

# CRIMINAL JUSTICE REFORM, PART II

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## HEARING

BEFORE THE

### COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JULY 15, 2015

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## CRIMINAL JUSTICE REFORM, PART II

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Wednesday, July 15, 2015

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
WASHINGTON, D.C.

The committee met, pursuant to call, at 10:04 a.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Mica, Jordan, Walberg, Gosar, Meadows, DeSantis, Buck, Hice, Russell, Carter, Grothman, Hurd, Cummings, Norton, Connolly, Cartwright, Duckworth, Kelly, Lawrence, Lieu, Plaskett, DeSaulnier, and Lujan Grisham.

Chairman CHAFFETZ. The committee on Oversight and Government Reform will come to order. Without objection, the chair is authorized to declare a recess at any time.

We thank the panel and those in the audience for joining us. This is day two of a criminal justice reform oversight hearing. We have had two panels yesterday and a distinguished panel today, and we appreciate the time and attention. This is ripe for oversight, but it is even more ripe in time to do something about it. This committee is the Oversight and Government Reform Committee. There are a number of things we can do on a bipartisan basis to make this part of our society and this part of government working better.

Today, we continue our discussion on criminal justice reform, and the committee is devoting, as I said, 2 days on this topic for a very important reason: The time to enact meaningful criminal justice reform is now. At a time when gridlock has become the norm, something important happened yesterday. We saw two Senators, two House Members, and two Governors, both sides of the aisle in a bipartisan, bicameral way, express the need and desire to actually move meaningful criminal justice reform. While the details of their proposals varied, the unifying theme we heard was that reform is needed and there is no time to waste.

States are leading the way in innovative reforms in which the Federal Government can learn. We were fortunate yesterday to hear from Governors Bentley and Markell about the reform efforts underway in Alabama and Delaware, and they are not the only States. States like Texas and Georgia and others are making meaningful reforms, and have led the way and shown that it can be done, and reduce the rate of recidivism.

As we continue our discussion today, it is time to continue to roll up our sleeves. We have the chance to hear from a panel of experts who can answer our questions about effective criminal justice re-

form, and we are looking forward to hearing about specific topics: The use of evidence-based risk assessment tools to identify lower risk inmates; identifying programs that have demonstrated record of reducing recidivism rates for youths inside of prison facilities, keeping more juveniles out of prison, and what is going to happen to these people when they come out of prison?

Remember, the vastly expanded number of Federal criminal laws and the use of Federal criminal courts in enforcing economic and other regulations is something that needs to be addressed.

We also need to address the ever-increasing Federal prison population and the Bureau of Prisons' budget. It is 140 percent of capacity. It is consuming nearly one-third of the Department of Justice budget. You can't continue to sustain those numbers.

We need to also examine reforms that are smart on crime but also protect public safety. There are people that have committed heinous crimes. That need to pay a punishment, they need to pay back a debt to society, but let's also remember that more than 95 percent of the people who go to prison, they are coming back out. Are they going to be better criminals? Or we actually going to engage in the reform necessary to be the Department of Corrections? In fact, a bill that Hakeem Jeffries and I sponsored would rename the Federal Bureau of Prisons to the Department of Corrections. That is the way it is in all 50 States. In all 50 States, it is the Department of Corrections, but the government, the Federal Government attitude and approach to this is it calls it the Bureau of Prisons. It is time to change the name, change the attitude and the approach, and recognize that we need to engage in reform.

The prisoners are reentering the community, and too many are returning to a life of crime. When we look at a smarter, fairer, and more cost-effective way for our criminal justice system to work, we must also ensure that our efforts do not jeopardize public safety. Indeed, some of the proposals discussed yesterday strike this proper balance. For example, we heard ideas from Senator Cornyn, Governor Markell and others about using risk assessments to identify low-risk prisoners. Those prisoners can then be subject to community-based supervision instead of the expensive and counter-productive imprisonment, or maybe it is some combination in between.

The panel today has this type of expertise and they have seen this up close and personal, and that is why this is an important hearing today. We look forward to exploring those ideas so we can continue to find areas of reform that we agree on while standing firm on the policies and strategies that are essential to success.

We, again, thank the panel. I will now recognize the ranking member, the gentleman from Maryland, Mr. Cummings, for 5 minutes.

Mr. CUMMINGS. Chairman Chaffetz, I want to thank you again, as well as all the other members of our committee, for the very productive discussion we are having on how to make significant bipartisan, bicameral lasting improvements to our criminal justice system. I also thank my esteemed colleagues who testified with us yesterday with such great passion and eloquence.

Criminal justice is personal to me. I have seen the problems that plague the system through many lenses. As a young boy growing

up in a poor section of Baltimore, watching my classmates go and be carted away to juvenile detention centers, I have seen it through that lens. I have seen it during my days as a young lawyer representing criminal defendants, who so often simply were minding their business when a police officer came upon them, said something, or in some instances told them to drop their pants in front of their girlfriends. It then escalated, and the next thing you know, he is charged with resisting arrest, assault on a police officer, disorderly conduct, and then he has a record.

I have seen them as a State representative, who has deep respect for the dedicated police officers that serve our community. I have seen them as a Congressman representing a district where finding balance between law and order and crime and punishment is a profound concern to my constituents. And this year, I have seen them as a citizen of my community, Baltimore, a city where I was born, a city where I raised my family, a city where I have lived my whole life, and I watched it erupt after the tragic death of Freddie Gray.

Unfortunately, one lens that has not changed enough is the lens of color. I can see things, continue to see African-Americans in this country facing daunting economic challenges, disproportionately high rates of poverty, and severe unemployment. There are too many communities of color that are missing family members, especially fathers, sons, and brothers who are in jail.

African Americans are incarcerated nearly six times the rate of whites. When these men leave prison, they come home to the same communities where they struggled to begin with, and so often, there is nothing there for them. You see, they have been saddled with a record, which bar them from getting grants to go to school, bar them from getting certain jobs. In some States, you can't even become a barber once you get a record. At the same time, we tell them, go out there and do well, support your family, and there is nowhere to go.

It is not unusual when I go back to my district, which is located not too far from the stadiums, for me to hear young men, I hear this almost every week, somebody comes up to me and says, Mr. Cummings, can you help me find a job? I don't want to do a crime, I just want to do a job. And then they tell me they can't get a job, because no one will employ them. And so when they come back from prison or they have a record, they have a big mark on their back.

It is very easy for us to say it doesn't matter. It does matter, because there are thousands upon thousands upon thousands of them, and the number grows every single day. In some cases, they lose their driver's licenses, they are ineligible for occupational licenses, and they have great difficulty finding any kind of employment.

When they can't find a job, many return to what they know: They commit more crimes, and the cycle starts over and over again.

A lot of people don't understand the criminal situation, and I kind of got a good view of it one time not long ago when a young man was talking about how he had—in my neighborhood, had now turned his life around and that he was now on the straight and narrow, and he said, I used to have to rob folk. And as I began to talk to him more and more, I realized that robbery was the way

he earned his money. And it is not just one robbery; that is how he had to go out day after day after day, just like we go to work. That means that there are more victims and more problems.

Yesterday Senator Booker spoke about the 2.7 million children who have incarcerated parents, and the one in nine African American children who have parents behind bars. These kids are more likely to be suspended from school and go to prison themselves. This is how the cycle continues to the next generation. As I mentioned yesterday, my oldest brother has been a public defender for 40 years, and he has now seen families with three generations in the criminal justice system, grandfathers, sons, and grandsons all together.

Ladies and gentlemen, this is the United States of America. We must do better, and we can. We cannot stand by while these alarming disparities and destructive cycles persist generation after generation. We owe it to generations yet unborn to make lasting changes that provide opportunities and hope. We should invest in reform now so the next generation can escape this cycle of despair.

As I said yesterday, these hearings are a landmark moment for this committee. And Mr. Chairman, I do, I applaud you for what you have done, and I applaud your staff for what they have done in working with mine. I really appreciate it.

We have heard about groundbreaking legislative proposals like the evidence-based bipartisan State Justice Act, we have learned how States are, “banning the box,” and how private sector companies like Wal-Mart and Koch Industries are changing their approaches so those with criminal records are not automatically disqualified from all employment.

And that leads me to another point. It is not just government that has to try to make some changes. Corporations can play a major, major role, and we can help them and encourage them to do so. Governor Bentley talked yesterday about the importance of providing topnotch free kindergarten education for all children in Alabama. Governor Markell talked about a women’s prison in Delaware that hosts a culinary festival featuring the work of inmates alongside established professional chefs.

These advancements are happening because we are coming to understand that we cannot look at our criminal justice system in a vacuum. We need to take a comprehensive approach to criminal justice reform.

As I close, we have a unique moment, a bipartisan momentum for true, I mean, true reform, and it is ours to seize. But momentum is nothing without action. I hope that the hearings inspire strong action. My Republican colleagues and I disagree about many things, but on this issue, on this issue, we have an opportunity to reach not only common ground, but higher ground.

I want to thank the chairman again for holding these hearings, and I look forward to hearing from all of our esteemed witnesses, and I thank the witnesses for being here.

And with that, Mr. Chairman, I yield back and I thank you.

Chairman CHAFFETZ. I thank the gentleman. The passion and the belief in his heart on this topic is exuded every time, and I do appreciate working with you on this.



I also—I don't normally do this, but I do appreciate the audience being here. This is a demonstrably younger demographic than we normally have in our hearings, and it's good to see. We don't have nearly enough young people involved and engaged in civics and in their government, and on this topic, we need your help, and so we appreciate your joining us here today as well.

I will hold the record open for 5 legislative days for any member who would like to submit a written statement, but we'd now like to recognize our panel of witnesses.

I am pleased to welcome Mr. Kevin Ring, Director of Strategic Initiatives with Families Against Mandatory Minimums; we have Mr. Marc Levin, Director of the Right on Crime and Center for Effective Justice at the Texas Public Policy Foundation; Mr. John Malcolm, Director of the Edwin Meese, III, Center for Legal and Judicial Studies at the Heritage Foundation; Ms. Liz Ryan, President and CEO of the Youth First! Initiative; and Mr. Brett Tolman, cochair of the White Color Criminal Defense and Corporate Compliance Practice Group at Ray Quinney & Nebeker. I would also note that Mr. Tolman is from Utah, served as the U.S. Attorney in Utah, was deeply involved with Senator Hatch in the Senate Judiciary Committee, and I have leaned on him heavily for perspective and insight on this topic, and we appreciate his presence and expertise here as well.

Pursuant to committee rules, witnesses are to be sworn before they testify. So if you will please each rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Thank you. Please be seated.

And let the record reflect that all the witnesses answered in the affirmative.

