

Testimony of
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June 11, 2009

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

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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 suspensions 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).

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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.

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