as it could have been in some areas. I think now is the time to build on what we learned from these past efforts to develop a truly comprehensive and successful criminal justice system for the future. The most important message that I want to leave with you is that we must focus on preventing crime before it occurs rather than respond to it after it does. This has been the focus of my entire career, from a rookie cop in Boston to Chief of the Los Angeles Police Department. One of the great failures of The President's Commission on Law Enforcement and Administration and Justice was the acceptance of the widely held belief that police should focus their professionalization efforts on the response to crime and not the prevention of it. They mistakenly believed that the so called societal causes of crime (racism, poverty, demographics, the economy, to name a few) were beyond the control and influence of the police. They were wrong. Those 'causes' of crime are in fact simply 'influences' that can be significantly impacted by enlightened and progressive policing. The main 'cause' of crime - human behavior - certainly is something that is a principal responsibility and obligation of the police to influence. The challenge in our democratic society is to always police constitutionally, consistently and compassionately.

My goal today is to briefly offer my perspective on what has transpired over the last forty years; to voice my support for the formation of a Criminal Justice Commission and to make recommendations on the composition and the scope of inquiry of such a Commission.

That was then, this is now

Thirty nine years ago, I was entering the police profession as a patrol officer, a profession that in many ways was severely flawed. It has been said that "the price one pays for pursuing any profession or calling is an intimate knowledge of its ugly side." I believe that is true, and I also believe that there is no greater calling than to protect and to serve the public, even through an imperfect and evolving system of justice.

So, what was happening forty years ago that prompted our elected officials to act? It is important to understand the context of the last inquiry in order to better prepare for our next foray into self-discovery and reform. The main criminal justice concerns in 1965 seemed to revolve around the hostile relationship between police and African Americans, organized crime, a dearth of research, problems with a growing juvenile justice system, gun control, drugs, the individual rights of the accused, police discretion, civil unrest, and a broken and isolated corrections system struggling to balance rehabilitation and custody issues. The "supervised" population at the time was quoted as hovering around one million people. That number has now swollen to over seven million. Another finding of The President's Commission on Law Enforcement and Administration and Justice held that in order to be effective, a parole agent's caseload should not exceed 35 cases. Now, parole agents in some parts of the country are struggling with caseloads exceeding 80 cases.

So, that was the scene when I entered the profession. The intervening 20 years of the 70s and 80s saw a historic surge in violence, an epidemic of drug abuse and addiction, the deinstitutionalization and abdication of responsibility for the needs of the mentally ill, an explosion in our prison population, and an ever increasing commitment of uncoordinated resources to contain the effects of gangs, drugs, and guns on our communities with diminishing positive impact.

What we learned over the past two generations

While we failed to effectively address the tremendous increase in crime and violence in the 1970s and the 1980s, we finally started to get it right in the 1990s. Young police leaders were encouraged and financed in their pursuit of education, and that exposure led to a change in the way we were doing business. We had been focused on a failed reactive philosophy emphasizing random patrol, rapid response, and reactive investigations. In the late 80s we began to move to a community policing model characterized by prevention, problem-solving, and partnership. We turned the system on its head, and we were successful in driving significant crime reduction through accountability, measuring what matters, partnership with the community, and policing strategies that emphasized problem-solving and broken windows-quality of life initiatives. We developed COMPSTAT with its emphasis on accountability and use of timely accurate intelligence to police smarter. The results, as reflected by the dramatic crime declines of that period continue to this day in New York, Los Angeles, and other cities. At the same time, the federal government took action to increase the number of law enforcement officers, to strengthen penalties, to control guns, and to support prevention programs, along with widening their efforts to combat organized crime. They became a true partner.

Since the 90s, crime has leveled off in some cities, has increased in others, and is continuing to decline in some others. This has given us the opportunity to pause, to look up from the task at hand, to analyze what we have done, to look at what has worked, and at what we can do better. The partnerships we have formed and the transparency and cooperation we have experienced has allowed us to more critically examine the form, process, and nature of criminal justice in contemporary American society.

Systemic problems persist

We have an opportunity here to capitalize on the relative success of the enforcement part of the equation to improve on the prevention, intervention, and reform aspects of criminal justice as a whole. Systemic problems persist as we fast forward to today's contemporary concerns.

The main criminal justice concerns for policy makers today revolve around the threat posed by gangs rather than traditional organized crime, continued problems with the corrections system in general and with the seemingly intractable problem of mass incarceration, a fractured and unrealistic national drug policy and a lack of protection of the individual rights and treatment of the mentally ill.

George Kelling has noted that "The jailing and imprisonment of the mentally ill is a national disgrace that, once again, puts police in the position of having to do something about a problem created by bad 1960s ideology, poor legislation, poor social practice and the failure of the mental health community to meet their responsibilities. In some places, Boston and Los Angeles are examples, mental health professionals are stepping up to the plate, but it is on a small scale and only affects a small portion of the mentally ill."

My friend and the Obama Administration's new drug czar, Gil Kerlikowski, has said that he wants to banish the idea that the U.S. is fighting "a war on drugs," and shift to a position favoring treatment over incarceration in trying to reduce illicit drug use. I agree with Gil and will go a step further by suggesting that strong enforcement and effective prevention and treatment programs are not mutually exclusive. It is possible to promote a responsible enforcement agenda without driving incarceration rates through the roof. I know that it sounds counterintuitive, so let me explain. During my tenure as Police Commissioner in New York, we increased the jail population at Riker's Island to somewhere in the neighborhood of 22,000 inmates. As we drove crime down and focused on prevention, we denied criminals the opportunity to commit crimes. We, the police, controlled and modified the behavior of the criminal element to the degree that open air drug markets were disrupted, criminals were less likely to carry weapons for fear of being stopped, and aggressive beggars and other offenders were forced to abandon their long held practices of intimidating victims and destroying public spaces. The population at Riker's today stands at around 11,000 inmates reflecting a city that has seen in excess of a 70% drop in reported crime and the numbers of people committing these crimes. Los Angeles is another example. In the past eight years, we have achieved historic crime reductions. While it is true that arrests (including those for narcotics) increased during the first few years, the last four years have been marked by declines in both crime and arrests. We recognize the importance of arrests in bringing crimes under control but also appreciate that we cannot use arrests as our only tool to deal with the crime problem.

In the intervening 40 years since the last commission, policing a free society has become significantly more complicated and demanding in order to meet the diverse expectations of citizens and elected leaders. I applaud the Committee for initiating this reexamination of our system of justice through the establishment of a National Criminal Justice Commission. The Commission, as outlined in the bill, will seek to inform policy changes designed to reduce our prison population, establish meaningful reentry programs, reform drug policy, improve the treatment of the mentally ill, and overhaul the way in which we deal with escalating gang violence, among other important issues. Together with an examination of law enforcement and policing, we expect a thorough review of the entire criminal justice system.

We Cannot Arrest our Way out of these Problems, Including the National Gang Crime Explosion

This bill recognizes what cops know and what the experience of the past forty years has shown, that we cannot arrest our way out of our gang crime problem. We recognize that arrest is necessary to put hardened criminals away; however, we will fall far short of our overall goal if this is all that we do. We need to also look for ways of preventing crime before it happens. Effective and long-term crime reduction can only be achieved through a comprehensive, collaborative approach that includes preventing gang involvement and gang violence, identifying the relatively small number of repeat violent offenders, and restoring public order. Experiences in NYC during the 1990s and LA and other cities now in the first decade of the 21st Century demonstrate that violent crime can be prevented in part by police working in partnership with neighborhoods and communities. In addition, a significant portion of any future conversation has to focus on the crime prevention capabilities of criminal justice agencies operating as criminal justice agencies. To be sure, there are long-term needs and opportunities for our justice system, but they should not be considered out of the context of the more proximate preventive measures now available to police and prosecutors, including "broken windows," "pulling levers," and "problem-solving." The focus of this Commission should be on proximate measures to prevent crime. This was largely ignored during the 1960s President's Commission on Law Enforcement and Administration and Justice, and we should be careful not to make this mistake again.

The Los Angeles Gang Intervention Strategy

In Los Angeles, we are committed to attacking gang violence through prevention. By flooding our neighborhoods with critical prevention, intervention, youth development services, and by getting illegal guns off our streets we are keeping violence down for the long term. Mayor Antonio Villaraigosa and I are determined to

continue to crack down on the gang carnage in the City and to provide young people at risk with better alternatives for their future.

We are already seeing some remarkable results. Gang-related homicides are down 26% since 2008 and 63% from 2002. An even more dramatic example is to compare gang homicides at their height in 1992 to last year's total. In 1992, 430 people lost their lives to gang violence in Los Angeles. Last year, the toll was 167. Still far too many, but our efforts meant that 263 fewer people were killed by acts of gang violence.

Mayor Villaraigosa created the Office of Gang Reduction and Youth Development in August 2007 and appointed Reverend Jeff Carr as its Director with the mission to combat the City's gang epidemic. Reverend Carr has challenged the community to do their part as well, stating, "We have to figure out how to not become so desensitized to the violence that is going on in our community that we allow it to numb us to the point where we don't take the kind of action and have the kind of moral outrage that is necessary to eliminate this problem."

A key part of our strategy to combat the City's gang epidemic is to establish Gang Reduction and Youth Development (GRYD) zones in the communities most affected by gangs. Importantly, in addition to an increased deployment of police, the GRYD zones receive additional resources focused on prevention, intervention, and reentry programs for those involved or otherwise affected by gangs. This holistic approach is seen by experts as key to reducing not only the crime rates but also the membership of young people in gangs. In some sense, we are competing with the gangs for our youth and their lives are at stake.

Many of the reforms that were implemented in Los Angeles were proposed by and for the community. The Advancement Project headed up by Civil Rights Attorney Connie Rice, and other stakeholders proposed that the City move from its former approach of small, uncoordinated, low impact programs to a strategy of comprehensive prevention, intervention, and community investment that is linked to strategic community policing and designed to have neighborhood level impact. In response, City public health and healing, child development, job development, and community development models have been implemented to effectively address underlying conditions that spawn gangs and violence. Any comprehensive strategy needs to address precursors to violence that may originate in the home such as domestic violence, negative parenting, and acceptance of gang culture. Its focus on prevention should reduce the need for incarceration significantly as gang related crime and violence continues to be reduced.

Final Thoughts

Our problems are systemic, widespread, and growing and only a singularly focused blue ribbon commission comprised of informed practitioners, scholars, policy makers and civil rights activists can adequately address the calculated formation of intervention and prevention strategies. Formation of this important commission is a major and essential step in the right direction. In closing let me add that:

"America's system of justice is overcrowded and overworked. It is undermanned, underfinanced, and very often misunderstood. It needs more information and more knowledge. It needs more technical resources. It needs more coordination among its many parts. It needs more public support. It needs the help of community programs and institutions in dealing with offenders and potential offenders. It needs above all, the willingness to reexamine old ways of doing things, to reform itself, to experiment, to run risks. It needs vision."

This was true when it was penned 42 years ago by the President's Commission on Law Enforcement and Administration of Justice, and I think we can all agree that it still holds true even more so today. Nonetheless, I repeat: sustained crime control and improvement of the quality of life of neighborhoods and communities can only be achieved if our focus is on preventing crime; we cannot and should not try to arrest and incarcerate our way out of the crime, gang, and drug problems. There is today in America a better way.

Mr. Chairman, we recommend that any commission impaneled to study criminal justice in the United States examine not just the progress made since the President's Commission on Law Enforcement and Administration of Justice on traditional crime control, but also evaluate and understand the changes to policing since the attacks of September 11, 2001. The addition of the homeland security mission has forever altered the fundamentals of policing, bringing new challenges to the men and women who wear the uniform of state and local law enforcement.

At the end of the Commission's work, it is my hope that we will have carefully studied the role of policing in the United States from all angles and all perspectives. The Commission's report back to Congress and the American people should anticipate future challenges to policing and issue clear and strong recommendations to enhance the safety and security of the people of the United States. In that way, the Commission's work will help the entire criminal justice system become stronger and function better for society.

Speaking for my colleagues in law enforcement, we stand ready to assist the Commission in its efforts to improve public safety and fairness in the implementation of the nation's criminal justice system. We advocate for a Commission that will take a comprehensive look at the entire criminal justice system, assessing the changes in policing and how they have helped to drive changes in other aspects of the field such as prosecution, community courts and prevention, probation, incarceration and parole.

Senator Specter and members of the Subcommittee, thank you for inviting me to speak today.

I am now ready to answer any questions you may have.