In order to allow time for discussion, you are going to see that members are coming in and out, we have several hearings going on simultaneously, we would appreciate it if you would limit your verbal comments to 5 minutes. You will see a red light appear. That's your cue that you have gone overtime. As my colleague, Trey Gowdy, likes to say, when you see the yellow light, that means speed up, as it does at every stoplight we see in this country. And by the time you get to red, you better be stopped, so—but your entire written record will be submitted into the record.

We'll now recognize Mr. Ring. You're now recognized for 5 minutes. Push that button and make sure that microphone's close, and the time is yours.

## **WITNESS STATEMENTS**

### **STATEMENT OF KEVIN RING**

Mr. RING. Can you hear me?

Chairman CHAFFETZ. Yes.

Mr. RING. Chairman Chaffetz, Ranking Member Cummings, members of the committee, my name is Kevin Ring. I serve as Director of Strategic Initiatives for Families Against Mandatory Minimums. Thank you for the opportunity to testify.

I should mention, you said there was a young crowd here. The youngest is my daughter, who joins us today. My older daughter is sleeping off the Taylor Swift concert from last night, so she couldn't make it.

Chairman CHAFFETZ. Your testimony thus far is entirely truthful, I can tell you that.

Mr. RING. Given some unique experiences, I have had a lot of time over the past 20 years to think about the Federal criminal justice system, and I've been able to examine it from wildly different perspectives.

In the 1990s, I worked on Capitol Hill as a staffer, both in the House and the Senate. I was a counsel on the Senate Judiciary Committee and helped draft some anti-crime legislation, really bad anti-crime legislation, I see now.

I then observed the legislative process from a different perspective as a lobbyist. Ultimately, my work as a lobbyist brought me under Federal scrutiny. After two trials and appeals, I was sentenced to serve 20 months in Federal prison. I spent 15-1/2 months at the Federal camp in Cumberland, Maryland. I then served 2 months of home confinement, wearing a GPS monitor, which ended just a few weeks ago.

I began working for FAMM before I was indicted. I continued to work there during my trials, and returned as soon as I got home from prison.

I hope to talk about FAMM's strong support for sentencing reform, especially the Sensenbrenner-Scott Safe Justice Act. But first, I wanted to share a few observations from my time in prison. I begin with the necessary caveat that I served in only one of the BOP's 122 institutions, but I think my observations go beyond there.

First, I saw little to no rehabilitation in prison. There were few useful programs. The institution was either understaffed or uninterested in providing worthwhile programming. Drug treatment, trade apprenticeships, GED classes, I was a dog handler, there were a few exceptions. Most people worked menial jobs and collected their \$0.12 to \$0.15 per hour wages.

If you were not in the Residential Drug Abuse Program, called RDAP, you were mostly limited to what were called ACE classes, adult continuing education. These were taught by other inmates. Offerings at Cumberland included such life-enhancing classes as Movie Review, Jeopardy, and Current Events. Most inmates skipped these classes but would sign the attendance sheets so the administration thought they went. The classes were 1 hour each week for 10 weeks, and then when you completed the 10-week session, you got a certificate. Prison officials seemed to know that these classes were worthless, but I think it was thought that if we went to them, we'd look busy and they'd look better for keeping us busy.

The most glaring deficiency in the area of programming was the lack of any cognitive behavioral therapy or anger management counseling. I know some people still hold on to myth that criminals, drug and white collar, are rational actors who review the U.S. Code and weigh the costs and benefits before breaking the law. The fact, however, is that the overwhelming majority of the inmates are

not just poorly educated, but also have terrible social skills and very little impulse control, ability to delay gratification, or risk awareness. The result is bad decision-making.

These, it seemed to me, were the shortcomings that needed to be addressed. At Cumberland, however, we had 250 inmates and one psychologist. And despite studies from the National Institute of Justice showing the effectiveness of cognitive therapy, BOP's main program for this is offered in just two of its 122 institutions.

There are few other things that are worth mentioning from my time, in no particular order. The health care is miserable. The waiting list to have a cavity filled is 2 years. If you experience intense enough pain, they'll pull your tooth. One of my bunkmates, a successful businessman, had eight teeth pulled during his 10-year sentence. Another fellow inmate was given the wrong blood pressure medicine and spent the night on the floor of the TV room after fainting.

I spent 40 consecutive hours in solitary confinement because the administration decided to quarantine us when a scabies outbreak occurred. Without a book or a piece of paper or pencil to write anything, I thought I was going to lose my mind. I understand now why so many people believe that isolation is a dangerous and over-used tool.

I saw over and over how difficult it is for a family to survive the incarceration of one of its members.

Finally, I witnessed how flagrantly the BOP is disregarding the Second Chance Act, which was passed by Congress in 2007. Low risk, nonviolent inmates are supposed to be able to get up to 12 months of halfway house time. This provision was designed to save taxpayers money and incentivize good behavior. It's not happening. The BOP says the problem is a lack of halfway house beds around the country. The GAO looked at the issue and agreed, concluding that Congress would need to spend more than half a billion dollars more every year just to implement the Second Chance Act's halfway house provisions. Given this reality, I think members should rethink the value of legislative proposals to make inmates eligible for more of something they already can't get.

My time in prison reaffirmed my belief that the only way Congress can improve public safety while reducing costs is to reform Federal sentencing laws, especially mandatory minimum sentences. Mind you, I did not get a mandatory minimum sentence. You can't simply try to unclog the drain by giving some people a few days off here and there for good behavior and rehabilitation. You need to adjust the spigot and manage the inflow.

The State Justice Act just introduced by Representatives Sensenbrenner and Bobby Scott is a good example of legislation that would reduce the flow of inmates in a responsible way.

I served with some prisoners who received mandatory minimum sentences that did not seem disproportionate. I met several others, however, who were serving mandatorics that far exceeded any notion of a fair sentence. That is the problem with one-size-fits-all sentences. Not everyone is the same, and not every crime is the same.

Mr. Chairman, one reason I think that lengthy sentences can be so counterproductive is because prison infantilizes people. You

often hear that it hardens people, but I saw it infantilize people. I rarely hear people talk about this. Everything we do and everything we need as prisoners is on campus. Inmates have very few responsibilities. Within a couple of years, people start to become institutionalized. They know what it takes to get by day to day in prison, but lose touch with what it takes to live outside.

So while some people absolutely deserve prison time, our goal should be to give them as little as necessary to accomplish the purposes of sentencing. If society can get its pound of flesh with a 3- or 5-year sentence, go with that instead of 10 years. It's incredibly important to keep in mind that while people are in prison, the world does not stop. Technology advances, job markets change, children age and stop seeing their incarcerated loved ones as an authority figure, and spouses and partners bear burdens alone and often move on. And while all this is happening, whatever skills a prisoner brought to prison start to atrophy, and they don't gain any new skills. So we must be mindful that more than 90 percent of prisoners are coming home someday, and we want them to be successful, if not for their sake, for the sake of those who want to live in safe communities with less crime.

In conclusion, we at FAMM appreciate the leadership that you, Mr. Chairman and Ranking Member Cummings, have demonstrated in calling for these 2 days of hearings. We will continue to help in any way we can to make sure that all this momentum does not go to waste, and that we end this process with a meaningful reform bill that takes effect as soon as possible. Thank you.

[Prepared statement of Mr. Ring follows:]

**Statement of Kevin A. Ring**  
Director of Strategic Initiatives  
Families Against Mandatory Minimums

House Oversight and Government Reform Hearing on "Criminal Justice Reform, Part II"  
July 15, 2015

Chairman Chaffetz, Ranking Member Cummings, members of the committee, my name is Kevin Ring. Thank you for the opportunity to testify. I want to clarify at the outset that, while I have been invited to appear in my capacity as an advocate for Families Against Mandatory Minimums (FAMM), I also plan to discuss my recent experience as a federal prison inmate. My comments about prison - what I saw, what I deem good and bad - are my own and will cover some topics on which FAMM does not take a formal position. My remarks about mandatory minimum sentencing reform, including our support for the SAFE Justice Act, reflect FAMM's position and I am honored to represent the group's views before the committee.

I have thought about the issues that make up criminal justice reform a lot over the past 20 years and have had the unique opportunity to think about it from different perspectives. In the 1990s, I worked on Capitol Hill as a staffer, both in the House and Senate. I was a counsel on the Senate Judiciary Committee and helped draft anti-crime legislation - really bad anti-crime legislation, I see now. I then observed the legislative process from a different perspective, as a lobbyist.

Ultimately, my work as a lobbyist brought me under federal scrutiny. After two trials and appeals, I was sentenced to serve 20 months in federal prison. I spent 15½ months at the Federal Prison Camp in Cumberland, Maryland. I then served two months of home confinement, wearing a GPS monitor, which ended a few weeks ago. I recently began my 30 months of probation and will also complete 200 hours of required community service.

Before I was indicted, I began working for Families Against Mandatory Minimums. I continued to work there during my trials and returned as soon as I got home from prison. I want to share FAMM's positions on sentencing and prison reform with the committee, but first I want to share just a few observations from my time in prison.

I begin with the necessary caveat that I did my time in just one of the Bureau of Prison's (BOP) 122 facilities, but I have good reasons to believe my assessment applies beyond Cumberland prison camp.

Programming in the BOP

First, I saw little to no rehabilitation in prison. There were few useful programs. The institution was either understaffed or uninterested in providing worthwhile programming. Trade apprenticeships, GED classes, and jobs with the National Park Service were the few

exceptions. Most people worked menial jobs and collected their 12 to 15 cent-per-hour wages.

If you were not in the Residential Drug Abuse Program (RDAP), you were mostly limited to Adult Continuing Education (or ACE) classes. These classes were taught by other inmates. Offerings at Cumberland included Movie Review, Jeopardy, and Current Events. Current events was taught by a Nigerian fraudster who hated the United States. A class called Money Smart was taught by a guy serving 14 years for bilking an EPA clean fuels program. He told the class that it was easy to start your own business and to do it you could simply raise money through crowd-sourcing sites on the Internet. This is not helpful advice for people who need to find realistic ways to support themselves and their families when they get out.

Most inmates skipped classes and would just sign their names to the attendance list during the week so the administration thought they went. The classes were one hour a week for ten weeks. When you completed a class, you got a certificate. The prison officials seemed to know the classes were worthless, but they wanted us to seem busy so they could get credit with the regional and national offices for keeping us busy.

The most glaring deficiency in the area of programming was the lack of any cognitive behavior therapy or anger management counseling. I know some people still hold onto the myth that criminals, drug and white-collar, are rational actors who review the U.S. Code and weigh the costs and benefits before breaking the law. The fact, however, is that the overwhelming majority of inmates are not simply uneducated or poorly educated, but rather, they have terrible social skills and very little impulse control, ability to delay gratification, and risk awareness. The result is bad decision-making. These are the issues they need to address during their time in prison. At Cumberland, however, we had 250 inmates and one psychologist. And despite studies from the National Institute of Justice showing the effectiveness of cognitive therapy, BOP offers a program for this in just two of its 122 institutions.

With regard to the BOP's RDAP program, while I think it is important to provide drug treatment for addicts, I think taxpayers deserve to have the program's effectiveness reviewed more frequently. RDAP is expensive. Moreover, the benefits to inmates who complete the program are great - up to 12 months off their sentence and extra halfway house time eligibility. For these reasons, I think Congress should work with BOP to review the program's eligibility requirements.

Specifically, I urge the committee to examine why a white-collar offender who developed a dependency on Ambien after his crime qualifies for RDAP, but a true addict whose addiction fueled his crime does not simply because the addict had (but didn't use) a gun when he committed his offense. Shouldn't the program be limited to those inmates whose addiction played a role in their offense?

I also think it makes little sense to have inmates participate in RDAP at the end of their sentences, as is the current practice. The apparent reasoning is that BOP can't afford to give

all inmates RDAP so, for budget reasons, they hold off admitting inmates until they are nearing the end of their sentences. But addicts would be better served by getting help when they arrive. Additionally, getting inmates sober at the beginning of their sentences, rather than at the end, seems like a prerequisite for any other programming to be effective. It would also likely reduce incidents of drug and alcohol abuse in prisons, contraband, and the practice of correctional officers bringing in this contraband for inmates. There are currently not enough RDAP programs for all those who need it. Space can be assured by limiting the program to those who truly need help fighting addiction.

#### Poor Health Care

During my initial screening, the physician assistant advised me to avoid getting hurt at all costs. Over the next 15.5 months, I learned why he gave this guidance: the healthcare provided was very poor. In one incident, a fellow inmate was given the wrong medication by the staff for his high blood pressure and ended up passing out in the TV room. The correctional officers who came through for count time (we are counted throughout the night) said there was nothing they could do until the morning. Early the next morning, the inmate was brought to the hospital and his stomach was pumped and he recovered.

Last fall, we had a terrible outbreak of scabies. A bunch of us were unable to sleep at night because the itching was so bad. The administration called a town hall meeting in the gym and told us it was just a skin rash and we had to practice better hygiene. (Note: scabies has nothing to do with personal hygiene.) This problem lasted much longer than it should have because the prison did not seem to want to treat everyone exposed to it, as experts recommend. In fact, the physician assistant knew it was scabies but the doctor, who rarely saw any patients, resisted. The problem got so bad that the administration was forced to shut down the compound and had all the inmates put all their personal property in garbage bags in the gym for a week.

I saw the dentist when I first arrived and was told I had a cavity. I requested an appointment but never heard back. Other inmates told me that there was a two-year waiting list to get a cavity filled. I saw three other inmates have teeth pulled because the pain grew so bad. Instead of filling cavities, the dental staff gives inmates 800mg Ibuprofen (a higher dose than you can buy at the commissary) to deal with the pain. When the pain gets bad enough, the inmates are able to get their teeth pulled. A 70-year-old white-collar offender who slept in the bunk below me had 8 teeth pulled during his ten years in prison.

#### Solitary Confinement Over-use

Before the prison administration finally decided to give everyone a pill to combat the scabies outbreak mentioned above, it treated a group of us with a cream. To quarantine us, the administration had eight of us spend two nights in solitary confinement at the medium security facility down the hill from the camp. Though we were not there for disciplinary reasons, we were treated that way: we never left our cells, were not given clothes (only t-shirts and underwear), and were not allowed any books or paper. I was only in solitary for 40 hours and I thought I was going to go crazy. That relatively short period was long

enough for me to fully appreciate how inappropriate it is to use the SHU (segregated housing unit, or solitary) for routine disciplinary infractions, which happens frequently. There seem to be other ways to punish inmates - loss of favorite job, loss of good time, loss of commissary privileges - that would be preferable than being locked in the hole.

#### Halfway House Time

Under the Second Chance Act, inmates are supposed to get up to a year of halfway house time and up to 10 percent or 6 months (whichever is less) on home confinement at the end of their sentences. No one gets a year in a halfway house today. Most get 3-6 months if they are serving a long sentence. Those of us with short sentences were being sent out to halfway houses on our "10 percent date" (the date we should have been able to begin a period of home confinement). This meant that every day we were asked to spend in a halfway house should have been a day we spent on home confinement.

Fiscally, the use of halfway houses is not cost-effective. The average annual cost of a halfway house for one person in FY 2014 was \$28,999.25 (\$79.45 per day), versus \$30,619.85 (\$83.89 per day) on average to incarcerate a person.<sup>1</sup> Halfway houses are difficult to build because of zoning restrictions and NIMBYism, and existing halfway houses are overcrowded and insufficient to meet demand. It would require enormous appropriations just to meet the existing need for halfway houses under existing law.

From GAO's report on the BOP last September:

We have previously found that not all inmates are eligible to be sent to an RRC [Residential Reentry Center, or halfway house] prior to their release from prison, and that for those who are eligible, some spend only a portion of the full 12 months' allowable time in an RRC because of a lack of bed space and because of eligibility criteria. According to BOP, an increase in the number of offenders getting the full 12 months' allowable time would necessitate additional bed space, which would require both additional funding and additional RRC contracts. For example, **in fiscal year 2013, BOP reported that it had 9,455 RRC beds available nationwide, but would have required about 30,000 beds to provide the maximum allowable 12 months in RRCs to all participants, or an addition of more than 20,500 beds above its current capacity.** As noted above, and as we have previously reported, BOP officials explained that such an expansion could be challenged by local zoning restrictions and the unwillingness of many communities to accept nearby RRCs. Moreover, if such an expansion were to take place, BOP would need additional funding to pay for the new RRC bed space. For fiscal year 2013, BOP reports that the average daily cost per offender in an RRC was about \$73, or \$26,645 per year. **This means that an increase of the more than 20,500 beds that would be required to achieve the allowable 12 months for all participants (at current program levels) would cost about \$546 million annually.** Expanding RRCs might help

<sup>1</sup> 80 FR 12523 (Mar. 9, 2015), <https://www.federalregister.gov/articles/2015/03/09/2015-05437/annual-determination-of-average-cost-of-incarceration>.



reduce recidivism but would require a substantial funding increase, equal to almost 8 percent of BOP's entire \$6.9 billion fiscal year 2015 budget request.<sup>2</sup>

I applaud the members of Congress who are trying to find a way to reduce prison costs by moving low-risk offenders to halfway houses (and home confinement) sooner. Given the reality revealed by GAO, however, I think members should rethink the value of legislative proposals to make inmates eligible for more of something they already can't get – and are unlikely to get more of in the future.

#### Sentencing Reform Needed

I think the only way Congress can improve public safety while reducing costs is to reform federal sentencing laws, especially mandatory minimum sentences. I served with some prisoners who received mandatory minimum sentences that did not seem terribly excessive given their conduct. I met several others, however, who were serving mandatorics that far exceeded any notion of a fair sentence. That is the problem with one-size-fits-all sentences: not everyone is the same and not every crime is the same.

Indeed, during my time in prison, I came to believe that common conservative and liberal narratives about sentence length were not accurate.

The liberal narrative that all nonviolent drug offenders are serving too long is not right. Some got sentences that seemed appropriate for their offense and for their background. Also, not all of the drug offenders I met were addicts or sold drugs to escape poverty. Many committed their crimes for the same reason white-collar offenders commit theirs: simply because they wanted more money and did not think they would get caught.

The traditional conservative narrative that longer and mandatory sentences are important to reducing crime is not right. Put simply, if mandatory minimums reduced crime, we would see crime rates fall in jurisdictions that adopted them and rise in those that didn't. But we don't. Over the past decade, more than a dozen states have either outright repealed or reformed their mandatory minimum laws. All have seen their violent and property crime rates drop to historic lows. States have found that instead of locking everyone up in expensive prisons, they can protect their citizens better by using limited anti-crime funding to hire more police, prosecutors, and drug treatment specialists. This approach seems to be working.

My time in Cumberland confirmed my belief that many people are serving sentences that are longer than necessary to deter the individual or others. The idea that most of these offenders knew the punishment they risked and then conducted a cost-benefit analysis that included a consideration of the risks and rewards before violating the law is laughable.

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<sup>2</sup> GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: INFORMATION ON EFFORTS AND POTENTIAL OPTIONS TO SAVE COSTS 35-36 (Sept. 2014), <http://www.gao.gov/assets/670/666254.pdf>.

These are not rational actors. It is little wonder that every reputable criminologist now believes with regard to punishment that “swiftness and certainty” of apprehension and punishment is more important than “severity” of the sentence. Swift, certain, and short punishments are understandable and meaningful to people with the traits I saw in prison.

My sense after talking to many of the other inmates was that the sentences issued pursuant to the sentencing guidelines ranged from short to long, but seemed mostly to fit the crime and offender, especially when compared to the sentences required by mandatory minimum laws. Two men I met are serving 10-year mandatory minimums because they did not qualify for the current “safety valve,”<sup>3</sup> which allows nonviolent drug offenders with no record to escape the mandatory minimum. But in these cases, both men had one prior but very minor offense that made them ineligible for the safety valve. So, instead of getting five or even seven years, both got ten. Ten years is an incredibly long time to spend in prison for truly nonviolent offenders, as these men were.

One reason I think that lengthy sentences can be so counterproductive is because prison infantilizes people. I rarely hear people talk about this point, but I think it is very important. Everything we do and everything we need is “on campus.” Inmates have very few responsibilities. Within a couple of years, people start to become institutionalized. They know what it takes to get by day-to-day in prison, but lose touch with what it takes to live outside. So while some people absolutely deserve prison time, our goal should be to give them as little as is necessary to accomplish the purposes of sentencing. If society can get its pound of flesh with a three- or five-year sentence, go with that instead of ten years. It’s incredibly important to keep in mind that while people are in prison, the world does not stop – technology advances, job markets change, skills atrophy, children age and stop seeing the incarcerated loved one as an authority figure, spouses and partners bear burdens alone and often move on. We must be mindful that more than 90 percent of prisoners are coming home some day, and we want them to be successful - if not for their sake, for the sake of those of us who want to live in safe communities with less crime.

#### FAMM Supports The SAFE Justice Act

Fortunately, meaningful changes to our federal sentencing and prison laws appear to be gaining support in Congress every day. This committee’s two days of hearings is evidence of that. President Obama’s decision to visit a federal prison, the first such visit in history by a sitting president, is another encouraging sign. But more important to FAMM and its members, who have been fighting for reform for more than 20 years, is action. We need Congress to pass meaningful sentencing reforms now.