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Testimony of

Brian W. Walsh

June 11, 2009

Testimony before
the Subcommittee on Crime and Drugs
of the Committee on the Judiciary
United States Senate
June 11, 2009

Brian W. Walsh
Senior Legal Research Fellow
The Heritage Foundation

My name is Brian Walsh, and I am Senior Legal Research Fellow in The Heritage Foundation's Center for Legal and Judicial Studies. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Thank you Chairman Specter, Ranking Member Graham, and Members of the Committee for inviting me here today to address the principles and provisions of the National Criminal Justice Commission Act of 2009 (S. 714). Criminal justice reform is a central focus of my research and reform work at the Heritage Foundation. Over the past three years, I have worked with hundreds of individuals and scores of organizations across the political spectrum to build consensus for principled, non-partisan criminal justice reform. My colleagues, allies, and I have gathered substantial evidence that the criminal justice system is in great need of principled reform, particularly at the federal level, and that this reform should not be driven by partisan politics.

As Harvard law professor Herbert Wechsler reminded us half a century ago, criminal punishment is the greatest power that government routinely uses against its own citizens. Criminal justice thus is too important to allow it to fall subject to partisan political interests. Rather, it should be governed and, whenever necessary, reformed according to sound principles that are widely acknowledged and understood by the American people.

Criminal justice policy has become increasingly politicized over the past few decades, including in Congress. This has been caused by at least three major factors. First, the American people's strongly negative reaction to the increase in crime in the 1960s and 1970s made it politically popular to be "tough on crime," with harsher criminal offenses and greater punishment indicating an elected official's bona fides. On average, candidates for election and reelection who are "tough on crime" can be expected to fare better at the polls than those candidates who are (or who are perceived to be) "soft on crime."

Second, the efforts to combat this trend were in the past bogged down in constituent and interest-group politics, with those engaged in criminal-justice reform advocating for offenders who have committed certain categories of crime rather than for even-handed, across-the-board reforms that benefit all Americans. Some reform advocates and their constituents purposefully and consciously allied themselves with a political party.

Third, state and local law enforcement officials have increasingly become regular supplicants for funding from the federal government. This hunt for federal funding skews the priorities of state and local law enforcement officials and generally results in their emphasizing those issues that receive national attention rather than those that pose the greatest risks and problems to local communities.

My criminal-justice reform allies and I have found among members of both major political parties at the federal, state, and local levels a growing recognition of the need for reform that is both principled and non-partisan. Before the November election, for example, a coalition of groups spanning the political spectrum and working with key Members of the House of Representatives reached substantial consensus on pursuing hearings and reform proposals for federal criminal justice reform. I am hopeful that the non-partisan spirit in which we worked will establish a foundation for sound, lasting reform as well as for greater trust and cooperation among reform-minded advocates and elected officials.

It is also my hope that any commission put in place by the National Criminal Justice Commission Act will be designed and focused to ensure non-partisan conclusions and recommendations that incorporate the experience and best thinking of persons across the political spectrum. For that reason, reform experts who are serious about criminal-justice reform should draw encouragement from Senator Webb's efforts to date to reach out to elected officials on both sides of the aisle and to criminal-justice reform advocates across the conservative-to-liberal spectrum. I commend such bipartisan efforts for criminal-justice reform. And along with some concerns expressed below about the current version of the Act, I hope that its positive elements might serve as a foundation for shaping and establishing a commission that will represent the full range of interests in the criminal justice system and that will investigate and make reasonable recommendations on the full range of problems affecting, in particular, the federal criminal justice system.

SALUTARY FEATURES AND NEEDED IMPROVEMENTS

In addition to the bipartisan approach, the Act as drafted has laudable features. It seems tailored to allow the commission to study and offer solutions addressing, for example, the problems of crime committed by the mentally ill and alternatives to incarceration for some first-time, non-violent offenders. With its emphasis on reviewing national drug policy, the commission should be able to explore the benefits of the drug courts that various states have been using as an alternative to the traditional criminal justice system for non-violent drug offenders in possession of relatively small quantities of drugs. The commission should assess the

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effectiveness of the various drug-court models and report on what works and what does not work in the various states.

Similar systematic study is needed of the programs the states have employed to facilitate offenders' productive reentry into society after their release from incarceration and government supervision. I am not aware of any comprehensive study of these state efforts since the enactment of the federal Second Chance Act, and the commission should undertake to rectify that gap in data.

While there is much positive in the Act's proposal, several features need improvement, notably:

1. As currently proposed, the composition of the commission would be too narrow, focusing too much on federal rather than state appointees to the commission as well as congressional rather than executive appointees, to address the full range of criminal justice issues that the Act proposes to be considered and that should be considered.
2. The Act as currently crafted is founded on unstated premises about the problems with - and lack of benefits from - current national policy on incarceration and drug enforcement; empirical data show that such premises are not well-founded.
3. While purporting to authorize a comprehensive review of American criminal justice, the Act has an undue emphasis on violent and drug offenders and fails to address the proliferation of offenses criminalizing socially and economically beneficial conduct, the federalization of truly local crime, the widespread elimination of criminal intent requirements, and related problems that put at risk the rights and liberties of all Americans. These necessary improvements will be addressed in sequence below.

COMPOSITION OF THE COMMISSION

For any national criminal justice commission to have a lasting, salutary impact on criminal justice policy, its membership must be broadly representative of the experts in the federal and state systems under inquiry. Otherwise, the commission's conclusions and recommendations are not likely to be widely respected or to stand the test of time. There are three problems with the composition of the commission as currently proposed by the Act that undermine the likelihood that the commission will be sufficiently broad. The Act makes insufficient provision to ensure that the views, backgrounds, and expertise represented among the commission's members will adequately cover each of the commission's areas of inquiry; that the 50 states have adequate representation to protect their sovereignty over criminal justice operations, a core state responsibility; and that the interests and expertise of the federal Executive Branch are adequately represented.

Broadening the Commission's Representation

Section 4 of the Act lays out an exceedingly broad scope of inquiry for the Commission, stating that it "shall undertake a comprehensive review of the criminal justice system," including making findings related to both federal and state criminal justice policies and practices. Further, the Commission is directed to "make reform recommendations for the President, Congress, and State governments" covering a broad range of criminal-justice topics. Section 6 sets forth a similarly broad range of topics for inquiry and recommendations. These include:

- ? incarceration policy;
- ? prison administration;
- ? prison violence;
- ? the treatment of mental illness;
- ? international and domestic gangs, cartels, and syndicates;
- ? the criminalization and punishment of illicit drug possession; and
- ? "the use of policies and practices proven effective throughout the spectrum of criminal behavior."

Although this defined scope of inquiry does not encompass all areas of American criminal justice, it covers a broad swath. Yet the Act makes insufficient provision to ensure that the views, backgrounds, and expertise represented among the commission's members will adequately cover each of these areas and provide well-supported and opposing perspectives on contentious issues. While it is helpful that both major political parties would appoint an almost equal number of commission members, the wide popularity of increased criminalization causes the interests of the two parties to converge in many critical areas of criminal-justice policy. In short, the politics at work on Capitol Hill make it difficult for Congress to view the criminal justice system objectively and resist the perpetual temptation to increase criminalization. Care must be taken to insulate the Commission from these forces, in part by including express language in the Act that will establish criteria ensuring that the expert practitioners and researchers chosen represent opposing, well-supported points of view.

The size of the commission may be slightly smaller than necessary to accommodate the requisite diversity of views, backgrounds, and expertise as well as the recommendations made below. The Act currently proposes 11 members for the commission, but this should be increased by 2 to 4 members to provide for a 13- or (at most) 15-member commission. The Act should also require a majority of the commission's members to be present to constitute a quorum for any meeting.

Increasing Representation to Protect Constitutional Federalism

The Act is unabashed about asserting Congress's review and oversight of State criminal justice systems and assigning that review to a national commission. Yet the Act's rationale for doing so is weak: "the conditions under which Americans are incarcerated and the manner in which former inmates reenter society is a compelling national interest that potentially affects every American citizen and every locality in the country." The same statement could be made about hundreds of areas of state government responsibility. Yet the federal government is a limited government of enumerated powers, and Congress must be careful not to dictate criminal-justice policy to the States, even through the use of the Spending Power. It is therefore of concern that only two members of the commission are to be appointed non-federal officials, one by the chairman of the Democratic Governors Association and the other by the chairman of the Republican Governors Association.

Criminal justice is at the very core of governmental powers and responsibilities that are predominately left to the states. The criminal justice burden borne by the 50 states dwarfs the burden undertaken by the federal government. In 2003, state and local governments were responsible for 96 percent of those under correctional supervision --i.e., in prison or jails, on probation or parole. Similarly, in 2004 just 1 percent of the over 10 million arrests made nationwide were for federal offenses. The enormously disproportionate responsibility for criminal law enforcement that the states fulfill is also reflected by the number of law enforcement officials in the two systems. Although the American justice system employed in aggregate nearly 2.3 million persons in 2001, only 9 percent were federal employees. The remaining 91 percent were employed by state and local governments.

Further, in repeatedly acknowledging that the federal government has no general or plenary police power, the Supreme Court has recognized that the power to punish crimes that do not implicate an enumerated power of the federal government belongs solely to the states. The Court's holdings on the police power and scope of federal authority to criminalize are consistent with the views of those who crafted and ratified the Constitution.

The states not only bear the vast majority of the burden for criminal law enforcement, but it is preferable that they do so. Among other reasons for this, what some refer to as the principle of subsidiarity holds that it is best for laws to be imposed and services to be provided by that level of government that is closest - and thus most responsive - to the individuals affected. Thus, criminal justice policy and priorities that do not fall squarely within the scope of a power the Constitution assigns to the national government should be set by state and local officials. State and local officials are in the best position to understand and respond to the needs and interests of the communities and individuals who are affected most by criminal law enforcement.

Official Washington has recently been demonstrating a willingness and propensity to drastically increase the scope and power of the federal government at the expense of the state sovereignty that is at the heart of the constitutional design. Particularly in this environment, Congress must be exceedingly careful about implying that state criminal justice systems are somehow subject to federal oversight. For this reason, at least one-half of the members of the commission should be members of non-federal organizations, some appointed by Congress and some by the executive branch. To protect our dual-sovereignty system of constitutional government, the commission's non-federal representatives should include several who are staunch and outspoken supporters of constitutional federalism.

Representation by Members Appointed by the Executive Branch

The only member of the commission that the Act as currently written would have appointed by the Executive Branch is the chairman, who would be appointed by the President. To better represent the interests and experience of the federal government as a whole, the commission should have an equal number of members appointed by the executive branch as the number appointed by Congress. This is not only a matter of fairness but of prudence, for it would allow the commission to draw upon the extensive expertise of the Department of Justice, Federal Bureau of Investigation, and other federal law enforcement agencies. This change would also afford the proper respect to a coequal branch of government, particularly in light of the fact that the commission seems designed to effect broad, sweeping recommendations for national criminal justice.

There seems to be little reason other than cost for limiting the number of commissioners to 11, and one of the purported reasons for this commission is to identify the best areas in which to find cost savings in the criminal justice system. If this premise of the Act is correct and the recommendations end up finding some cost savings, the commission might indirectly pay for itself even if were to have 13 or 15 members.

ACT'S UNSTATED PREMISES REGARDING CRIMINAL PUNISHMENT

Despite the potential benefits of a non-partisan national commission on criminal justice reform, the Act's unstated premises must not be allowed to go unquestioned. Nor should these unstated premises be allowed to shape the focus and scope of the investigations conducted by a commission that purports to be designed to consider the entire criminal justice system. Instead, a commission with this broad scope should be designed and directed to be as objective as possible in its review.

Incarceration

One of the Act's chief unstated premises may be the unfounded assumption that incarceration rates need to decrease across the board. Section 6 would direct the commission to make recommendations "to reduce the overall incarceration rate." While it may be true that some prison sentences, particularly those at the federal level, are longer than required to fulfill the needs of justice, a directive to decrease the overall incarceration rate strongly suggests that all prison sentences are too long. This is simply not borne out by the best available evidence. It should neither be overlooked nor minimized that nationwide rates for all categories of violent and property crimes are today at or near their lowest levels for the last fifteen years. This drop in the crime rates has coincided closely with the increased levels of incarceration that the Act apparently seeks to change.

Much has been said and written by those in advocacy organizations, professional research organizations, and the media who are broadly opposed to most incarceration suggesting that incarceration does not decrease crime rates. This not only defies common sense and is contrary to the considered opinion of the vast majority of law enforcement professionals, it is contrary to some of the best research. Texas is often held up as the poster child for unwarranted incarceration. Yet the rates of violent and property crime in Texas decreased substantially in the 1990s. And research that disaggregated Texas's incarceration rates from economic, demographic, and other law-enforcement factors concluded that "[v]irtually all the reduction in violent crime, and about half the reduction in property crime, can be attributed to an increase in jail and prison populations."