Towards that end, FAMM was very pleased last month to join Congressmen Jim Sensenbrenner (R-WI) and Bobby Scott (D-VA), other members of the House from both sides of the aisle, and an incredibly diverse group of policy advocates to announce the

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<sup>3</sup> 18 U.S.C. § 3553(f) (2014) (permitting federal drug offenders to be sentenced below the applicable mandatory minimum term if they have a negligible criminal history, were not leaders or organizers of the offense, did not possess a gun or use violence, and plead guilty).

introduction of H.R. 2944, the Safe, Accountable, Fair, and Effective (SAFE) Justice Act. The legislation would bring the federal criminal justice system up-to-date with evidence-based and cost-effective practices adopted in many states, as well as re-focus federal law enforcement and its limited resources on the highest-level drug offenders.

The changes most important to FAMM and its members would do the following:

1. **Limit application of federal mandatory minimum drug sentences** to people who meet the drug quantities listed in 21 U.S.C. §§ 841 and 960 and were organizers, leaders, managers, or supervisors of a criminal activity that involved at least five people. Everyone else would not be subject to a mandatory minimum sentence, but could still be sentenced up to the law's statutory maximum terms, depending on the drug quantity, number of participants, and role in the case. People who are already in prison would be permitted to seek retroactive application of these changes to their current sentences by filing a motion to the courts under 18 U.S.C. § 3582.
2. **Expand the existing "safety valve"**: The bill would enlarge the safety valve so that courts could sentence a person below the mandatory minimum term for drug offenses and gun offenses that occurred during drug offenses (18 U.S.C. § 924(c)), as long as the person meets all of these criteria:
  - a. is in criminal history category I (0 to 1 criminal history points under the sentencing guidelines) after any downward departure;
  - b. did not use violence or threats;
  - c. the offense did not result in death or serious bodily injury;
  - d. the person was not convicted of a continuing criminal enterprise (21 U.S.C. § 848), and
  - e. the person pled guilty.
3. **Create a new "safety valve" for drug and gun mandatory minimums**: The bill would create a new safety valve so that courts could sentence a person below the mandatory minimum term for drug offenses and gun offenses that occurred during drug offenses (18 U.S.C. § 924(c)), as long as the person meets all of these criteria:
  - a. The person committed the crime as a result of mental illness, cognitive defects, or a history of persistent or serious substance abuse or addiction; financial, emotional, or mental distress; trauma suffered while serving on active duty in an armed conflict zone for a branch of the United States military; or victimization stemming from any combination of physical mental, emotional, or psychological abuse or domestic violence, if the offense was committed at the direction of another individual who was a more culpable participant in the instant offense or played a significantly greater role in the offense or effectively coerced the defendant's involvement in the offense by means of threats or abuse either personally or from any person or group;
  - b. the defendant did not use violence or credible threats of violence in connection with the offense;
  - c. the offense did not result in death or serious bodily injury to any person;
  - d. the person was not convicted of a continuing criminal enterprise (21 U.S.C. §

- 848) and  
 e. the person pled guilty.

- 4. Create a new "safety valve" for drug mandatory minimums:** The bill would create a new safety valve so that courts could sentence a person below the mandatory minimum term for drug offenses, as long as the person meets all of these criteria:
- a. the person falls within criminal history category II (2 or 3 criminal history points under the sentencing guidelines) after any downward departure;
  - b. the person does not have any prior convictions for an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another;
  - c. the current offense is not a sex, terrorism, or racketeering offense, or gun offense under 18 U.S.C. §§ 922 or 924(c);
  - d. the defendant did not use violence or credible threats of violence in connection with the offense;
  - e. the offense did not result in death or serious bodily injury to any person
  - f. the person was not convicted of a continuing criminal enterprise (21 U.S.C. § 848) and;
  - g. the person pled guilty.

These first four reforms are absolutely critical to eliminating the most harmful consequences of federal mandatory minimum sentencing laws. Those laws were intended to target drug kingpins and major suppliers, but U.S. Sentencing Commission data reveals that the offender most likely to receive a mandatory minimum is a street-level seller distributing grams and ounces, not kilograms, of drugs.<sup>4</sup> Because these offenders are also the most easily replaceable ones in a drug conspiracy, their lengthy incarceration does little to disrupt or stop drug trafficking.<sup>5</sup>

Moreover, contrary to the assertions made by some opponents of reform, minimum sentences are not necessary to get people to plead guilty at high rates. People plead guilty at high rates regardless of whether a mandatory minimum sentence applies. In fiscal year (FY) 2014, 97.4 percent of federal drug offenders pled guilty, compared to 97.1 percent of federal offenders overall. Individuals accused of larceny and forgery, environmental and wildlife offenses, and embezzlement all pled

<sup>4</sup> U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 165-70, 171, Fig. 8-11 (2011), available at <http://www.uscc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

<sup>5</sup> The U.S. Sentencing Commission and other experts have long recognized that "sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and easily are replaced." U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 85 (2007), available at [http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

guilty at higher rates than drug offenders, even though none of those crimes carry mandatory minimum sentences.<sup>6</sup>

5. **Fix the technical error that leads to § 924(c) “stacking”:** The bill would fix 18 U.S.C. § 924(c) so that the 25-year mandatory minimum sentence for second or subsequent gun possession/use offenses only applies when the prior 924(c) violation is a final conviction.<sup>7</sup>
6. **Make the Fair Sentencing Act of 2010 retroactive:** Federal prisoners serving crack cocaine mandatory minimum sentences for crimes committed before August 3, 2010, would be allowed to petition the court for a sentence reduction in line with the new, 18-to-1 crack-powder ratio Congress unanimously passed in 2010.
7. **Life mandatory minimum terms for drugs:** Reduce the mandatory minimum life sentences for a third felony drug offense or a second drug offense that results in death or serious bodily injury under 21 U.S.C. § 841 to a mandatory minimum term of 35 years. These changes would be retroactive, if the bill becomes law.
8. **Redefine the kinds of prior convictions** that can be used to increase mandatory minimum drug sentences to 10, 20 years, or higher and that can be used to trigger the 15-year mandatory minimum sentence for gun possession under the Armed Career Criminal Act (18 U.S.C. § 924(e)). The bill also strengthens the procedural and notice requirements when prosecutors want to increase sentences based on prior convictions.
9. **Allow prisoners to earn up to 33% earned time credit for rehabilitation:** With few exceptions, federal prisoners could earn up to 10 days of time credits for every 30 days of rehabilitative programming they complete in prison. These credits would be real sentence reductions, not time spent in another form of confinement such as a halfway house or home detention. This change would be retroactive. Federal prisoners would not be eligible to earn time credits if they were convicted of federal homicide with intent to cause death and death resulted, or terrorism or sex offenses. These prisoners may instead receive other incentives for completing programming, such as additional commissary, telephone, or visitation privileges.
10. **Fix the technical error in good time credit calculation:** Prisoners could earn up to 54 days of credit for good behavior per year in prison, rather than 47 days, as is current practice. This change would be retroactive.

<sup>6</sup> All data here are from U.S. SENTENCING COMM’N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Tbl. 11 (2014), available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table11.pdf>.

<sup>7</sup> If this change were enacted, multiple counts of 924(c) charges in the same indictment would no longer lead to stacked sentences like the horribly unjust and infamous 55-year term being served by Weldon Angelos. For more on Mr. Angelos’s case, see <http://famm.org/weldon-angelos>.

**11. Expand compassionate release and elderly prisoner release:** The bill would permit prisoners and the courts, as well as the BOP, to request a compassionate release for extraordinary and compelling reasons, or for prisoners who are at least 60 years old, have an extraordinary health condition, or have been notified that the primary caregiver of the prisoner's minor child has died or become incapacitated or is unable to care for the child any longer or cannot be cared for by other family members and is at risk of being placed in foster care.

The SAFE Justice Act's sentencing reforms would fix many of the problems FMM has highlighted with existing mandatory minimum sentencing policies. If the bill were enacted, courts would be required to keep imposing stiff prison sentences on violent offenders and major drug kingpins, but would be spared from giving lower-level and first-time offenders lengthy sentences that do not fit their crimes.

Consider among the thousands of nonsensical mandatory sentences FMM has highlighted the recent sentencing of Shirley Schmitt.

For more than 50 years, Shirley Schmitt lived a quiet, serene life, raising her daughter and training horses on an Iowa farm with her husband, Lawrence. But when her beloved husband died of a heart attack in 2006, Shirley's life began to unravel. She struggled to care for her farm and animals. She developed chronic pain and fell into a depression. To numb herself and her pain, she foolishly started using methamphetamine. She soon became an addict.

Shirley wasn't the only addict in her area. Shirley and seven others began buying pseudoephedrine, a highly monitored chemical that is found in allergy medication and used in manufacturing methamphetamine. Shirley offered the use of her farm to manufacture the drug, which was split among the eight acquaintances for their own personal use.

When a couple of people in the group were arrested on meth charges, they gave Shirley's name to police and pointed to her, the property owner, as the leader. Shirley was arrested in July 2012 on charges of conspiracy to manufacture and distribute 50 grams or more of methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine.

While awaiting trial, she entered drug treatment for 30 days, and then was released to live with her parents. Her sister was relieved that Shirley was able to live with and care for her parents, as they both needed daily assistance. Shirley had turned her life around; she remained clean the entire year before she went back to court and still maintains her sobriety today. "I left the area where I got into trouble, got a new job, and was helping my parents," she says. She thought that her progress and the fact that she had never sold meth for profit would work in her favor at trial.

Her judge seemed to find the circumstances of her case unique, as well. He made the following statement during her trial: "All matters of methamphetamine manufacturing are

serious. The Court's well aware of that. But this case, the evidence was pretty clear, that there wasn't anybody really selling any methamphetamine. There wasn't—nobody had any big cars or stacks of 20s in their pocket or anything like that. It involved a group of addicts who were satisfying their own addiction."

Unfortunately, Shirley was found guilty, and the judge had little discretion at sentencing. Judge O'Brien ruled that Shirley was not a "leader" because there can be no leader in "a group of people who had next to no money and were not selling anything and were all working together trying to satisfy their addictions." Shirley was shocked, though, that two prior convictions for minor offenses—purchase of pseudoephedrine over limit and possession of drug paraphernalia, both of which stemmed from a 2008 incident—gave her criminal history "points" that disqualified her from the safety valve and led to a lengthier sentence.

Shirley spoke passionately at her sentencing and expressed disbelief that her rehabilitation and sobriety would have no influence on her sentence: "If successfully completing treatment, moving away from the area, getting a new job, [staying sober], and moving in with my folks, helping them both physically and financially, isn't enough to show my ability to rehabilitate, then my mere words are not going to do anything to keep me out of prison."

She was right. Because of mandatory minimum laws, Shirley received and is currently serving a 10-year mandatory minimum prison term. Had she been sentenced under the SAFE Justice Act, she would not have received this mandatory minimum prison sentence, though she still would have served some prison time. Since Shirley reported to prison, her father has passed away.