Incarceration has also been found to have a substantial deterrent effect on crime. One research study, for example, reviewed the deterrent effect of the longer sentences the people of California in 1982 imposed by popular referendum - i.e., Proposition 8 - on repeat offenders. For anyone convicted of any "serious felony" after Proposition 8 took effect on June 9, 1992, the new sentencing provisions added five years to the length of the offender's sentence for each "serious felony" of which he had been convicted in the past. The study made good use of the insight that the deterrent effect of this new sentencing regime could be disaggregated from its incapacitative effect by looking at those convictions that would have been punished with incarceration both before and after the longer sentences took effect. The incapacitative effect could not come into play until a period longer than the sentences that would have been imposed before the new law. So the years immediately following Proposition 8's enactment could be compared with the years before its enactment to see how much crime was deterred. The study found that, controlling for other factors, the rates of both violent crimes and property crimes decreased substantially in California even in the first three years after the new law took effect. Consistent with both common sense and economic research, the deterrence effect of the tougher sentencing law appears to be the best explanation for these drops in California's violent and property crime rates. Experience, common sense, and scholarly research provide solid reasons to conclude that incarceration reduces crime.

Moreover, in addition to the factors above, the benefits of incapacitating violent and other criminals cannot be disputed. The safety of law-abiding citizens and their hard-earned property is increased when criminals who would otherwise commit additional crimes are held in jail or prison. Long terms of incarceration are particularly appropriate for those who have committed multiple violent felonies and, according to criminological research, are likely to do so again. Similarly, those who have committed multiple violent felonies and who intentionally purchase or possess a firearm in violation of criminal law pose a great risk of further violence. They, too, should be subject to substantial terms of incarceration.

This analysis counsels strongly in favor of any national commission on criminal justice engaging in careful study and deliberation when determining which prison sentences are warranted and should be maintained and

which should be reduced. The analysis also counsels against the sort of wholesale reductions in prison populations invited and encouraged by the current version of the Act. Regardless of how much cost savings broad reductions in incarceration may generate in these challenging economic times or how politically popular such reductions may be, non-criminological factors such as these should not be allowed to trump public safety.

The Act therefore should be amended to clarify that the commission should carefully assess and report on the criminological effects of existing sentences before recommending any reductions. Further, the Act should direct the Commission to present the evidence "for" along with the evidence "against" the benefits of incarceration.

Retroactive reductions in sentences are particularly prone to abuse. Incarcerated offenders who waived their right to an expensive criminal trial and pled guilty to one charge often did so in exchange for other, greater charges being dropped. They may be serving a long sentence for a non-violent offense, but that is often the minimum sentence necessary to fulfill the needs of justice because they also committed a violent offense for which the maximum sentence was even longer. For these reasons, the Act should include language directing the commission not to recommend reducing sentences for incarcerated offenders who pled guilty to a lesser charge in exchange for a greater charge being dropped.

Drug Policy

As has been true with incarceration policy, the public discourse on national drug policy has been dominated in the past few years by those members of advocacy organizations, the research industry, and the media who are broadly opposed to enforcement and often favor drug decriminalization. As currently crafted, the Act appears to be premised on assumptions about drug enforcement policy that are one-sided and not entirely well-founded. Nothing in the Act mentions the successes the states and the federal government have had in the fight against drug abuse. Similarly, the Act's language ignores the fact that the national strategy against drug abuse already employs a three-part approach in which prevention, enforcement, and treatment all play a key role. While drug rehabilitation may bring about successful results for some drug offenders, few drug users voluntarily seek such treatment. It is often enforcement that compels them to obtain the help they need to end the damage that drug abuse causes to themselves and others. A rehabilitation-centric approach alone is, as Professor Henry Hart suggested in his classic essay on the purposes of the criminal law, an inadequate response to criminal problems, including those associated with drug abuse.

The discussion that follows in this section is by no means intended to be a full review or unequivocal defense of all current drug-enforcement policy. Rather, its purpose is to highlight a few of the many facts and research studies on national drug policy that have been largely ignored in the recent public discourse and that seem by default to have been largely ignored in the Act as well. This is the type of research and information on the destructive effects of drug abuse and successful results of the fight against it that any commission the Act creates must investigate thoroughly, weigh carefully, and report accurately if the commission's findings and recommendations are to be accorded substantial weight.

Section 2 of the Act emphasizes that a "significant percentage" of incarcerated drug offenders "have no history of violence or high-level drug selling activity." No mention is made, however, of the economic and human costs drug abuse imposes on individuals, families, communities, or employers. For example, one out of every 10 children in America under 18 years old lives with a parent who is substance-dependent or substance-abusing, and the Department of Health and Human Services (HHS) reports that such living situations have a severe negative impact on children. As Eric Broderick, the acting administrator of HHS's Substance Abuse and Mental Health Administration has stated, "The chronic emotional stress in such an environment can damage [children's] social and emotional development and permanently impede healthy brain development, often resulting in mental and physical health problems across the lifespan." In short, personal drug abuse is far from a victimless crime.

Further, drug abuse correlates with the commission of crime. Forty-five percent of incarcerated federal offenders and 53 percent of incarcerated state offenders meet the criteria for drug abuse or dependence, and this dependence correlates with extensive criminal records. The same HHS research reports that 18 percent of federal prisoners and 17 percent of state prisoners committed their offenses in order to get money to purchase drugs, and 15 percent reported that they used marijuana at the time of their criminal offense.

Although such facts do not alone justify all current drug policy, such information about the national fight against drug abuse must be granted its full weight by the commission in order for any of its drug policy recommendations to be granted any weight or authority. As currently written, the Act does not invite such study and suggests that it is unnecessary. The Act should be changed to ensure that drug policy is addressed thoroughly, systematically, and in an unbiased manner and that the states' experience with drug courts for those charged with non violent, low-level possessory offenses are fully explored.

Overcriminalization

A major omission of the Act is that it overemphasizes violent offenders and drug offenders. It does not address the problems presented by the proliferation of criminal offenses - particularly federal criminal offenses - involving conduct that should not even be criminalized at all. The rapid expansion of federal criminal law, beyond almost all prudential and constitutional limits, may not be the first thing to leap to mind when one thinks of key problems with American criminal law. But the existence now of over 4,450 federal criminal offenses is itself a problem that implicates the foundations of the criminal law. The number of federal offenses is too great for Americans to be familiar with all of the conduct that is criminal, and many of the offenses themselves are deeply flawed, omitting essential substantive elements necessary to protect the innocent. As a result of these flaws, the federal criminal code fails to serve what may be its most important function, which is not to expose and punish the relatively few persons who consciously choose to engage in criminal conduct, but to inform citizens of the law's requirements, thereby equipping them to avoid the conduct deemed worthy of society's most severe penalty and moral censure.

The explosion of the federal criminal law - both in the number of offenses and their overall scope - demands that legal reformers revisit basic assumptions about what criminal law is and how best to rein in its actual and potential abuses. Over the last 40 to 50 years, government at all levels has succeeded in convincing Americans that the criminal law is whatever legislators define it to be. Ill-conceived new criminal offenses occasionally raise an eyebrow or two, but Americans generally accept their legitimacy. The result is that Americans have come to rely, consciously or not, on the good graces of prosecutors and the laws of probability to shield them from prosecution. When lightning does strike and an otherwise law-abiding citizen is charged and convicted for conduct that is not traditionally criminal or necessarily even wrongful, most Americans convince themselves that the accused must have done something to warrant the prosecutor's attention. Yet while Americans remain incredulous that improper criminal laws could be used to convict someone who had no intention of doing anything wrongful, the reality is otherwise.

"An unjust law is a code that is out of harmony with the moral law," wrote Martin Luther King, Jr., who had no little experience with unjust law. Many federal criminal offenses fall far short of this standard because they do

not require an inherently wrongful act, or even an act that is extraordinarily dangerous. In the days when average citizens were illiterate, they could still know and abide by the criminal law. At that point, most criminal offenses addressed conduct that was inherently wrongful - *malum in se* - such as murder, rape, and robbery. That is no longer the case. Many of today's federal offenses criminalize conduct that is wrong only because it is prohibited - *malum prohibitum*.

Worse, many of these prohibitions are actually contrary to reason and experience, giving average Americans little notice of the content of the law. For example, few would imagine that it is a federal crime for a person to violate the terms of service of an online social networking site by registering with a fake name, as a recent federal indictment in Los Angeles alleged. Indeed, many Americans might instead expect such conduct to be protected, for it promotes the user's privacy and anonymity and, by extension, the personal safety of minors and other vulnerable users. Another example: Unauthorized use of the 4-H organization's logo is a federal crime. There are undoubtedly reasons that these laws are on the books, but they are not reasons that average law-abiding Americans would be likely to anticipate when trying to conform their conduct to the law's requirements.

Exacerbating the criminalization of an ever-increasing array of behavior that is not inherently wrongful is the crumbling of traditional protections in the law for Americans who act without wrongful intent. Historically, a criminal conviction required that a person:

1. committed an inherently wrongful act that constituted a serious threat to public order, and
2. acted with a guilty mind or criminal intent (that is, *mens rea*).

These two substantive components were essential for conviction in almost all criminal cases from the time of the American founding through the first decades of the 20th century.

But over the past few decades in particular, Congress has routinely enacted criminal laws that lack *mens rea* requirements or that include *mens rea* requirements that are so watered down as to provide little or no protection to the innocent. As a result, honest men and women increasingly find themselves facing criminal convictions and prison time. This happens even when their "crimes" are inadvertent violations that occur in the course of otherwise lawful, and even beneficial, conduct.

Despite increasing attention to this problem in recent years, the trend is for fewer and weaker *mens rea* requirements. In a recent study, Professor John Baker found that 17 of the 91 federal criminal offenses enacted between 2000 and 2007 lacked any *mens rea* requirement whatsoever. The Heritage Foundation and the National Association of Criminal Defense Lawyers will soon publish the results of their joint research into the *mens rea* provisions in bills introduced in the 109th Congress. Preliminary findings reveal that the majority of the offenses studied lack a *mens rea* requirement sufficient to protect from federal conviction anyone who engaged in the prohibited conduct but who did so without the intent to do anything wrongful.

Many lawyers today accept uncritically the idea that any act made criminal by a legislature is, by that fact alone, a proper *actus reus*. But to accept that definition is to obliterate the deeper, more fundamental meaning of *actus reus* as a bad act (not merely something to be disincentivized), for it would be a mere synonym for "act that has been made criminal." The problem may be best illustrated using some of the "criminal" laws made and enforced by totalitarian regimes. For example, under some communist regimes it was deemed a "criminal" act for relatives of politically or religiously persecuted persons to discuss their relative's persecution, even in private and even with other family members. In some regimes, any type of unauthorized communication with a foreigner was deemed a "crime." Regardless of any elaborate (or convoluted) logic and rhetoric that may be used to justify the prohibited conduct, it is evident that there is no proper *actus reus* in these so-called crimes.

Similarly, but to a lesser extreme, when Congress makes it a federal crime to violate any foreign nation's laws or regulations governing fish and wildlife - as it has done in the Lacey Act - many violations will end up being deemed "crimes" despite including no genuinely bad act. Some foreign fish and wildlife regulations may be nothing more than protectionist measures designed to favor the foreign nation's local business interests. For example, the fishing regulations of a Central American nation might require fishermen to package their catch in cardboard, perhaps only in order to provide a stimulus to business for a domestic cardboard manufacturer. If a fisherman then packs his catch taken in that nation's waters in plastic rather than cardboard and imports it into the United States - in violation of the express language of no federal or state law of the United States other than the Lacey Act - is there a proper *actus reus*? Answering 'yes' leads to the absurd conclusion that Congress could, with a single sentence in a single legislative act, make it a crime to violate any and every law of every nation on earth - and that every such offense thereby includes a genuinely bad act. Such may be positive law, but they are not "crimes" in the truest sense of the word; they are merely legislatively enacted offenses that are unworthy of the criminal justice system of any free nation.

The size of the federal criminal law compounds these problems and undermines other protections. The principle of legality, for example, holds that "conduct is not criminal unless forbidden by law [that] gives advance warning that such conduct is criminal." The sheer number and disorganization of federal criminal statutes ensures that no one could ever know all of the conduct that constitutes federal crimes. Those who have tried merely to count all federal offenses - including both Professor Baker and the Department of Justice itself - have been able to provide only rough estimates. The task proves impossible because offenses are scattered throughout the tens of thousands of pages of the United States Code (not to mention the nearly 150,000 pages of the Code of Federal Regulations). If criminal-law experts and the Justice Department itself cannot even count them, the average American has no chance of knowing what she must do to avoid violating federal criminal law.

Threat to Liberty

Perhaps the central question that the Framers of the Constitution and the Bill of Rights debated, and to which they gave painstaking consideration, was how best to protect individuals from the unfettered power of government. They were well-acquainted with abuses of the criminal law and criminal process and so endeavored to place in our founding documents significant safeguards against unjust criminal prosecution, conviction, and punishment. In fact, they understood so well the nature of criminal law and the natural tendency of government to abuse it, that two centuries later, the most important procedural protections against unjust criminal punishment are derived directly or indirectly from the Constitution itself, specifically the Fourth, Fifth, Sixth, and Eighth Amendments.