#### My Role in Creating Unjust Sentencing Laws

In 1998, I had the high honor of working as a counsel for then-Senator Ashcroft on the Senate Judiciary Committee. After he decided to forgo a presidential run in 2000 and instead focus on keeping his Senate seat in Missouri, Senator Ashcroft needed to show he was focused on the threats facing Missourians — and none was scarier at that time than the growing menace of methamphetamine abuse and production. Meth was becoming known as the crack of rural America.

I had what I thought was a great idea. I suggested that we draft a bill to impose the same mandatory minimum sentences on meth trafficking that applied to crack, which were the harshest penalties on the books. The Clinton Justice Department supported the bill, which we were able to attach to an omnibus appropriations bill and get signed into law.<sup>8</sup>

When I look back on what should have been a genuine professional accomplishment - developing an idea and getting it codified into law - I can tell you that, instead, I am embarrassed. I am embarrassed how certain I was of our righteousness when I lacked the

<sup>8</sup> See Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

most basic facts to support what we were doing. I did not know what the average sentence imposed on meth traffickers was at the time, whether those sentences were sufficient at deterring use, whether alternatives to prison might have been more effective at reducing recidivism, or how much these new, longer sentences would cost the federal government. These are things policymakers — or, at least, the staff they entrust to craft their legislation — should know before making national policy.

If I did not know these critical facts as the lead staffer on the bill, how little did other Hill staffers (and their bosses) know when they agreed to let this bill pass? I know this for certain: If someone had objected, I would have recommended that we accuse the objector of not being serious about saving Americans from this deadly threat. I am not proud of this fact, but neither can I deny it.

The new meth penalties we passed changed the weight thresholds for triggering mandatory minimum sentences. Thanks to our work, five grams – the equivalent of a couple of sugar packets – of methamphetamine triggers the 5-year mandatory minimum, and 50 grams – about the weight of a candy bar – of methamphetamine triggers the ten-year mandatory minimum.

Shirley Schmitt was convicted of trafficking 50 grams of methamphetamine. The law I helped create required her to serve a minimum sentence of ten years in federal prison. Needless to say, 55 year-old mothers who buy drugs to feed their own addictions and do not sell drugs to anyone else are not the dangerous kingpins we had in mind when we sought support for the meth sentencing law. I can blame my ignorance in not foreseeing such cases, but the truth is that all mandatory minimum sentencing laws sweep up offenders that the laws' authors did not envision reaching. Members of Congress must act with the humility I lacked as a young staffer and refrain from establishing sentences to cover thousands of future cases, the facts and circumstances of which are not knowable today.

#### Conclusion

I hope that my observations and experiences both as an inmate in a federal prison and as a congressional staffer who was involved in making federal anti-crime policy are helpful to the committee. I hope even more that today's hearing helps to build momentum for meaningful sentencing and prison reform. FAMM believes that Congress should act now to take advantage of the unprecedented level of bipartisan support to improve our criminal justice system.

I am very grateful to the committee for holding this hearing. FAMM and I look forward to helping the committee and Congress in any way possible.



Chairman CHAFFETZ. Thank you.

Mr. Levin, you're now recognized for 5 minutes. Did I pronounce it properly?

Mr. LEVIN. Yes.

Chairman CHAFFETZ. Is it Levin?

Mr. LEVIN. Yes, Chairman. Thank you very much. It's a pleasure to be—

Chairman CHAFFETZ. Is your microphone—make sure that button is pushed.

Mr. LEVIN. Oh.

Chairman CHAFFETZ. There you go. Thanks.

#### STATEMENT OF MARC A. LEVIN

Mr. LEVIN. It's a pleasure to be here. I started working on criminal justice reform with the Texas Public Policy Foundation in 2005, and then we launched Right on Crime in 2010, our national initiative with signatories to our statement of principles, like Newt Gingrich, J.C. Watts, Grover Norquist, and, of course, our governor, Rick Perry, former governor. And we have a phrase in Texas, "It ain't bragging if it's true," and since we began our efforts in 2005, our crime rate is down 24 percent, and our incarceration rate is down 12 percent. But I'll tell you even more than that, we are seeing that across the country. Over the last several years, according to the Pew Center, States that have reduced incarceration have actually had a larger crime rate decline than the rest of the country. And we have seen major reforms in States such as Utah this year, congratulations, Chairman, but also South Carolina, North Carolina, Georgia, Mississippi, Kansas, Connecticut, the list goes on.

And so this provides a lot of momentum, I think, for Federal action as well. And we've seen reform in a host of areas in States, from mandatory minimums, to earned time, to addressing the growth of regulatory crimes. In Texas, we adopted the rule of lenity this year, which says that if an offense is ambiguous, the benefit of the doubt goes to the defendant. We've also seen States like Mississippi, Maine, and Colorado safely reduce solitary confinement by more than two-thirds.

So let me talk a little bit about what Federal reforms can take place. And we very much urge Congress to take action this year on comprehensive reforms, including both front-end and back-end change. And the Safe Act is excellent. There's also many other bills, your bill, Chairman Chaffetz, as well as some legislation that a working group in the Senate is putting together that will also contain front- and back-end reforms. So one of the places to start, of course, is sentencing, as Mr. Ring mentioned, and looking at the Federal mandatory minimums.

And once again, particularly as we look at nonviolent offenses, some of these mandatory minimums result in excessive prison terms that go beyond the nature of the offense, and so drugs is one of those examples.

And so, for example, the problem with many of these mandatory minimums is rather than just focusing on kingpins, and we wish one more of those was in prison today in Mexico, but they focus on small-level drug dealers, low level drug—and even drug users. And

so, for example, one of the problems is 21 U.S.C. 851, and what that says is if a Federal defendant is convicted of as little as 10 grams of certain drugs and has one or more prior convictions for drug offenses, the mandatory minimum is 20 years with a maximum of life in prison; and if there were two prior felony drug offenses that the prosecutor files notice of, life without parole, life in Federal prison is mandatory. And these prior offenses could even be State offenses that resulted in diversion, a possession of very small amounts of drugs. So this is a major problem.

And so to illustrate my point, we do have a safety valve now, but currently, that applies to only 24 percent of all drug Federal mandatory minimum cases, and it applies to only 24 percent of cases, even though only 7 percent who are charged with these Federal drug mandatory minimums are considered leaders, supervisors, or managers.

Now, in addition to drug cases, there are other problems with mandatory minimums. One of those deals with people with a felony record who have a gun or even ammunition, and these can result in mandatory minimums of 10 to 40 years. There was one particular case of an elderly gentleman in Tennessee who was hunting turkey with a rifle, and he wound up getting a 15-year mandatory minimum that a Federal judge said was way too harsh.

Now, turning to the back end, we also see a need for earned time provisions. Wisconsin implemented earned time several years ago, and they found that those inmates who took advantage of that and completed programs had a 17 percent recidivism rate compared to 28 percent of those who didn't of similar inmates.

We need to reduce the more than 12,000 in Federal solitary confinement through disciplinary alternatives, such as withholding privileges, a gradual process for earning your way out of solitary, and, of course, Stop It, releasing inmates directly from solitary confinement.

Also, looking at a bill we passed just this year in Texas, non-disclosure, where you can have your record sealed after a number of years of living safely in the community crime-free, and be able to move on in your life.

And then, also, we need to address the problem of over-criminalization and over-federalization, and this includes reducing the over 4,500 Federal statutory offenses, which could be done through a military-base style closure commission, consolidating all remaining offenses in a unified criminal code.

We also need to remove authority from Federal agencies to impose criminal penalties by rule that are not directly authorized by Congress. We need to adopt a default mens rea provision as Ohio did last year, so conduct must be knowing or intentional, if not otherwise specified. And we need the Department of Justice to adopt guidelines to focus on Federal prosecutions on those areas where the Federal Government has a clear advantage, such as those implicating homeland security, international relations, and crossing State lines.

Finally, let me urge you to address the civil asset forfeiture problem. This has resulted in confiscation of money and property from many innocent Americans. And the Fair Act is a great way to start. That takes a number of reforms, including making sure there is

clear and convincing evidence, not just preponderance of the evidence, getting rid of equitable sharing, which States have used to circumvent some of their own restrictions on asset forfeiture. And also, making sure the property is automatically returned to people if they're not convicted, rather than putting the burden on them to hire a lawyer and file a lawsuit.

So I'll conclude by just saying we are so grateful to the bipartisan leadership that we are seeing on this committee and across Congress, and we're very encouraged that major reform can happen this year. Thank you.

Chairman CHAFFETZ. Thank you.

[Prepared statement of Mr. Levin follows:]



**Testimony of Marc Levin, Esq.  
Policy Director, Right on Crime Initiative  
at the Texas Public Policy Foundation  
House Committee on Oversight & Government Reform  
July 15, 2015**

### **Introduction**

- I am very pleased this Committee and distinguished members of both parties have come together to identify ways we can improve the federal criminal justice system. We applaud Congress for examining various options for reining in unnecessary criminal laws that are properly the province of state governments, revising mandatory minimums for nonviolent offenses, implementing evidence-based practices in community supervision, improving programming within federal prisons, and strengthening reentry. As an organization committed to the Tenth Amendment and the founders' vision of states serving as laboratories of innovation, I am pleased to share with you today that many states, particularly those led by conservative Governors, have taken these steps and found great success in reducing costs, and much more importantly, reducing their crime rate. I am attaching a document that summarizes the recent successful reforms in many states.
- Keeping Americans safe, whether accomplished through our military or justice system, is one of the few functions government should perform and perform well. As crime began increasing in the 1970's, Americans and particularly conservatives were correct to react against the attitudes and policies that stemmed from the 1960's, which included an "if it feels good, do it" mentality and a tendency to emphasize purported societal causes of crime while disregarding the fundamental individual responsibility for crime. In the ensuing couple of decades, a six-fold increase in incarceration occurred, some of which was necessary to ensure violent and dangerous offenders were kept off the streets.
- However, the pendulum shift, while necessary, went too far, sweeping too many nonviolent, low-risk offenders into prison for long terms while at the same time new research and techniques have emerged on everything from drug courts to actuarial risk assessments to electronic monitoring to pharmacological interventions to treat heroin addiction. One of the most recent and promising models is the Hawaii HOPE Court launched by former federal prosecutor Steve Alm that utilizes swift, sure, and commensurate sanctions, which has reduced

substance abuse and re-offending by two-thirds.<sup>1</sup> With all of these advancements, just as we recognize that locking up violent offenders and international drug kingpins continues to make us safer, we must also follow the examples of many states that demonstrate utilizing more alternatives for low-level, low-risk offenders can lead to better public safety outcomes at a lower cost to taxpayers.

- The astronomical growth in the breadth of federal criminal law is in tension with the primary constitutional role of state and local governments in the area of criminal justice. With more than 4,500 federal statutory offenses on the books, and hundreds of thousands of regulations carrying criminal penalties, it is time to right-size the federal criminal law as part of a broader effort to revive federalism and the Tenth Amendment. We recommend that all necessary federal criminal laws be consolidated into one federal criminal code with clear *mens rea* requirements, which will make it simple for the average citizen to determine what is prohibited, and that agency regulations be precluded from carrying criminal penalties unless expressly authorized by Congress. In the 1970's, Dick Thornburgh, serving as the Assistant Attorney General for the Justice Department's Criminal Division under President Ford, urged Congress to create a unified criminal code.<sup>2</sup> It was a good idea then, and it is only more urgently needed now as the volume, scope, and complexity of federal criminal laws continues to grow.

#### **About the Texas Public Policy Foundation & Right on Crime**

- Since 1989, the Texas Public Policy Foundation has served as the state's free-market think tank and in 2005 I launched our Center for Effective Justice. Our work in Texas which included research, data analysis, and legislative testimony helped shape Texas' historic shift in criminal justice policy in 2007 away from building more prisons to instead strengthening alternatives for holding nonviolent offenders accountable in the community, such as drug courts. Since making this shift, Texas has achieved a drop in its incarceration rate by more than 12 percent and, most importantly, a drop in its crime rate by more than 24 percent, reaching its lowest level since 1968.<sup>3</sup> Taxpayers have avoided spending more than \$2 billion on new prisons.
- Building on the Texas success, we launched Right on Crime in 2010. Our Statement of Principles signed by conservative leaders such as Jeb Bush, Newt Gingrich, Rick Perry, Bill Bennett, Grover Norquist, and J.C. Watts, as well as leading experts in the field such as John DiLulio and George Kelling, explains how conservative principles such as personal responsibility, limited government, and accountability should apply to criminal justice policy. Our focus areas include: 1) maximizing the public safety return on the dollars spent on criminal justice, 2) giving victims a greater role in the system through restorative justice approaches and improving the collection of restitution, and 3) combating

overcriminalization by limiting the growth of non-traditional criminal laws. Right on Crime does not endorse or oppose legislation, but continues to highlight how these principles can be applied at all levels of government.

- Over the past few years, we have worked with our counterpart free-market think tanks and conservative Governors and legislators across the country to advance tough and smart criminal justice reforms, which in most cases have passed unanimously or with just a few votes against. Examples include Georgia, South Carolina, Ohio, and Pennsylvania. These legislative packages have shared many similarities, such as strengthening and expanding alternatives such as drug and other problem-solving courts, reducing penalties for low-level drug offenses while still holding these offenders accountable and requiring treatment, reinvesting a share of prison savings into proven community corrections and law enforcement strategies, imposing swift, certain, and commensurate sanctions for non-compliance with community supervision terms, implementing earned time policies that incentivize offenders to succeed, and instituting rigorous, outcome-oriented performance measurements to hold the system accountable for lowering recidivism. Also, in Georgia, the mandatory minimum safety valve for drug cases in the successful legislative package spearheaded by Governor (and former prosecutor) Nathan Deal is very similar to pending federal legislation.
- While in the last two years, state incarceration rates have been declining, the federal prison system continues to grow. Since 1980, the number of federal prisoners has grown by over 700 percent, while the U.S. population has only grown by slightly more than 32 percent.<sup>4</sup> Some 46.8 percent of federal inmates are drug offenders.<sup>5</sup>

#### **Mandatory Minimums for Nonviolent Offenders**

- In 1999, Ed Meese told the *New York Times*, “I think mandatory minimum sentences for drug offenders ought to be reviewed. We have to see who has been incarcerated and what has come from it.” More than two decades later and four years after Ed Meese became one of the signatories to our Right on Crime Statement of Principle, today we have that opportunity to do that. As you consider recalibrating mandatory minimums that apply to nonviolent offenses, we think the following factors should be taken into account:
  - Judges and juries have much more information as to the specific facts of the case, yet mandatory minimums prevent the judge and jury from considering the defendant’s background and especially his risk level. Research shows that actuarial risk assessments can accurately determine that two offenders who committed the same offense pose very different levels of risk to the community.

- Some mandatory minimums result in excessive prison terms, particularly following the abolishment of parole in the federal system. For example under 21 U.S.C. § 851(a), if a federal defendant is convicted of as little as 10 grams of certain drugs and has one or more prior convictions for a “felony drug offense,” the mandatory minimum is 20 years with a maximum of life in prison. If there were two prior “felony drug offenses” that the prosecutor files notice of, life in federal prison is mandatory. Notably, a prior “felony drug offense” can be satisfied by a state misdemeanor in states where a misdemeanor is punishable by one or more years behind bars and even a diversionary disposition in state court. Furthermore, there is no limit on how old the prior offense can be and in some cases it has been decades old. Also, the current safety valve for federal drug cases is too narrow, as it applies to only 24 percent of cases even though only 7 percent of those charged were considered leaders, supervisors, or managers.<sup>6</sup>
- Most federal drug offenders are not violent. Of the 22,300 federal drug offenders sentenced in FY 2013, half had little or no prior criminal record and 84% had no weapon involved in the crime – and most of the 16% who did merely possessed the weapon.<sup>7</sup> Despite these facts, 97 percent of all federal drug offenders went to prison in FY 2013, and 60% received mandatory minimum sentences of five, 10, 20 years or life without parole.<sup>8</sup> Yet, of drug offenders sentenced in FY2012, just 28 defendants (.1%) received a seven-year increase under 18 U.S.C. § 924(c) for brandishing a firearm, and just 44 (.2%) received a ten-year increase, either for discharging a weapon or possessing a more dangerous type of weapon. Only 89 (.37%) of the 23,758 defendants sentenced under USSG §2D1.1 in FY2012 received the 2-level increase under (b)(2) for having “used violence, made a credible threat to use violence, or directed the use of violence.” Just 6.6 percent received any increase for playing an aggravating role in the offense, and only .4 percent received a super-aggravating adjustment under §2D1.1(b)(14).
- There are many cases where federal judges have lamented in the record that the sentence they are forced to give by the applicable mandatory minimums is unjust and far beyond what is needed to sufficiently punish and ensure public safety. Among those are the case of college student Michael Wahl just this year in Florida who received ten years for growing marijuana in his apartment due to a § 851 enhancement for drug possession case two decades earlier. An Iowa 40 year-old man named Robert Riley was sentenced to mandatory life in federal prison for selling 10 grams of drugs, including the weight of the blotter paper they were attached to, due to the prosecutor filing § 851 enhancements based on prior drug convictions involving small amounts. The judge said the sentence he was forced into was “unfair” and wrote a letter supporting presidential clemency which has proven futile so far. In addition to the drug cases, there are also many problematic cases involving guns

otherwise legally owned by persons previously convicted of any crime punishable by more than a year behind bars. Some such defendants have received mandatory terms of 10 to 40 years even when the prior offense was nonviolent and decades ago and the gun they currently possessed was otherwise legal and not being used for any illicit purpose. In one such case where the gun was a sixty year-old hunting rifle used to hunt turkey in rural Tennessee, the judge described the 15 year mandatory term he was forced to impose as “too harsh.”

- A Rand Institute study found mandatory minimums for nearly all drug offenders are not cost-effective, although long sentences for major international drug kingpins trafficking enormous quantities were found to be cost-effective.<sup>9</sup>
- Mandatory minimums do not allow for input from the victim in cases where there is one. Research has shown that in some cases victims do not want the maximum prison term and that restitution is much more likely to be obtained if an alternative sentence is imposed.<sup>10</sup>
- Mandatory minimums have not met the goal of achieving uniformity in sentencing. Mandatory minimum sentences can actually create geographical sentencing disparity, because whether to charge someone with an offense carrying a mandatory minimum is entirely up to prosecutors – and the 94 US Attorney offices around the country have different charging policies and practices. For example, a defendant in the Northern District of Iowa “who is eligible for a § 851 enhancement is 2,532% more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska,” a defendant in the Eastern District of Tennessee is “3,994% more likely to receive” the enhancement than in the Western District. *United States v. Young*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 4399232 (N.D. Iowa 2013). The USSC’s 2011 report found that the charging and application of the 18 USC 924c penalties, for example, depended greatly on where the crime was committed – nearly half of all cases came from just three districts in 2010, despite no difference in the prevalence of that offense conduct among all districts. (p. 276).
- Mandatory minimums were implemented in large part due to concerns with excessive use of judicial discretion, but judicial adherence to drug sentencing guidelines is relatively high overall. An overreliance of mandatory minimums effectively results in a massive transfer of discretion from judges to prosecutors, since the sentence is dictated by what charges and notices are filed. Indeed, it is prosecutors, not judges, who are responsible for the largest proportion of deviations from the guidelines in drug cases. In FY2013, only 17.8% of below-guidelines sentences for drug offenders were initiated by the court for *Booker* reasons.<sup>11</sup> More than 38% of below-guideline sentences for



drug offenders in FY 2013 came at the urging of prosecutors for reasons Congress has sanctioned (Table 45 of USSC 2013 Sourcebook).

- Mandatory minimums are not necessary to encourage defendants to plea. Some 96.9% of federal cases are resolved by plea, with only 3.1% going to trial.<sup>12</sup> These figures are very high for every category of cases, even those to which mandatory minimums do not apply. For example, 99.4% of immigration cases result in pleas, as do 93.4% of fraud cases. In fact, the U.S. Sentencing Commission found that those convicted of an offense carrying a mandatory minimum penalty pled guilty at a slightly lower rate (94.1%) than offenders who were not convicted of an offense carrying a mandatory minimum penalty (97.5%).<sup>13</sup> Furthermore, offenders facing longer mandatory minimum penalties were less likely to plead guilty.
- We do recognize the value of appropriate sentencing ranges to guide the discretion exercised by judges and juries as well as judges being aware of the sentencing patterns of their colleagues. If mandatory minimums were revised for certain nonviolent offenses and/or if the safety valve was expanded, judges in each circuit could be asked to annually review data comparing their sentencing patterns in similar cases with those of their colleagues. In short, policymakers should not be forced to choose between the false dichotomy of a sentencing regime that is entirely rigid and one with no limits and monitoring to constrain discretion.
- It is important to remember that, even if mandatory minimums did not apply to certain drug cases, these offenders would be going to federal prison. Recent experience illustrates that federal judges would generally impose tough sentences even if Congress dialed back mandatory minimums in such cases. For example, even after the crack/power disparity was narrowed in 2010, those convicted in subsequent crack cases received an average prison term of 97 months.
- We appreciate the outstanding work that most prosecutors do at all levels of government. We have heard the concern that prosecutors in some jurisdictions have excessive caseloads and mandatory minimums provide the leverage needed to quickly extract plea bargains that are satisfactory to them, but the better way to address this concern is to ensure there are sufficient prosecutors to properly examine the facts of each case and, when necessary, fully prosecute those cases that merit a trial. The growth in the Bureau of Prisons, however, is consuming an ever greater share of the Department of Justice budget, the same budget that funds federal prosecutors.
- It is useful to note that Texas generally does not have mandatory minimums, except for repeat seriously violent offenses, but still has long provided for meaningful [and appropriately stringent] sentencing ranges and penalties for

criminal offenses. In the recent groundswell of state policy innovations in this area, a number of states have addressed their mandatory minimums. For example, in 2010, South Carolina eliminated mandatory minimums for the manufacture, distribution, dispensing, delivery or purchase of drugs below certain weight thresholds for first and second offenses. Delaware reduced its mandatory minimum sentences for many drug trafficking offenses in 2003. In 2013, Georgia provided judges with a “safety valve” for departing below mandatory minimums for trafficking and manufacturing, if certain findings were made. Reductions in state mandatory minimums does not appear to have had an adverse impact on crime, as the crime rates have continued to decline in these states. Since the reforms in South Carolina 2010, the crime rate has decreased by 14 percent.