But despite these protections, the wholesale expansion of federal criminal law - both as to the number of offenses and the subject matter they cover - is a major threat to Americans' civil liberties. Each time Congress crafts a criminal law covering a new subject matter, it effectively expands the power of the federal government. And the types of crimes that Congress now often creates - lacking a proper *actus reus* or a meaningful *mens rea* requirement - can effectively circumvent the Bill of Rights' procedural protections: It is little or no help to have the right to legal representation, indictment by a grand jury, or trial by a jury of your peers if the conduct you are charged with is not truly wrongful according to any reasonable definition of that word and it matters not that you acted with no intention of doing anything unlawful or otherwise wrongful.

Of similar concern, criminal offenses that exceed the limits of Congress's limited, enumerated power are breaches of one of the primary structural limitations that constitutional federalism imposes on the federal government. After countenancing for decades Congress's almost unlimited criminalization of conduct that is inherently local in nature (as long as, that is, the Constitution's Commerce Clause was invoked to justify the assertion of congressional authority) the Supreme Court rediscovered constitutional limits in *United States v. Lopez* and *United States v. Morrison*. In both of these cases, the Court explained that such limits on federal commerce power are consistent with and flow from the fact that Congress is a body of limited, enumerated powers.

The federal offense of carjacking is a prototypical example of Congress's over-reaching assertions of federal criminal jurisdiction. The federal carjacking offense is currently defined as taking a motor vehicle "from the person or presence of another by force and violence or by intimidation." The federal jurisdictional "hook" for this carjacking offense is that the vehicle must have been "transported, shipped, or received in interstate or foreign commerce," but how many vehicles have not? Actual commissions of carjackings take place almost uniformly within a single locale of a single state, yet federal criminal law now purports to authorize federal prosecutors to be the ones to charge and prosecute local carjackings.

Such breaches of constitutional federalism are not mere breaches of technical and theoretical niceties, for the power to criminalize is the power to coerce and control. James Madison rightly characterized constitutional federalism as a "double security . . . on the rights of the people," and it is akin to the purpose of limited government itself: to guard against accumulation of power by a single sovereign - that is, the federal government. In sum, without constitutional boundaries on Congress's power to criminalize, there would be no limits on the power of the federal government to coerce and control Americans.

With these considerations firmly in mind, and in order to ensure that the commission can function as a principled, non-partisan body, the Act should be amended to expand the scope of the inquiry to include the problems of overcriminalization. Otherwise, the commission will be focusing on a select class of offenders and overlooking the dire threats the criminal justice system poses to Americans who never intended to engage in conduct that is unlawful or otherwise wrongful. This sort of constituent-based approach will politicize the commission and make it unnecessarily controversial, thus undermining its effectiveness. A principled, non-partisan approach presents the best opportunity for the commission to undertake a thorough and comprehensive review of the criminal justice in America and the federal criminal justice system in particular.

Conclusion

Thank you again, Mr. Chairman, Ranking Member Graham, and Members of the Committee for this opportunity to address the National Criminal Justice Commission Act of 2009 (S. 714). I look forward to providing additional information and answering any questions you may have.

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Sections of this testimony are incorporated in part from my previous work on the problems of overcriminalization affecting the federal criminal justice system that was published in the *Federal Sentencing Reporter*. See Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 *FED. SENT'G REP.* 295 (2008). Members of the Committee may want to review this publication for a more complete discussion of the problems and possible solutions.

Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

See *CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 2* (1998). The ABA Task Force was composed of 17 academics, former prosecutors, Justice Department officials who served in Republican and Democratic Administrations, and Members of Congress of both major parties. Its final report was unanimous.

BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2003, 7 (July 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf>. In 2003, the federal government was responsible for 282,800 of those under correctional supervision, while state and local governments bore the burden of 6,607,000 of the total under correctional supervision. *Id.*

BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004, 17 (Dec. 2006), available at http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4.pdf; see also *FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, CRIME IN THE UNITED STATES 2004*, 290-91 (2004), available at http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4.pdf. Of the total number of arrests made in 2004 (10,047,256), 9,942,501 of those arrests were made by state or local agencies.

LYNN BAUER, BUREAU OF JUSTICE STATISTICS, JUSTICE, EXPENDITURE, & EMPLOYMENT IN THE U.S. 2001 (May 2004), available at <http://ojp.usdoj.gov/bjs/pub/ascii/jees01.txt>.

United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); *United States v. Lopez*, 514 U.S. 549, 566 (1996) ("[S]o long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce

Clause always will engender 'legal uncertainty.' . . . The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.").

See THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter, ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." (emphasis added)); see also id. NO. 17 (Alexander Hamilton) (referring to the ordinary administration of criminal and civil justice as the "transcendent advantage [over the national government] belonging to the province of the State Governments").

See id. NO. 51 (James Madison).

FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, CRIME IN THE UNITED STATES 2007, Table 1 (Sep. 2008), available at http://www.fbi.gov/ucr/cius2007/data/table_01.html (2008).

William Spelman, Jobs or Jails? The Crime Drop in Texas, 24 J. OF POLICY ANALYSIS & MANAGEMENT 133, 158 (2005).

See CAL. PENAL CODE §§ 667(a), 1192.7(c).

Daniel Kessler & Steven D. Levitt, Using Sentence Enhancements to Distinguish between Deterrence and Incapacitation, 42 J.L. & ECON. 343, 352-59 (1999).

See Gary Becker, Crime and Punishment: An Economic Approach, J. POL. ECON. 76, 169-217 (1968) (applying economic analysis to demonstrate the deterrent effect of increasing criminal punishment).

See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 403-11 (1958).

See U.S. Dep't of Health and Human Services, Substance Abuse and Mental Health Administration, Office of Applied Studies, Children Living with Substance-Dependent or Substance-Abusing Parents: 2002-2007, April 16, 2009.

BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, DEPARTMENT OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, Oct. 2006 (rev'd Jan. 2007).

Id. at 2.

Id.

John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 1.

Although some treat enforcement of the law as if it were the only means of reducing crime, this ignores the role of moral censure and individual conscience and assumes that most Americans would violate the law without compunction if they could get away with it. But others argue persuasively that conscience, upon being conditioned by appropriate moral education, reduces more crime than is deterred by punishment. See, e.g., JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME & HUMAN NATURE 494-95 (1985).

Martin Luther King, Jr., Letter from Birmingham City Jail, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 293 (James Melvin Washington ed., 1986).

See United States v. Lori Drew, Case No. CR-08-0582-GW (C.D. Cal. May 15, 2008) (indictment), available at <http://online.wsj.com/public/resources/documents/Drew.pdf>.

See 18 U.S.C. § 707.

See, e.g., John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 7.

Id.

The research is limited to non-violent criminal offenses that do not involve drugs or firearms.

The Heritage Foundation & National Association of Criminal Defense Lawyers, Report on Overcriminalization in the 109th Congress (forthcoming).

16 U.S.C. § 3371 et seq.

This is no academic question. Although the reasons behind the Honduran regulation requiring cardboard packaging are unclear, U.S. federal prosecutors charged Honduran lobster fisherman David McNab and three Americans with whom he did business with alleged violations of the Lacey Act based in significant part on McNab's having packed his catch in clear plastic. McNab and two of his three fellow business associates are finishing eight-year federal prison terms despite the fact that the Honduran government certified to the U.S. Department of Justice, and also informed the federal court of appeals in an amicus brief, that the regulations in question were not in force at the time of McNab's alleged violations. See, e.g., United States v. McNab, 331 F.3d 1228 (11th Cir. 2003); Tony Mauro, Lawyers See Red over Lobster Case, LEGAL TIMES, Feb. 18, 2004, available at <http://www.law.com/jsp/article.jsp?id=1076428337070>.

WAYNE R. LAFAVE, CRIMINAL LAW 11 (4th ed. 2003).

Clyde Wayne Crews, COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 2007 13 (2007), available at <http://cei.org/pdf/6018.pdf>.

514 U.S. 549 (1995).

529 U.S. 598 (2000).

Some commentators have called into question the viability of Lopez and Morrison after the Supreme Court held in Gonzales v. Raich that the federal Controlled Substances Act (CSA) preempted California's so-called medical marijuana law. 545 U.S. 1, 32-33 (2005). But the Raich majority expressly distinguished its two earlier precedents, repeatedly emphasizing that the statutory scheme at issue in Raich (which includes the CSA as well as the Comprehensive Drug Abuse Prevention and Control Act, of which the CSA is a part) is highly comprehensive and regulates actual commerce, specifically commerce in controlled substances. See id. at 13, 23-28.

18 U.S.C. § 2119.

The wanton, fatal 1992 carjacking Congress used as justification for asserting federal criminal jurisdiction over almost all carjackings took place wholly within suburban Maryland. See Graciela Sevilla, Basu's Slayer Sentenced to Life Without Parole, WASHINGTON POST, Aug. 19, 1993, at B1.

THE FEDERALIST No. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

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Testimony of

Pat Nolan

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Testimony of Pat Nolan
 Vice President, Prison Fellowship
 Before the Senate Judiciary Committee, Subcommittee on Crime and Drugs
 June 11, 2009

Mr. Chairman and members, I am grateful for this opportunity to testify in support of Senator Webb's proposal to establish a national commission on criminal justice. My name is Pat Nolan, and I am a Vice President of Prison Fellowship and lead their efforts to reform the criminal justice system. I bring a unique background to Prison Fellowship. I served for 15 years as a member of the California State Assembly, four of those as the Assembly Republican Leader. I led the fight on crime issues, particularly on behalf of victims' rights. I was one of the original sponsors of the Victims' Bill of Rights (Proposition 15) and was awarded the "Victims Advocate Award" by Parents of Murdered Children.

Then my life took an unexpected turn. I was prosecuted for a campaign contribution I accepted, which turned out to be part of an FBI sting. I pleaded guilty to one count of racketeering and became #06833-097 and was held in the custody of the Federal Bureau of Prisons for 29 months. What I saw inside prison troubled me because I observed that little was being done to prepare the inmates for their release. And, I also saw that the skills the inmates learned to survive inside prison made them more dangerous when they were released.

My role at Prison Fellowship is to work with government officials to improve our criminal justice system. Our prison reform efforts have taken me to 35 states, where I have worked with Governors, Attorneys General, Judges, Secretaries and Directors of Corrections and legislative leaders. I have seen what works and what isn't working. I serve on the National Prison Rape Elimination Commission and was also a member of the Commission on Safety and Abuse in America's Prisons. I was appointed by Governor Schwarzenegger to his Rehabilitation Strike Team and am currently a member of Virginia's Task Force on Alternatives to Incarceration.

I tell you all this because my work has given me a close up view of our criminal justice system across the country, and I must tell you our prisons are in crisis. There are three important points I want to emphasize from the outset. First, our top priority must always be a justice system that keeps our communities safe with fewer victims. Second, we need prisons. There are some offenders that are so dangerous to the public that they need to be quarantined, some for the rest of their lives. Third, the crisis in our prisons was not created by the dedicated corrections and law enforcement professionals; they are merely trying to cope with policies they didn't choose.

The report of the Commission on Safety and Abuse in America's Prisons put it well, "...many of the biggest so-called prison problems are created outside the gates of any correctional facility. Congress and state legislatures have passed laws that dramatically increased prisoner populations without providing the funding or even the encouragement to confine individuals in safe and productive environments where they can be appropriately punished and, for the vast majority who are released, emerge better citizens than when they entered."

Our current crime policies have resulted in overcrowded prisons where inmates are exposed to the horrors of violence including rape, infectious disease, separation from family and friends, and despair. Most offenders are idle in prison, warehoused with little preparation to make better choices when they return to the free world. When they leave prison they will have great difficulty finding employment, and the odds are great that their first incarceration will not be their last.

The Pew Public Center on the States has chronicled the magnitude of our prison systems and the challenges they face. Over 2.3 million Americans are behind bars at this very moment - that is one out of every 100 adults in the US. In addition, another 5 million are on probation and parole, meaning that one out of every 31 adult Americans is under some form of corrections supervision. The cost to the taxpayer is a whopping \$78 billion. On average, corrections are eating up 15% of state discretionary dollars, and last year corrections was the fastest growing item in state budgets.

We just can't sustain the continued expansion of prisons because corrections budgets are literally eating up state budgets, siphoning off money that could be going to schools, roads and hospitals. The dilemma we face is how to keep the public safe while spending less on corrections.

My work in the states and at the federal level has convinced me that we desperately need a complete review of the criminal justice system as called for in Senator Webb's legislation.