### **Beyond Mandatory Sentencing: Other Federal Criminal Justice Reforms**

- The criminal justice reforms in some states like Texas have not dealt with mandatory minimums because Texas only had minimum prison terms for repeated seriously violent offenses. However, at the federal level, since mandatory minimums affect many cases, including many nonviolent cases, comprehensive reform approaches should address both mandatory minimums and other changes that do not involve sentencing laws such as earned time and strengthening reentry.
- Our recent paper “The Verdict on Federal Prison Reform” focuses on policy changes that are backed by empirical research and proven success in the states.<sup>14</sup> These include: utilizing validated risk and needs assessments, earned time policies, strengthening alternatives to incarceration such as problem-solving courts and electronic monitoring, reducing collateral consequences of convictions that make it harder for rehabilitated ex-offenders to find employment, and strengthening reentry. With regard to both alternatives to incarceration and reentry, we suggest considering subcontracting in some instances with state, local, and non-profit agencies, as this can be more efficient than the federal government reinventing the wheel, particularly in areas where there are not that many federal offenders on probation or on supervised release.
- Congress must also act to rein in overcriminalization by reducing the number of superfluous criminal laws, consolidating all necessary criminal laws into one unified criminal code, adopting a rule of construction that applies a strong *mens rea* protection where the underlying statute is unclear, codifying the rule of lenity<sup>1</sup>, and removing the authority of agencies to apply criminal penalties to regulations unless expressly authorized by Congress.

<sup>1</sup> This canon of statutory interpretation provides that, if there are two objectively reasonable meanings of a statute, the court should adopt the one that is favorable to the defendant. The rule of lenity has a long pedigree in Western law (See *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”) and has been applied

- When it comes to conduct that is properly criminalized, limited federal criminal justice resources should be refocused on areas where the federal government is uniquely situated to supplement the role of states and localities, such as matters involving homeland security and international drug and human trafficking. The garden variety drug, property, or even violent offense that occurs on one street corner can and should be addressed by prosecution at the local and state levels. Congress and the administration should look at how to develop mechanisms, such as guidelines and performance measures, to ensure federal prosecutorial resources are being appropriately prioritized.
- In addition to considering the statutory penalties for various crimes, we urge the Committee to examine collateral consequences. One example is the federal law that requires states to suspend the driver's licenses of all individuals convicted of any drug offense, even a misdemeanor. While those who are driving while inebriated with any substance should be taken off the road, this issue should be dealt with at the state and local levels. States should not be subject to losing federal transportation funds based on their policy in this area, as the threat of withholding unrelated funds involves coercion that undermines the framework of federalism embodied in the Tenth Amendment.

### **Reforming Solitary Confinement**

- As conservatives, we are appropriately skeptical of government that is too large, too intrusive, and too costly, and we insist on accountability and transparency. Government is at its most restrictive when it imposes solitary confinement so it is only appropriate that we bring a critical focus to this issue rather than succumb to an out of sight, out of mind mentality. While we recognize solitary confinement is needed in some instances, policies and practices must be implemented to ensure it is not unnecessarily used to the detriment of public safety, taxpayers, and justice.
- The U.S. Bureau of Prisons (BOP) maintained approximately 12,400 inmates in solitary confinement at the time of the May 2013 General Accounting Office (GAO) report, although BOP officials claim the segregated population has declined since then. Many more inmates are so housed in state prisons, which typically means 23 hours alone in a small cell with no stimulation or interaction with other people. The GAO report found that the use of solitary confinement has

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on occasion by the U.S. Supreme Court and federal appellate courts in recent years. It is tied to the core principle that citizens should have fair notice as to what is a crime, since a statute capable of an objectively reasonable interpretation whereby the conduct at issue would not be prohibited would, thereby, fail to provide such notice. By codifying the rule of lenity, Congress can ensure it is uniformly applied.

been growing in the federal prison system despite a lack of any available evidence that this practice was increasing safety for inmates and staff.<sup>15</sup> The GAO report also for the first time revealed the actual cost of solitary confinement on the federal level, finding that it amounts to \$78,000 per inmate per year, nearly three times that of housing inmates in the general population.<sup>16</sup> Since the time of the last Senate hearing on solitary confinement, BOP has agreed to begin an audit that will, for the first time, lead to some outside scrutiny of BOP's use of segregation.

- The research in this area and the recent successes that several states have achieved in both reducing solitary confinement and improving order in their correctional facilities suggests that there are changes in policies and practices from which both the BOP and state prison systems can benefit.
- While often viewed primarily as a moral issue, solitary confinement has significant implications for public safety. First and foremost, prisons must discontinue the practice of releasing inmates directly from solitary confinement to the public. A study in Washington state found that inmates released directly from the Supermax prison, which consists entirely of solitary confinement, committed new felonies at a rate 35 percent greater than that for inmates of the same risk profile released from the general population.<sup>17</sup> Additionally, a greater percentage of the new crimes committed by those released from solitary confinement were among the most serious violent felonies.<sup>18</sup>
- Despite this finding, many states continue to release inmates directly from solitary confinement, with more than 1,300 such releases in 2011 in Texas alone.<sup>19</sup> In 2013, a Colorado inmate released directly from solitary confinement murdered the state's director of corrections, Tom Clements. Alarming, dating back to 2002, half of those released from Colorado prisons who subsequently committed murder served time in solitary confinement, with some discharged directly to the street. However, as documented below, major changes are underway that are significantly reducing overall solitary confinement in Colorado and those discharged directly from this custody level, with the latter figure falling from 221 in 2004 to 70 in 2013.<sup>20</sup>
- The average American may understandably wonder, if an inmate is too dangerous for the general population of a prison, how can they live next to me the next day? While inmates who have served their entire sentence must by law be released, this date is not a mystery to corrections officials. Stepping them down to a lower level of custody at least several months prior to release is not too much to ask.
- While it is commonsensical to most people that someone who was subjected to 23 hours a day in a cell with no stimulation will have great difficulty reentering society the next day, the negative effects of solitary confinement on those who were mentally ill even prior to entering solitary confinement are well documented.

*The Journal of the American Academy of Psychiatry Law* noted: “The stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence. Suicides occur disproportionately more often in segregation units than elsewhere in prison.”<sup>21</sup> One study found that 45 percent of prisoners in solitary confinement suffered from serious mental illness, marked psychological symptoms, psychological breakdowns, or brain damage.<sup>22</sup>

- Fortunately, jurisdictions are increasingly demonstrating that the use of solitary confinement can be safely reduced. One of the most stunning examples of downsizing solitary confinement comes from Mississippi. In 2007, Mississippi had 1,300 inmates in solitary confinement while today there are only 300.<sup>23</sup> This downsizing has saved Mississippi taxpayers \$6 million, because solitary confinement costs \$102 per day compared to \$42 a day for inmates in the general population.<sup>24</sup> Most importantly, violence within Mississippi’s prisons and the recidivism rate upon release are both down, with violence dropping nearly 70 percent.<sup>25</sup>
- Maine is a similar success story. In 2011, the state prison in Warren instituted a plan to reduce long-term segregation which has resulted in a decline in the segregated population from 139 in August 2011 to between 35 and 45 inmates just a year later.<sup>26</sup> Importantly, Maine Corrections Commissioner Joseph Ponte said the downsizing of solitary confinement has led to “substantial reductions in violence, reductions in use of force, reductions in use of chemicals, reductions in use of restraint chairs, reductions in inmates cutting [themselves] up — which was an event that happened every week or at least every other week... The cutting has] almost been totally eliminated as a result of these changes.”<sup>27</sup>
- Some of the changes involved reducing the duration of solitary confinement — for example, those segregated for drugs can now graduate out of confinement and stay in the general population as long as they pass drug tests. Moreover, there was a change in the chain of command. Rather than the shift captain being able to place an inmate in segregation for more than three days, the segregation unit manager and the housing unit manager must agree after this period to continue the segregation and that decision must be ratified by the Commissioner.
- Similarly, in the last decade, Ohio dramatically reduced its solitary confinement population from 800 to 90 prisoners.<sup>28</sup> Additionally, from September 2011 to September 2013, Colorado cut the number of inmates in solitary confinement from 1,505 to 662. The number of mentally ill offenders in solitary confinement has fallen even more sharply.
- It is important to note that prison staff do not necessarily want more inmates to be in solitary confinement. In fact, in January 2014, the association representing Texas prison guards, AFSCME Texas Correctional Employees Local 3807,

called for reducing the solitary confinement of death row inmates, noting that because “inmates have very few privileges to lose,” staff become easy targets.<sup>29</sup>

- More broadly, any intervention that reduces prison violence is likely to reduce solitary confinement by avoiding the incidents that often lead to it. One of the best models for promoting order in prisons is the parallel universe model embraced by Arizona in 2004 through the “Getting Ready” program, which won the innovation award from the Harvard University JFK School of Government. The parallel universe model attempts to make prison more like ordinary life in that how the inmate is treated is directly related to their behavior. For example, inmates who are exemplary, both in completing educational and treatment programs, holding a job inside of prison, and maintaining an unblemished disciplinary record, have a longer curfew and receive better food. Since the program was implemented, inmate violence has decreased by 37 percent, inmate-on-staff assaults by 51 percent, and inmate suicides by 33 percent.<sup>30</sup> So many inmates are working through the program that they have contributed more than \$1 million to a fund for victims of crime, and recidivism rates of participants are 35 percent lower than for similar inmates.<sup>31</sup>
- By the same token, the swift and certain sanctions model that is so successful in the HOPE Court certainly has a place inside prisons. It is a bit more challenging to apply a matrix of intermediate sanctions in prison because there are fewer privileges that inmates have that can constitutionally be withheld, as compared with those on probation or parole. However, such sanctions can include withholding access to the commissary, withholding access to the phone and mail except to communicate with an attorney, relocation to a less desirable cell or higher security unit and away from any inmate with whom they have a dispute, and even short stints in solitary confinement of 24 to 72 hours. Required anger management programming should also be available as a response to misconduct. While inmates who instigate force causing serious bodily harm to a staff member or other inmate should be placed in solitary confinement for a significant period of time rather than dealt with through intermediate sanctions, these intermediate sanctions can address the more common, less severe disciplinary infractions before they escalate to that point.
- However, perhaps the most effective sanction is sometimes not available due to policies that result in a large share of inmates serving all or nearly all of their sentence behind bars, regardless of their behavior. Those inmates eligible for parole typically realize that their record of behavior inside prison will be a major factor in whether they will be approved for parole. In those states with good time or earned time policies, the only way an inmate can earn time off their sentence is through good behavior, though under earned time policies they often must go beyond that by completing treatment, educational, and vocational programs. Yet, the federal government and many states abolished parole in the 1990’s, even for

nonviolent offenders. Some of these same states such as Florida also adopted so-called truth-in-sentencing policies that require even nonviolent offenders to serve 85 to 90 percent of their sentences beyond bars.