We incarcerate more people than any nation on earth, and I don't think we are getting our money's worth in public safety. Many commentators look at the drop in crime rates and conclude the massive increase in incarceration has worked. But most social scientists, even the conservatives, think that at most one-fourth of the drop in crime is the result of incapacitation of repeat offenders. As I said before, we need prisons, but not for everyone who commits a crime. Prisons are meant for people we are afraid of, but we have filled them with people that we're just mad at.

A check kiter can safely be punished in the community, while holding down a real job, repaying their victims, supporting their families and paying taxes. A drug addict who supports his habit with petty offenses needs to have his addiction treated. Sending him to prison where less than 20% of the addicts get any treatment doesn't change the inmate. When he is released he'll still be an addict. Our object should be to get him off drugs. Spending \$30,000 a year to hold him in prison without any drug treatment is just plain wasteful.

We can learn a lot from the experience of New York City under the strong leadership of Chief Bratton. Most people are aware that crime has dropped dramatically in New York; a much larger drop than other large cities. For instance, murders in New York City dropped from 2,605 in 1990 to 801 in 2007. What isn't as well known is that this drop in crime occurred while New York was cutting its prison population. Officials were more selective in who they put in prison and for how long. They examined the tipping point where longer sentences don't buy more public safety. Those folks were released. Why keep them behind bars if it isn't making the community safer? Some sentences were cut significantly, and the savings from those shorter stays behind bars were put into medical care, education, and more police on the streets.

Several states have succeeded in separating the dangerous from the low-risk offenders. And the results are impressive. They have shown that it is possible to cut the costs of prisons while keeping the public safe. Last year, Texas enacted sweeping reforms of its prison system, reserving costly prison capacity for truly dangerous criminals, while punishing low-risk offenders in community facilities. As a result, Texas was able to scrap plans to build three more prisons. Maryland, Massachusetts, Nevada, New Jersey, North Carolina, and South Carolina have also reduced their prison population while reducing their crime rates.

These states are saving hundreds of millions of dollars by reserving costly prison beds for truly dangerous criminals, while punishing low-risk offenders in community facilities. They use new technologies to monitor parolees' whereabouts and behavior, and more effective supervision and treatment programs to help them stay on the straight and narrow.

That is why the commission can play a very important role. Corrections officials are so busy coping with the flow of new bodies being sentenced that most don't have the time or resources to examine how they might be doing better. The commission can evaluate the evidence of what works and share their findings with state and federal corrections leaders. The crisis in our criminal justice system is national in scope, and only a national commission can conduct the type of review that will help guide us into better policies and safer communities.

Because the states cannot afford to build the prisons necessary to house the increasing number of offenders that are the result of more numerous crimes and longer sentences, they are crowding offenders into facilities that were never designed to hold that many prisoners. Our prisons are literally bursting at the seams. The commission can review the policies that swelled the prison population so dramatically and recommend changes that will reduce the number of people we incarcerate.

Governor Schwarzenegger's Deputy Chief of Staff described their dilemma starkly. He told me that every available space in their prisons is used for housing - every classroom, chapel, gym, classroom and closet. He asked, "How can we have education classes, drug treatment, or Bible studies when there is no place to hold them?"

Overcrowding also puts the inmates at terrible risk. The incidence of rape in our prisons is scandalous. In 2007, the Bureau of Justice Statistics released a survey based on prisoner self-reporting. The results are shocking. An estimated that 60,500 federal and state prisoners had been sexually abused by staff and other inmates in a twelve-month period - a number that likely understates the actual incidence. That averages 166 sexual assaults per day! A BJS pilot study of juveniles in detention found that nearly one out of every five inmates in juvenile facilities had been sexually abused. How can we expect these young people to live normal lives after they are released when they have been victimized so horribly while in the custody of the government? No crime, no matter how horrible, includes rape as part of the sentence.

Fortunately, Congress with strong support from the leadership of both parties, passed the Prison Rape Elimination Act, which established the National Prison Rape Elimination Commission. Later this month the Commission will release its report and recommended standards. These will give a roadmap to corrections officials on how to fight prison rape and to assist the victims when it does occur.

I should note that shortly as soon as the commission releases its report, we will begin the process of shutting down the office and will go out of existence within three weeks. As a conservative, I have always been suspicious of government commissions that seem to go one forever- the closest thing to eternal life here on earth. But the Prison Rape Commission is proof that a federal commission can do its work and then close up shop. As a member of that commission, I can tell you that having a drop dead date forced us to grapple with the issues and reach a conclusion. Without it, a lot more would have been said than done. Fortunately Congress didn't give us that option. The commission proposed by Senator Webb has the same "self-destruct" mechanism, and I think that is very good thing.

Offering proven ways for the states to make better use of their prison beds would be a major accomplishment for the commission. Here are four specific reforms I hope the commission will consider:

Treat the non-dangerous mentally ill in community facilities. Obviously, some people with mental illness are very dangerous. But thousands are merely sick, and pose no threat. They end up in our jails and prisons as a result of "mercy bookings." The police would much rather take them to a civilian facility for proper treatment, but few beds are available. Holding the mentally ill behind bars is very costly. Taxpayers spend \$65 a day to jail the mentally ill; community treatment costs only \$29. Money spent on new community mental health facilities would be far cheaper than building more prisons.

Apply swift and certain sanctions for parole violations. In many states a large number of new admissions to prison are parole violations, but most did not commit a new crime, but instead committed a "technical violation" such as failure to turn in paperwork, a missed appointment with a parole officer, or a dirty drug test. Many offenders are knuckleheads who just don't follow the rules. One judge summed up the situation well when he said, "Please give me more options. Right now I can send them to prison or let them go to the beach."

The Pew Center studied Project HOPE, a program in the Hawaiian courts established by Judge Stephen Alm, a former federal prosecutor. This program enforces the rules of probation with immediate consequences. If offenders have a dirty urinalysis they are immediately jailed - but not for years, just 24 or 48 hours. If they have a paying job, their incarceration is postponed until the weekend - but there is no exception to serving it then. Drug treatment is provided for those who have difficulty staying clean.

The results are impressive for those offenders who have been in HOPE the longest: 92 percent fewer missed appointments and 96 percent fewer positive drug tests. This program accomplishes what we want - teaching offenders to follow the rules and keeping addicts in drug treatment - without filling our prisons.

Tailor the level of supervision for parolees to the risk they pose to the public. Some states place virtually every inmate on parole, a very costly and burdensome process. As the Chairman of California's Little Hoover Commission put it, "These laws have not been tough on crime, but they have been tough on taxpayers." Instead, these policies need to be changed so that the most dangerous offenders receive the greatest attention of parole officers.

Revoke the perverse policy that stops in-prison mentors from continuing to help inmates after they are released. Returning offenders need healthy relationships. Having a good, moral person to help think through the decisions that confront them as they leave prison makes a huge difference in whether they can stay out of trouble and become contributing members of the community. A study of a Prison Fellowship program by Dr. Byron Johnson of the University of Pennsylvania found that graduates of the program had a significantly lower reincarceration rate, and that mentors were "absolutely critical" to the success. Yet, many states and the Federal BOP prohibit mentors who have worked with prisoners inside prison from staying in touch with them after they are released. This prevents inmates from having access to the very people that can help them succeed. No wonder our recidivism rate is so high. It's time to stop turning away the helping hands of mentors.

In conclusion, for years state and federal leaders have been trying to fix our criminal justice system a bit at a time. It hasn't worked, and the public has suffered. It is time to look at the system as a whole and revamp it so it protects public safety and does it at a sustainable cost to the taxpayers. I applaud Senator Webb and the cosponsors of the legislation in taking this timely and very important step toward safer communities.

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Testimony of

Charles J. Ogletree

June 11, 2009

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Written Testimony Submitted to the

Subcommittee on Crime and Drugs
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Exploring the National Criminal Justice Commission Act of 2009

June 11, 2009
Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law
Founding & Executive Director of the
Charles Hamilton Houston Institute for Race & Justice

Dear Chairman Specter and Members of the Senate Subcommittee on Crime and Drugs:

Good afternoon. My name is Charles J. Ogletree, Jr. and I serve as the Jesse Climenko Professor of Law at Harvard Law School. In 2005 I founded the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School and serve as its Executive Director. I am very pleased to have been invited to appear before the Subcommittee today. It is my heartfelt belief that the comprehensive, timely and important bill proposed by Senator Jim Webb of Virginia will go a long way toward addressing some of the severe inequities in the criminal justice system. I applaud Senator Webb's goals and those of this Subcommittee to move them forward. Having had a chance to carefully review the National Criminal Justice Commission Act of 2009, it is clear to me that this bill will not only create a bipartisan blue ribbon commission to study all aspects of our criminal justice system, but will also provide an opportunity to promote reform of antiquated criminal justice methods at every conceivable level. I am convinced that the Subcommittee will examine the many reasons that make the National Criminal Justice Commission Act of 2009 both timely and necessary.

As the late Justice William Brennan reminded us more than two decades ago: "[t]hose whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment." 1 Justice Brennan's prescient view in 1987 should provide us with some guidance as we address these critical issues in the year 2009. It is important that we recognize, at the local, state and federal level, as Democrats and Republicans, those who are seeking a re-examination of our criminal justice system. This effort should be pursued with great vigor to ensure that we not only hold offenders accountable, but that we implement criminal justice policies that are sensible, fair, increase public safety and make judicious use of our state and federal resources. We are taking this matter a step further by encouraging the voices of governors, state legislators, wardens, district attorneys, corrections officials and police officers who have come to see that public safety includes alternatives to incarceration. Or, in the words of Ohio Governor Ted Strickland, "[y]ou don't have to be soft on crime to be smart in dealing with criminals." 2

I want to express my gratitude to Senator Webb, Senator Specter and the Subcommittee members for allowing me to testify, on behalf of the Charles Hamilton Houston Institute for Race and Justice, and its staff members and interns. 3 As you will see, it is important to provide a brief sense of the work that we do at the Institute, and how our work relates to the challenges faced by this Subcommittee.

After this brief introduction, I want to discuss three major issues. First, I describe the critical features of our current criminal justice system, including its sheer magnitude, the issue of racial disparities, exorbitant costs, and stunning rates of failure. Second, I address the historic and structural factors that created this system and continue to fuel it. Third, I offer my views about why a Commission is urgently needed now and describe areas in need of review. In conclusion, I discuss the ways that the criminal justice system affects individuals, and identify ways that we can redirect our public resources to help individuals currently caught up in the criminal justice system become productive leaders and advocates within their communities.

INTRODUCTION

Before launching into the actual testimony, I believe it will be helpful to provide the Subcommittee with some background on the perspective I bring to the question of whether we, as a nation, should re-examine the efficiency and effectiveness of our criminal justice system. At the Houston Institute, I, with a staff of experts in the areas of education, housing, child development and criminal justice, attempt to carry on Houston's legacy in remedying racial inequalities in opportunity and related injustices in connected systems of education and criminal justice. The Institute conducts policy and legal analysis, and regularly convenes meetings, roundtables and conferences. Staff members take part in activities ranging from research analysis and synthesis to community organizing to presentations at academic and legal conferences. Ultimately, the Houston Institute creates a bridge between knowledge and action. We reach deeply into the worlds of research, policy, and practice. While adhering to the most rigorous standards of academic scholarship, we are equally committed to ensuring that such knowledge is accessible and useful to policy makers, practitioners and the general public.

My own areas of expertise are civil rights and criminal justice, as a scholar and practitioner. I am a graduate of Stanford University and Harvard Law School. I spent the first eight years of my career in Washington, D.C., first as a trial attorney, later as Director of Training, then as Chief of the Trial Division and finally as Deputy Director of the District of Columbia's Public Defender Service. In this capacity, I represented hundreds of clients in juvenile and adult matters, in trials and at the appellate level. Moreover, I was able to train and supervise hundreds of lawyers, investigators and others involved in the criminal justice system in the District of Columbia and other jurisdictions. In addition to my work in Washington, D.C., I argued criminal justice cases in state and federal courts, including death penalty cases before the United States Supreme Court and state supreme courts. For example, I was counsel of record in *James Ford v. Georgia*, 498 U.S. 411 (1991). I have also argued cases before courts in Georgia, South Carolina and other states.

I am Chairman of the Board of the Southern Center for Human Rights, based in Atlanta, which handles death penalty and

prison condition cases in Georgia and other southern states. I have served on several committees of the American Bar Association and other professional organizations dealing with criminal justice matters.

As a legal scholar, I have written extensively in a variety of contexts about criminal justice and race. For example, my most recent book, titled *When Law Fails: Making Sense of Miscarriages of Justice*, which I edited with Austin Sarat, reveals the human consequences of failures of our criminal justice system, including wrongful convictions, faulty eyewitness identifications, false confessions, biased juries, and racial discrimination. As both a scholar and practitioner, I have viewed from many perspectives the remarkable and enduring repercussions of race in the criminal justice system. As my and other research has long shown, and individuals who work in the system will confirm, people of color, and African Americans in particular, are frequently the subject of disparate treatment at every stage of the criminal justice process. This disparate treatment often begins with police profiling, either of individuals of color or communities of color, and continues to be reflected in decisions about which defendants will be granted bail pending trial, the severity of charges brought, the juries selected for trial and the punishments imposed. It ends with the hugely disproportionate numbers of African Americans, and other people of color, currently serving lengthy sentences in prison.

PART ONE: FOUR DEFINING FEATURES OF A DYSFUNCTIONAL SYSTEM

1. Sheer Magnitude:

We have become the world's leader in incarceration. In the past thirty years, the United States has built up a criminal justice regime of a size and pervasiveness unparalleled in this or any other country in the world. According to the Pew Center on the States' Public Safety Performance Project, 2,319,258 adults, or one in every 99.1 men and women, were held in American prisons or jails in 2008. 4 This figure represents an increase of more than tenfold in less than four decades—rising from 200,000 people in 1970. 5 When one adds the individuals currently on probation or parole, there are now more than 7 million men and women in this country under legal supervision—a number equal to the population of Israel. 6 In addition, 2.2 million people are currently employed by our mass incarceration system—in policing, corrections or the courts. 7 This population exceeds the 1.7 million Americans employed in higher education, and the 650,000 employed by the system of public welfare. 8 At the turn of the millennium, approximately 1.5 million children have had at least one parent in jail or prison, and 10 million have had a parent in jail at some time during their lives. 9

2. Large Racial Disparities:

As overall numbers of individuals imprisoned or monitored by the government have grown, so have racial disparities among this population. African Americans make up only 13 percent of the overall population, and Latinos 15 percent. However, 40 percent of the prison population is African American and 20 percent is Latino. One in every 8 black males in their twenties is in prison or jail on any given day, as compared with 1 in 26 Latinos, and 1 in 59 white males. 10 Black males have a 1 in 3 chance of serving time in prison, and Latinos 1 in 5, as compared with 3 in 50 for white males. According to Harvard sociologist Bruce Western, the U.S. penal system has become "ubiquitous in the lives of low-education African American men," and is becoming an "important feature of a uniquely American system of social inequality." 11

These large disparities are due to a constellation of complex and interrelated factors that include poverty, high rates of joblessness, low levels of education, and the clustering of African Americans and Latinos in concentrated urban areas. They are also related to very deep, systemic flaws within the criminal justice system. For example, while blacks and whites use and distribute drugs at comparable rates, 12 African Americans were arrested for drug offenses in every year between 1980 and 2007 at rates between 2.8 and 5.5 times higher than whites. 13 This is related to the fact that their environments are more heavily policed than whites living in the suburbs and rural areas. Youths of color are more likely than their white and Asian American peers to attend segregated, high poverty, failing schools, often referred to as "dropout factories," which do not prepare them for higher education or with marketable skills. Relatively recent research on unconscious stereotypes suggests that they may also well be victims of implicit bias, as well as overt racism, on the part of key decision-makers within the criminal justice system. All of these factors are described in later sections. Whatever the causes and reasons, the racial disparities are so pronounced that the Leadership Conference on Civil Rights wrote in its report that they "threaten to render irrelevant fifty years of hard-fought civil rights progress." 14

3. Exorbitant Costs

As states are forced to make wrenching cuts in education, health care, and other basic services, it is critical that we consider the price we are paying to maintain current levels of incarceration and law enforcement oversight. Between 1985 and 2000, state corrections spending grew at six times the rate of higher education spending. 15 State spending on corrections increased by 166 percent, while higher education spending grew by only 24 percent. 16 Between 1996 and 2005, total government spending on criminal justice related expenses increased by 64 percent. 17 The United States spent \$213 billion on the criminal justice system in 2005—\$98 billion on police, \$68 billion on corrections, and \$47 billion on the judiciary. In contrast, it spent less than \$42 billion on housing, and \$192 billion on higher education. 18

Researcher Amanda Petteruti wrote in a study released by the Justice Policy Institute: "[E]very dollar spent on the prison industrial complex is a dollar withheld from programs that educate our children and build on the strengths of our communities." 19 One current example of how criminal justice costs dwarf other pressing societal needs can be found in California. Despite proposing devastating cuts totaling over \$21 billion, including eliminating health insurance for the state's poorest children, Governor Schwarzenegger's budget still allocates \$400 million to build a new facility to house death row inmates. 20

An example of how funds could be more effectively deployed in order to improve public safety and reduce crime can be found in "LA's BEST"—the largest after-school program in Los Angeles. It currently serves more than 28,000 children in 180 Los Angeles Unified School District (LAUSD) elementary schools with the greatest needs and fewest resources throughout the City of Los Angeles. The program is open to children who regularly attend a school where LA's BEST is located and is offered at no cost to parents.

A 2007 evaluation of LA's BEST, funded by the Department of Justice, found that:

- ? Students enrolled in LA's BEST are 30 percent less likely to commit juvenile crime than their peers;
- ? For every dollar invested in the LA's BEST program, Los Angeles saves \$2.50 in costs associated with crime. 21

At the press conference to release the study's results, Mayor Antonio Villaraigosa said, "This study shows that when we invest in our children and we engage our students, crime rates drop and everyone benefits." The cost per child to enroll in LA's BEST is \$7.50 per day, or approximately \$1,350 per year. If \$1 million were redirected from the criminal justice system into this program, an additional 740 of the city's neediest children could be served each year, and the city would stand to save \$2.5 million in crime-related costs.

4. High Rates of Recidivism

This is a system that thrives on failure. Each year, more than 700,000 people return to their neighborhoods from jail or prison. Within three years, approximately two thirds of these men and women are re-incarcerated. The reasons are numerous and complicated: the lack and adequacy of programs and resources to help formerly incarcerated individuals

successfully return to their communities; the reluctance of employers to hire formerly incarcerated individuals; the "collateral" punishments that have been imposed in states and communities even after an individual has completed his or her sentence; and the structure of parole and probation policies.

In addition, many researchers have noted that by incarcerating young people who may be marginally involved in gangs, and other non-violent, low-level offenders, we isolate them from opportunities to develop healthy relationships, complete their education and attain marketable skills. As such, our current system in fact generates criminal behavior from our young people who might, with support and structure, become productive citizens. For example, one report found that "the experience of incarceration is the most significant factor in increasing the odds of recidivism... the odds of returning to DYS [Department of Youth Services] increased 13.5 times for youth with a prior commitment."²² This same report cited research from Carnegie Mellon that found that incarcerating young people may actually interrupt and delay the natural pattern of "aging out" of delinquency.²³

Julio Medina is currently the Executive Director of the Exodus Transitional Community in East Harlem, an organization that addresses the needs of formerly incarcerated men and women. He spent over eleven years in prison for drug offenses. This is how he described his experience:

The upstate correctional camps are breeding grounds for people who were coming home again to make every drug contact in the world. I met every Columbian, Nigerian drug connection that I wanted to meet. It was kind of a planning stage. I was 22 years old...incarceration wasn't a deterrent.²⁴

PART TWO: HISTORICAL AND STRUCTURAL FACTORS FUELING THE CURRENT SYSTEM

As Senator Webb has noted, this unprecedented build up and investment of resources in confining and monitoring so many individuals must indicate that we are home to the world's most dangerous and violent population. But we know this is not the case. According to the Sentencing Project, 82 percent of those sentenced to state prisons in 2004 were convicted of non-violent crimes, including 34 percent for drug offenses and 29 percent for property offenses.²⁵ So, how did we become an incarceration nation? A review of the legislation and legal decisions that fueled this incarceration phenomenon suggests that it came about through a convergence of a variety of social and political factors. First, as Professors Bruce Western and Christopher Wildeman have documented exhaustively, the merciless tandem of urban deindustrialization [with its chronic loss of unskilled labor jobs] and punitive politics combined in the 1970s and 80s to skyrocket prison populations throughout the country.²⁶ Around the same time period, and largely in response to urban riots and other signs of social chaos in several American cities, politicians running for national office began to shepherd crime control onto the national platform. Before this time, criminal justice was largely in the domain of state and local governments. Since then, the use of national resources to control crime has been a bipartisan effort: As Western and Wildeman note, in 1994 the Violent Crime Control and Law Enforcement Act signed by President Clinton and championed by Democrats and Republicans alike, "earmarked \$9.9 billion for prison construction and added life terms for third-time federal felons."²⁷

Not to be outdone by their federal counterparts, state officials implemented "tough on crime" policies of a kind and quantity unrivaled in our nation's history. The kidnapping and murder of a 12-year-old girl named Polly Klaas jumpstarted the trend. In 1993, Richard Allen Davis, a two-time convicted kidnapper who would still have been incarcerated at the time Klaas was killed had he served more than half of his sentence on his previous kidnapping charge, took Klaas from her home in Petaluma, California.²⁸ After a massive public outcry, the California Governor signed the "Three Strikes and You're Out" bill into law in 1994. The stated purpose of the law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."²⁹ By 1995, 24 states had passed three-strikes laws.³⁰ These laws, however, have netted mostly people who have committed non-violent triggering offenses, including many for drug offenses. For example, in a bitterly divided 5-4 decision, the United States Supreme Court upheld a sentence against charges that it was cruel and unusual for a recidivist whose theft of \$1,200 worth of golf clubs resulted in an indeterminate life sentence with a minimum term of 25 years without the possibility of parole.³¹

Along with three strikes laws, states and the federal government began to implement mandatory minimum sentences. These sentences, including mandatory terms of imprisonment for people who have committed first time non-violent offenses, drastically reduced sentencing discretion, and in the process eliminated the ability of judges to take the extenuating facts of a case (such as addiction or mental illness) into consideration. At the federal level, Congress created a Sentencing Commission which promulgated sentencing guidelines to dictate the proper sentencing range for a wide variety of offenses. As Congress passed increasingly stiff statutory minimums, the guideline ranges increased accordingly.³² The result was a higher level of punishment imposed with less discretion for judges to lower prison sentences for less culpable people or for those whose circumstances suggest they could make a valuable contribution to society if not incarcerated.

One of the major critiques of mandatory minimums, three strikes laws, and sentencing guidelines, and an undeniable source of the prison boom near the end of the century, is the interaction between these harsh laws and people who are affected by mental illness and substance abuse. Prisons and jails have become America's default mental health institutions. As many experts, including the former president of the American Psychiatric Association, have recognized, our penal institutions are neither designed for, nor up to, the task.³³ With experts estimating that as many as 1 in 5 people in prison suffer from severe mental illness, profound moral questions about our treatment of people with mental illness are also in play.³⁴

While these figures and statistics are well-known to people who study and document trends in criminal justice, the implications—for individuals, youth, families, communities, businesses, civil rights, and our democracy—of what David Garland has called a "massive and controversial social experiment"³⁵ are only beginning to be fully understood. Bruce Western has documented how going to prison reduces wages through lost work experience and diminished skills, signals untrustworthiness to employers, weakens social connections to steady employment, and increases wage inequality because incarceration is concentrated among minority and low-education men.³⁶ Because communities of color have such concentrated numbers of people who were formerly incarcerated, this has the effect of taking fathers, and increasingly mothers, away from their children, removing wage earners from their families, and thus de-stabilizing entire communities.

In sum, we have become the world's leader in incarceration by resorting to a crippling case of tunnel vision. In response to burgeoning crime, social unrest, mental illness, and drug abuse, we came up with only one approach: build more prisons and pass tougher laws so that we can put more people in prison and keep them there for longer periods of time. It has not worked. The criminal justice system is devouring our resources; putting people who have committed low-level offenses, who are perfectly capable of being rehabilitated, away for lengthy sentences and turning them into hardened criminals; destroying families and communities; and callously throwing away lives. We cannot afford to continue to invest in such a system. My hope is that this Congress passes the legislation proposed by Senator Webb, so that the Blue Ribbon Commission can begin to examine optimal policies to increase public safety.

PART THREE: WHY WE NEED A BLUE RIBBON COMMISSION AND RECOMMENDED AREAS FOR STUDY

Senator Webb is to be commended for recognizing that piecemeal solutions will not solve these massive structural problems. We need a "soup to nuts" review of the entire system, along with a comprehensive evaluation of what recent scholarship finds to be necessary to promote public safety.

Our current system is not only failing victims of crime, people who are currently and formerly incarcerated, and each American taxpayer; it is also failing our law enforcement public servants, police, and corrections officers who are committed to keeping communities safe. As David Kennedy, Director of the Center for Crime Prevention and Control at John Jay

College, wrote in his 2007 testimony to Congress: "[N]one of us likes what is going on. Law enforcement does not want to endlessly arrest and imprison. Communities do not want to live with violence and fear...Everybody wants those who will take help to have it..." 37

Unfortunately, too often, the people who live and work inside U.S. penal institutions experience the complete antithesis of a safe, stable and humane community. There are many dedicated people within the field of corrections who are committed to rectifying the problem of deficient training, diverting non-violent offenders from the system to get them the services they need, and creating more humane and effective punishment practices. 38 Many district attorneys, police chiefs, prison wardens and other law enforcement officers are forging new partnerships aimed at reducing recidivism, and changing negative perceptions of community members and law enforcement. 39 Holistic prison reform requires that the Commission listen carefully to the critical perspective of law enforcement to create policies that will improve the lives of all who are engaged in the system.

Below, I outline four major areas that, in my opinion, should be the focus of the Commission's work.

1. Review Mandatory Minimum Sentences, Particularly in Regard to Drug Policies:

America's criminal laws currently take a draconian stance towards drug users and low-end drug dealers. Rather than attempting to cure addiction or target the underlying cause of rampant drug abuse, our laws put drug users and drug addicts in jail for sentences that often span decades or even for life. The result is that more than one-third of people being held in state prisons and jails in 2004 were imprisoned for non-violent drug offenses. 40 Their incarceration accounts for a staggering amount of our tax dollars and exacts a devastating toll on already impoverished communities.

In particular, the crack/powder cocaine disparity may be the single largest factor fueling the huge racial disparities that now exist in our jails and prisons. As with Polly Klaas and the three strikes laws in California, a dose of history speaks more to why this disparity exists and persists than any attempt at justification ever could. In the early 1980s, crack cocaine use began to increase throughout urban communities, quickly gaining media attention as an example of illicit drug use on the rise. Then, in June of 1986, one day after being drafted by the Boston Celtics as the number two overall pick in the National Basketball Association draft, 22-year-old standout college basketball star Len Bias died suddenly after ingesting cocaine. 41 Though Bias actually died after using cocaine in its powder form, the widespread perception was--and still is--that he died from using crack cocaine. During Senate hearings on crack cocaine sentencing held shortly after his death, Bias's name was mentioned 11 times. 42 The Senate passed the Anti-Drug Abuse Act, complete with the 100:1 crack/powder disparity, by the fall after Len Bias's death. 43 Because the United States Sentencing Commission must promulgate guidelines consistent with the statutory minimums created by Congress, the sentencing guidelines (until very recently) reproduced the 100:1 disparity.

As Assistant Attorney General Lanny Breuer reported to this Subcommittee last April, the best data available shows that despite the 100:1 ratio, our laws are only netting low-level street crack dealers. More disturbingly, and as Breuer also underscored, the crack versus powder categorization breaks down along racial lines: 82 percent of federal defendants convicted in 2006 for distributing crack cocaine were African American. Only 9 percent were white. To be sure, crack cocaine has had a heartbreaking effect on inner city communities, but a law that sends a disproportionate number of African Americans who have committed low-level drug offenses to jail (and away from their communities and families) for a disproportionately long period of time--sometimes for decades or even for life--is neither fair, just, nor a judicious use of public resources, particularly when we know that treatment is less expensive and more effective. 44

Fortunately, we seem to be making strides at eliminating the 100:1 ratio. This year, Representative Sheila Jackson Lee (D-TX) introduced the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, which aims to dismantle the disparity between crack and powder cocaine sentencing. A member of the United States Sentencing Commission, United States District Court Judge Reggie Walton, testified to this Sub-committee this past May urging Congress to eliminate the 100:1 ratio. Two decisions by the United States Supreme Court have also worked to eradicate the rigid 100:1 disparity: In *Kimbrough v. United States*, 45 the Court held that sentencing courts do not need to adhere to the sentencing guidelines' 100:1 ratio. This year, in *Spears v. United States* 46 the Court reiterated that district courts are entitled to reject and vary categorically from the crack-cocaine guidelines based on a policy disagreement with those guidelines. Following in the wake of *Kimrough* and *Spears*, leading federal judges, such as the Honorable Mark Bennett who sits on the United States District Court for the Northern District of Iowa, have refused to employ the 100:1 ratio, instead opting to use a 1:1 ratio to calculate the proper sentencing range. 47 I hope that this Congress will take the next step and eliminate the unjust and nonsensical ratio completely.

2. Identify Effective Re-Entry Programs and Bring Them to Scale

As previously mentioned in this testimony, about 700,000 people return home to their communities each year after their release from prison. From a purely public safety standpoint, the urgent need to provide them, their families and their communities with effective re-entry programs cannot be under-estimated. There is no question that the re-assimilation of people with criminal records into society is among the most weighty--and elusive--objectives of the criminal justice system. New York University Law School Professor Anthony Thomas captures the gravity of the transition from prison back to the outside world in the following testimony:

Armed with little more than her own instincts and innate abilities, she is thrust instantaneously into a world that is at once foreign and intimidating in its differences and complexities. Her home community barely resembles that which she left behind. Yet, more than physical changes await her. The community that she enters has undergone significant economic, technological, and social changes that perhaps its insider now takes for granted, but that will be all too apparent to our time traveler--the outsider. The insider will be familiar with the norms of conduct, the formal and informal structures that exist in this environment, and the relationships that govern how residents interact and thrive. The outsider will not know the rules. And yet, we will expect the ex-offender--the quintessential stranger in a strange land--to enter this dramatically different environment and simply fit in without information, without significant support, and without meaningful preparation. If she does not manage to succeed on her own, she must then face the ultimate consequence--a return to her own time, a return to prison. 48

And far too many do not succeed on their own. According to the Pew study, "parole violators accounted for more than one-third of all prison admissions" and half of the population in U.S. jails. 49 In California, over two-thirds of people on parole are returned to prison within three years of release; 39 percent of whom were the result of technical violations. 50

These high rates of recidivism make it clear that parole officers need better monitoring and compliance tools, and more graduated sanctions to use when people on parole make minor violations. As the Pew study highlights, these tools could include "a mix of day reporting centers, electronic monitoring systems, and community service" and would "make offenders pay for their missteps but keep prison beds free for more violent and chronic lawbreakers." 51 Doing so maximizes the chances for a person on parole to succeed while simultaneously decreasing the heavy tax burden placed on society when a person is re-incarcerated for a technical or other minor non-violent offense.

One of the most damaging and counter-productive policy developments of the past 25 years has been a trend within state legislatures to enact "collateral" punishments on people who have served their time. These include restrictions on employment, access to housing, the right to vote, and eligibility on obtaining student loans for further education. These policies actually put communities at public safety risk by increasing the likelihood that people who are released from jail and prison will re-offend because they are not able to survive any other way. As Anthony Thompson, Professor of Law at

New York University wrote: "[C]ountless scores of men and women alike...have been released from federal and state prisons having paid their debt to society only to find the walls of prison extend into their own communities." 52

Research on best practices from national experts like Jeremy Travis, President of John Jay College; Joan Petersilia, Professor at the University of California at Irvine; and Anthony Thompson has given us much information about how to structure effective re-entry programs. We know that, to be effective, these programs need to address housing, health and employment needs. In addition, many people with criminal records require treatment for alcohol, substance abuse or mental health issues. This is an area where creative and dedicated law enforcement officials, such as Brooklyn District Attorney Joe Hynes; John Rutherford of the Jacksonville (Florida) Sheriff's Office; Patricia Caruso, Director of the Department of Corrections of Michigan; and Ken Massey of the Douglas County (Kansas) Sheriff's Office, are partnering with community advocates, clergy, health agencies, and others to make a difference. These programs need to be evaluated so we can more fully understand the components of success, and bring them to scale.

3. Increase High School Graduation Rates and Redirect the School to Prison Pipeline

I believe it is particularly important that the Commission closely examine the strong connection between educational attainment, public safety and incarceration. In this country, as most of you know, we have a dropout crisis. This crisis is particularly severe among youths of color. According to a new report issued in April 2009 by America's Promise Alliance, 53 only 55.3 percent of African American students, and 57.8 percent of Latino students, graduated from high school on-time with their peers in 2005. 54 This compares with 77 percent of white students, and 81 percent of Asian American students. In school districts serving our nation's largest cities, which are overwhelmingly attended by students of color, these graduation rates are often much lower, prompting one researcher to label these schools, "dropout factories." 55 For example, the on-time high school graduation rate for urban schools is 38 percent in Cleveland, 41 percent in Baltimore, and 54 percent in New York City. 56

Dropping out of school triples the likelihood that an individual will become incarcerated at some time in his or her life. 57 If one is black and male, then the risk becomes far greater. According to Bruce Western, almost 60 percent of black male high school drop-outs in their early thirties have spent time in prison. 58 Leading economists from Columbia, Princeton and Queens College have estimated that increasing high school graduation rates would decrease violent crime by 20 percent, and property crime by 10 percent. They calculate that each additional high school graduate would yield an average of \$36,500 in lifetime cost savings to the United States public. 59 Another study concludes that a 10 percent increase in male graduation rates would reduce murder and assault arrest rates by about 20 percent, motor vehicle theft by 13 percent and arson by 8 percent. 60

Below, I reproduce a chart from a policy brief that the Charles Hamilton Houston Institute for Race and Justice wrote about best practices and strategies to reduce gang violence and affiliation, titled No More Children Left Behind Bars. 61 The chart estimates the savings to states from averted crime costs if they increased high school graduation rates by ten percentage points. As you can see, states stand to save hundreds of millions--billions in California--of dollars from reduced crime if they invested in programs that would increase high school graduation rates. 62

Put simply, what this research tells us is that reducing the number of high school dropouts is, in and of itself, an effective crime prevention and public safety strategy. It suggests that lawmakers should think very seriously about redirecting funds now used to build more juvenile halls and prisons toward programs that keep our youths in school and those "second chance" programs that help dropouts successfully re-engage in GED and other high school equivalency programs.

ESTIMATED STATE LEVEL SAVINGS FROM AVERTED CRIME COSTS RESULTING FROM 10 PERCENTAGE POINT INCREASE IN GRADUATION RATES FOR ALL STUDENTS

A phenomenon closely related to the high school dropout issue, particularly for children of color, is what has become known as "the school to prison pipeline." The pipeline refers to the growing numbers of children and teens in the United States who are getting suspended and expelled from public schools. Such suspensions and expulsions make students more vulnerable to falling into the "prison track." According to recent statistics from the U.S. Department of Education, in 2004, more than 3 million students were suspended and 106,000 were expelled. This represents a 7.4 percent increase in expulsions and a 9.3 percent increase in expulsions since 2000. 63

For more than three decades, numerous studies and investigations have revealed that harsh school discipline policies are imposed upon children of color at highly disproportionate rates. 64 Importantly, the U.S. Department of Education reports show that the reasons for suspensions differ markedly by race. For example, most white students are suspended for smoking, vandalism, leaving school without permission or obscene language. Black students are more likely referred for arguably more subjective reasons such as showing disrespect, excessive noise, making a threat and loitering. 65 Russell Skiba and his colleagues at Indiana University studied 37 states and found a strong relationship between racial disparities in school suspension and overall juvenile incarceration rates. 66 Indeed, racial disparities in suspension do correlate closely with the racial disparities we find in state juvenile prison populations. Nationally, in 2003, youth of color made up 38 percent of the U.S. youth population, yet they represented 65 percent of the youth in secure detention facilities. 67

This national-level increase in punitive school policy does not appear to be a rational response to increased school violence. The most recent government data, in fact, indicates a decline in school violence. 68 Fortunately, a growing number of school officials, parents, law enforcement officers, and community members are beginning to recognize that all children need to be in school. They are implementing a host of promising programs designed to keep schools orderly and safe without pushing out large numbers of students. These include restorative justice practices, PBIS (Positive Behavioral Intervention Systems) that implement a graduated system of sanctions and focus on creating a positive school environment, and additional mental health and health services in schools to address students' non-academic needs. As we learn more about the relationship between children's out of school environments and their ability to succeed in school, it is important that lawmakers support communities in their efforts to help all children succeed in school.

4. Address the Role of Implicit Bias in Decision-Making

Another area worthy of investigation by this Commission involves a growing body of research about the role that implicit, or unconscious, racial bias may play in decisions and judgments made routinely by actors across the criminal justice system. 69 Implicit bias refers to unconscious negative feelings about particular racial or ethnic groups that might clash with one's publicly professed views or feelings about such groups. 70 In other words, a teacher may say she does not think that her African American students are more prone to violence than her white students, and she may truly believe that she holds that view. However, because of images or conditioning from a variety of sources over many years, she may hold wholly unconscious negative feelings about African Americans that do indeed affect her actions. This leads some social psychologists and others to advocate for further professional education that might bring such prejudices and their consequences to light, lead to self-examination and, in the end, possibly reduce huge racial disparities in criminal justice systems.

In the past five years, this scholarship has become increasingly sophisticated and rigorous. For example, one large-scale

study from Florida showed that judges were far less likely to "withhold adjudication" for Latino and black males than they were for white males. (The withholding adjudication provision applies to people who have pled or have been found guilty of a felony and will be sentenced to probation. It allows the person on probation to retain his civil rights and to legally assert that he has never been convicted of a felony.) The racial association was strongest, researchers found, for blacks and for people with drug offenses. 71 Other research from the field of cognitive science demonstrates that people tend to make unconscious associations between African Americans and crime, among other negative characteristics. 72

In one such study, "Priming Unconscious Stereotypes about Adolescent Offenders," (2004) authors Sandra Graham and Brian Lowery examined the potential for racial stereotypes to affect decisions made by police officers and probation officers. By simulating conditions with experimental priming, they determined that, once activated, racial stereotypes can affect these key decision-makers' judgments about young people's character, culpability, negative traits and "deserved punishment." The authors concluded that "racial disparity in the juvenile justice system can partly be understood as the outcome of a complex causal process that begins with unconscious stereotype activation and ends with more punishment of African American offenders." 73 They also posited that parallel racial disparities in school discipline may also be caused, at least in part, by the activation of unconscious stereotypes of teachers and administrators.

These associations appear to have real-world consequences: Research conducted by Jennifer Eberhardt on the application of the death penalty confirms that "defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black." Even in non-death cases, the more stereotypically black a defendant's physical characteristics are perceived to be the more likely he will receive a longer sentence. 74

These findings accord with a recently published study of 133 sitting judges, authored by scholars from Cornell and Vanderbilt Law Schools and United States Magistrate Judge Andrew Wistrich, which found that judges, like other citizens, harbor implicit biases, and that these biases can affect the outcome of judicial decisions. 75

Fortunately, there is some evidence to suggest that automatic stereotypes can be "unlearned" through "social tuning," or relationship building with members of the group subject to stereotyping. One author noted that: "Because stereotypes are amenable to change, we can educate decision-makers...to be more aware of the nature and function of these biases." 76 We must study these results carefully, commission further research, if necessary, and heed the early advice of experts: With proper training and awareness, we can reduce the effects of implicit racial bias.

CONCLUSION

I want to conclude by putting a human face on these numbers. Last year, Ely Flores testified before the House Subcommittee on Crime, Terrorism and Homeland Security, on the impact of YouthBuild on his life. YouthBuild is a program that provides young men and women between the ages of 16 and 24, mostly adolescents of color who have been court-involved, with job and leadership training. At a cost of \$22,000 per participant per year, YouthBuild sets these young people to work building affordable housing units in their communities, while simultaneously requiring them to obtain a GED or high school diploma. It offers them a community of peers and adults who believe in them, are willing to give them a new chance, and expect them to succeed. And they do.

Ely Flores grew up poor in Los Angeles. He was abandoned by his father at an early age. Like many of his peers, he fell into a life of violence and gang membership. He cycled in and out of jail several times. In his testimony, he wrote:

As I adopted a gang life style, incarceration naturally followed. For four years I went in and out of prison. Some people say I was just a knuckle head but I...was never given any resources to better my life or to improve a community I truly did care for. I had to go hunt for resources outside of my community because there simply were not any in mine. I was hungry for change. However, jail and probation officers never seemed to believe me. I felt I'd been written off. But, I was lucky in the end. I found an organization like the Youth Justice Coalition and LA CAUSA YouthBuild that believe in the empowerment of young people to better their lives and their communities. 77

Ely is now a youth worker, making Los Angeles safer by diverting youths from gangs and other anti-social behaviors toward more productive outlets. But he was lucky. YouthBuild has to turn away thousands of young people each year eager to learn new skills, obtain a GED, and make a difference. In Los Angeles alone, there is a waiting list of 800 youths, without any marketing or recruiting whatsoever by YouthBuild.

In contrast, many of you may have read the Fox News series on Clarence Aaron, a young man of color who, at age 24, was sentenced to three life terms for distributing 24 kilos of crack cocaine. He is now 39. 78 Unless his sentence is commuted, he will spend the rest of his life in prison, at an annual cost to the taxpayer of approximately \$15,000 per year. 79 If he lives to be 74, Louisiana taxpayers will end up paying, at the most conservative estimate, \$750,000 to keep him in jail, exclusive of any medical expenses.

Bear in mind that Louisiana has the highest incarceration rate in the country, with one in 26 adults under control by the criminal justice system. 80 It was also recently ranked 44th among the country's 50 states in its high school graduation rate. 81 The state legislature is currently debating how to make \$1.4 billion in cuts. 82 Consider what the state could do with the millions of dollars freed up by creating other options for people who have committed non-violent offenses. It might build schools, improve roads and public transportation, fund victim assistance programs, community policing efforts, substance abuse and alcohol treatment, or any number of other services or programs that would actually make its communities safer and better places to live.

A system that routinely chooses to throw away the lives of its young people who have made mistakes, but could become productive citizens, is a system that has lost its moral compass. Of course, we must protect communities from violent and dangerous individuals, and we must punish those who break the law. But incarceration should be our choice of last, not first, resort, and our precious resources should be reallocated toward preventing crime in the first place--by educating our children and providing them with alternatives to gang affiliation, violence, and drugs--and toward doing a better job of assisting victims of crime. Given all that we now know about the effectiveness of prevention over harsh punishment, it would be utterly counter-productive for this nation to continue its present course in regards to criminal justice policies and laws.

Today, political leaders of all persuasions, ranging from Republican Senator Sam Brownback of Kansas to former President William Clinton to Supreme Court Justice Anthony Kennedy, recognize that our current punitive policies are wasteful, ineffective, and unfair. Several states have already moved in the right direction: to rescind mandatory minimum sentences; to employ "justice reinvestment" strategies for diverting funds away from prisons to services that will help communities in need; to fund substance abuse treatment over incarceration. These are all positive and hopeful developments.

But they are piecemeal, adopted by states and communities without always considering important evidence or research. We need Senator Webb's Commission because we must reform and restructure this system in its entirety--in a bipartisan and thoughtful way. We must be able to provide states and communities with sound guidelines for how they can reduce costs and overall prison populations without overwhelming already distressed communities, and without sacrificing public safety. We need to examine the best re-entry programs that will help the formerly incarcerated become productive members of society. We need to tie criminal justice reform to education reform, health care reform, workforce issues and job training programs, so that prison wardens, corrections officials and guards can be retrained as prisons close down. We need to figure out how to carefully, and effectively redirect resources now used to incarcerate those who pose no danger to society toward programs that will lift up communities and families. Weaning ourselves off of our incarceration addiction will

not be easy, but it will make us a more just and prosperous society, if we do it right. Senator Webb's Commission is an important step in that direction.

Thank you for this opportunity to testify on this critical matter.

1 *McCleskey v. Kemp*, 481 U.S. 279 (1987) (dissenting).

2 The Pew Center on the States, *One in a Hundred: Behind Bars in America in 2008*, citing *The Columbus Dispatch*, January 26, 2008. Available online at: <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>

3 I want to specially thank the following people for their help and research in drafting this testimony and for so much of the important work that we do at the Houston Institute to address disparities in the criminal justice system. Each of them deserves credit for their extraordinary dedication to creating a fair and equitable criminal justice system: Johanna Wald, Director of Strategic Planning; Rob Smith, Legal and Policy Advisor; Kaia Stern, Director of our Pathways Home project; Kelly Garvin, Researcher; David Harris, Managing Director; and our student interns, Harrison Stark and Nicole Kinsley.

4 The Pew Center on the States, *One in a Hundred: Behind Bars in America in 2008*, available online at: <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>

5 The Sentencing Project: *Facts about Prisons and Prisoners*, 12/07, available online at:

http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprison.pdf

6 Justice Policy Institute, *Moving Target, A Decade of Resistance to the Prison Industrial Complex*, p. 6, September 25, 2008, Amanda Petteruti and Nastassia Walsh, available online at: <http://www.justicepolicy.org/content-hmID=1811&smID=1581.htm>

7 *Ibid.*

8 Justice Policy Institute, *Deep Impact, Quantifying the Impact of Prison Expansion in the South*, available online at: <http://www.riseup.net/jpi/article.php?list=type&type=44>. Annual expenditures for this revolving prison system reached \$57 billion in 2001 (\$167 billion for police, prisons and courts combined), and these figures do not begin to account for productivity losses or other social costs. See Butterfield, *With Longer Sentences, Cost of Fighting Crime Is Higher*, *New York Times* (May 3, 2004).

9 Council on Crime and Justice, *Children of Incarcerated Parents*, January 2006, available online at:

www.racialdisparity.org/files/CCJ%20CIP%20FINAL%20REPORT.pdf

10 The Sentencing Project, *Racial Disparity*, available online at: <http://www.sentencingproject.org/IssueAreaHome.aspx?IssueID=3>

11 Bruce Western, *Incarceration, Employment, and Public Policy*, *New Jersey Institute for Social Justice Report*, April 2003.

12 *Targeting Blacks: Drug Law Enforcement and Race in the United States*, May 2008.

13 Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States*, March 2009.

14 Ronald H. Weich and Carlos T. Angulo, *Leadership Conference on Civil Rights, Justice on Trial*. 2000. Available online at: <http://www.civilrights.org/publications/reports/cj/justice.pdf>

15 Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men*, 2002. Available online at: [http://www.justicepolicy.org/images/upload/02-](http://www.justicepolicy.org/images/upload/02-09_REP_CellblocksClassrooms_BB-AC.pdf)

[09_REP_CellblocksClassrooms_BB-AC.pdf](http://www.justicepolicy.org/images/upload/02-09_REP_CellblocksClassrooms_BB-AC.pdf)

16 *Ibid.*, p. 4

17 *Moving Target*, p. 7, original source: Bureau of Justice Statistics.

18 *Ibid.*; original source U.S. Census Bureau, Government Division, *State and Local Government Finances by Level of Government and by State, 2005-2006*, available online at: www.census.gov/govs/www.estimate.html

19 *Ibid.*, p. 7

20 Natasha Minsker, *Save \$1 Billion in Five Years--End the Death Penalty in California*, available online at the Death Penalty Information Center: <http://deathpenaltyinfo.org/california-could-save-1-billion-5-years-eliminating-death-penalty>

21 Full study available online at: <http://www.lasbest.org/resourcecenter/ucla.php>

22 Justice Policy Institute, *The Dangers of Detention*, November 2006. Available online at:

<http://www.justicepolicy.org/content-hmID=1811&smID=1581&ssmID=25.htm>

23 *Ibid.*, p. 9, original research completed by A. Golub, *The Termination Rate of Adult Criminal Careers*.

24 Interview for doctoral dissertation of Kaia Stern, titled *Eight Voices from Prison: Transforming the Spirit of Punishment*.

25 The Sentencing Project, *Facts About Prisons and Prisoners* (original source: Bureau of Justice Statistics), available online at: http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprisons.pdf

26 Bruce Western and Christopher Wildeman, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades: The Black Family and Mass Incarceration*, 621 *Annals* 221 (2009). See *id.* ("From 1969 to 1979, central cities recorded enormous declines in manufacturing and blue collar employment. New York, for example, lost 170,000 blue-collar jobs through the 1970s, another 120,000 jobs were shed in Chicago, and blue-collar employment in Detroit fell by 90,000 jobs. For young black men in metropolitan areas, employment rates fell by 30 percent among high school dropouts and nearly 20 percent among high school graduates. Job loss was only a third as large among young non-college whites.") (internal citations omitted).

27 *Ibid.*

28 *Ewing v. California*, 538 U.S. 11 (U.S. 2003), discussing genesis of three strikes laws.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner's Perspective*, B.Y.U.L. Rev. 935, 943 (2004) ("As statutory mandatory minimums trump any conflicting sentencing guidelines, the Sentencing Commission has always structured the guidelines to conform to statutory mandatory minimum terms. Thus, many of the harsh penalties contained in the guidelines represent congressional mandatory minimums rather than Commission policy.")

33 American Psychiatric Association, *Mental Illness and the Criminal Justice System: Redirecting Resources toward Treatment, Not Containment*, May 2004.

34 *Ibid.* ("Perhaps as many as 1 in 5 prisoners was seriously mentally ill, with up to 5 percent actively psychotic at any given moment.")

35 David Garland, *Mass Imprisonment: Social Causes and Consequences*, Sage Publications, 2001.

36 Bruce Western, *Incarceration, Employment and Public Policy*, available online at:

http://www.njisj.org/reports/western_report.pdf

37 David M. Kennedy, *Making Communities Safer: Youth Violence and Gang Interventions that Work*, February 15, 2007, prepared testimony available online at: http://www.jjay.cuny.edu/cmjc/pdfs/Making_Communities_Safer_Kennedy.pdf

38 For example, as part of the National Institute of Corrections' *Norval Morris Project*, two teams are currently addressing the topics of "corrections workforce transformation" and "safely reducing the corrections population." See:

<http://www.nicic.org/Norval>

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