- However, a 2013 study conducted by the Pew Charitable States Public Safety Performance Project of New Jersey of inmates released from prison found that comparable inmates placed on parole supervision committed 36 percent fewer new offenses, casting doubt on policies such as the abolishment of parole that have led to more inmates maxing out their entire term behind bars.<sup>32</sup> Not only does the elimination of parole and requirements that inmates serve virtually all their time in prison put prison growth on auto-pilot, these policies create another drawback that is relevant here. That is, many inmates know that, unless they go so far as to commit another crime in prison, they will be released on the same date or virtually the same date regardless of their behavior. The same drawback applies to life without parole sentences, which while justified in many of the cases in which they are imposed due to the heinousness of the crime and a pattern of violence, are being served by inmates in Louisiana for offenses such as marijuana and stealing a belt.<sup>33</sup> While Louisiana is the state with the most nonviolent offenders serving life without parole, the federal system dwarfs all states, accounting for two-thirds of the 3,278 prisoners serving life without parole in 2013 for nonviolent offenses. By reducing the share of inmates, particularly nonviolent inmates, who must serve all or virtually all of their entire terms behind bars, we can ensure that more inmates have an incentive to avoid the types of misconduct that often lead to solitary confinement.
- The successful experiences of several states and the empirical research in this area lead to many recommendations that can reduce the unnecessary use of solitary confinement while promoting order in correctional facilities. These include:
  - End the practice of releasing inmates directly from solitary confinement.
  - Ensure that there is an oversight mechanism, whether that is an ombudsman or the head of the department, to review decisions to keep an inmate in solitary confinement beyond 72 hours. This is particularly important in states like Texas where inmates can be placed in solitary confinement simply for being a suspected gang member, a determination which is prone to human error.
  - Provide a means for inmates to earn their way out of solitary confinement, such as through a period of exemplary behavior and gang renunciation, if they were not placed there for instigating force that caused serious bodily injury to a staff member or other inmate.
  - Eliminate rules that make all inmates in solitary confinement ineligible for any programming and allow such inmates access to constructive reading materials, including educational course books.

- Enhance training for prison personnel in de-escalation techniques, mental illness, and mental retardation, issues which often lead to solitary confinement. Some states such as Nebraska are looking at having some higher level prison guard positions filled by individuals with degrees in areas such as social work who are better equipped to not just respond to behavior, but change it.
- Implement a parallel universe model that creates incentives for positive behavior and self-improvement.
- Create a matrix of intermediate sanctions that must be used prior to placing an inmate in solitary confinement for more than 72 hours, unless that inmate has instigated force that caused serious bodily injury to a staff member or other inmate.
- For many inmates, allow for earned time, thereby reducing the number of “dead-enders” and allowing for substantial variation in time served based on the inmate’s performance.
- Reduce overcrowding through sentencing reform. Overcrowding can contribute to the overuse of solitary confinement by leading to an insufficient number of guards to control inmates in the general population and making it more difficult to separate inmates and groups of inmates who may have issues with one another.
- Utilize “missioned housing,” which are separate, smaller correctional settings, for inmates in segregation as protective custody, such as former police officers and those who have recently exited a gang, as well as for mentally ill and developmentally delayed inmates who were segregated due to an inability to follow orders. These inmates who did not harm another inmate or staff member should not be subject to 23 hours of solitary confinement alongside those who committed acts of violence behind bars. The Wisconsin model of Special Management Units provides an example of such “missioned housing” for these types of inmates.
- Reexamine prison construction and renovation plans to ensure unnecessary Supermax/solitary confinement beds are not added. Even if additional maximum security capacity is needed, the vast majority or all of the beds can be general population beds.
- Improve availability of data. For example, there is no reliable data on the number of inmates in different types of segregation (punitive versus protective) and very little data at all on local jails and immigration detention centers.

### Conclusion

- The successes of many states in reducing both crime and costs through reforms anchored in research and conservative principles provide a blueprint for reform at the federal level. By learning from what is working in the states and taking steps to ensure the federal role in criminal justice does not intrude on the constitutional



purview of state and local governments, Congress can focus federal resources on those areas where it can most uniquely contribute to advancing public safety and the rule of law. We are encouraged by the remarkable vision and leadership of the distinguished members of this Committee and look forward to being of assistance in any way we can.

<sup>1</sup> "Program Evaluation Results," Hawaii State Judiciary's HOPE Probation Program, <http://www.hopeprobation.org/about/program-evaluation-results>.

<sup>2</sup> Dick Thornburgh, "Codification and the Rule of Law," <http://www.justice.gov/ag/aghistorical/thornburgh/1990/01-22-90.pdf>.

<sup>3</sup> Marc Levin, "The Texas Model: Adult Corrections Reform, Lower Crime, Lower Costs," Texas Public Policy Foundation, Sept. 2011, <http://www.texaspolicy.com/sites/default/files/documents/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf>.

<sup>4</sup> The Sentencing Project, "The Expanding Federal Prison Population" (Mar. 2011) 1. Internal citations omitted.

See also "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 6, 2012). Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. Noting "substantial ongoing challenges" posed by overcrowding.

<sup>5</sup> Federal Bureau of Prisons Quick Facts, <http://www.bop.gov/news/quick.jsp>.

<sup>6</sup> U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at Tbls. 37, 39, 40, 44, (2012), [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm).

<sup>7</sup> All data come from U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013>.

<sup>8</sup> U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013>.

<sup>9</sup> Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, and James Chiesa, "Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?," Rand Institute, MR-827-DPRC, 1997, 217 pp., ISBN: 0-8330-2453-1

<sup>10</sup> "The 1997 Iowa Adult Crime Victimization Survey," Center For Social and Behavioral Research University of Northern Iowa, April 1998, [http://www.csbs.uni.edu/dept/csbr/pdf/CRI\\_Crime\\_Victimization\\_Survey-1998.pdf](http://www.csbs.uni.edu/dept/csbr/pdf/CRI_Crime_Victimization_Survey-1998.pdf). "Empowering and Restoring Crime Victims," Texas Public Policy Foundation, <http://www.texaspolicy.com/sites/default/files/documents/Empowering%20and%20Restoring%20Crime%20Victims.pdf>.

<sup>11</sup> U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 168-69 (2011), <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

<sup>12</sup> U.S. Sentencing Commission, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table11.pdf>.

<sup>13</sup> U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 168-69 (2011), <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

<sup>14</sup> Marc Levin & Vikrant Reddy, "The Verdict on Federal Prison Reform," Texas Public Policy Foundation, July 2013, <http://www.texaspolicy.com/sites/default/files/documents/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf>

<sup>15</sup> "Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing," General Accounting Office, May 2013, <http://www.gao.gov/assets/660/654349.pdf>.

<sup>16</sup> *Ibid.*

<sup>17</sup> David Lowell, et. al., "Recidivism of Supermax Prisoners in Washington State," *Crime & Delinquency*, Oct. 2007, vol. 53 no. 4 633-656, <http://cad.sagepub.com/content/53/4/633.abstract>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Testimony of Travis Leete, Texas Criminal Justice Coalition, April 17, 2013, [http://www.texasajc.org/sites/default/files/uploads/2012/06/2012Testimony%20\(Ad%20Seg%20Review\).pdf](http://www.texasajc.org/sites/default/files/uploads/2012/06/2012Testimony%20(Ad%20Seg%20Review).pdf).

<sup>20</sup> Jennifer Brown and Karen Krummy, "Half of parolees who murdered spent time in solitary confinement,"

*Denver Post*, Sept. 23, 2013, [http://www.denverpost.com/parole/ci\\_24140370/half-parolees-who-murdered-spent-time-solitary-confinement](http://www.denverpost.com/parole/ci_24140370/half-parolees-who-murdered-spent-time-solitary-confinement). Rick Raemish, "My Night in Solitary," *New York Times*, Feb. 20, 2014, [http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?\\_r=0](http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?_r=0).

<sup>21</sup> Jeffrey L. Metzner, MD and Jamie Fellner Esq., "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics," *J Am Acad Psychiatry Law* 38:1:104-108 (March 2010), <http://www.jaapl.org/content/38/1/104.full>.

<sup>22</sup> D. Lovell, Patterns of disturbed behavior in a supermax population, *Criminal Justice and Behavior*, 35, 985-1004 (2008).

<sup>23</sup> Randall Pinkston, "Mississippi Rethinks Solitary Confinement," CBS News, May 18, 2013, <http://www.cbsnews.com/news/mississippi-rethinks-solitary-confinement/>.

<sup>24</sup> *Ibid.*

<sup>25</sup> Terry Kupers et al., "Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs," *Criminal Justice and Behavior* 36 (2009): 1037-

50, [https://www.aclu.org/files/images/asset\\_upload\\_file359\\_41136.pdf](https://www.aclu.org/files/images/asset_upload_file359_41136.pdf).

<sup>26</sup> Alex Barber, "Less restriction equals less violence at Maine State Prison," *Bangor Daily News*, June 15, 2012, <http://bangordailynews.com/2012/06/15/news/state/less-restriction-equals-less-violence-at-maine-state-prison/>.

<sup>27</sup> *Ibid.*

<sup>28</sup> Terry Kupers et al., "Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs," *Criminal Justice and Behavior* 36 (2009): 1037-

50, [https://www.aclu.org/files/images/asset\\_upload\\_file359\\_41136.pdf](https://www.aclu.org/files/images/asset_upload_file359_41136.pdf).

<sup>29</sup> Nicholas Flatow, "Texas Prison Guards Vie For Less Solitary Confinement." *Think Progress*, Jan. 30, 2014, <http://thinkprogress.org/justice/2014/01/30/3223731/texas-prison-guards-vie-solitary-confinement/#>.

<sup>30</sup> Ann Coppola, "A Parallel Universe," *Corrections.com*, <http://www.corrections.com/news/article/20339>.

<sup>31</sup> *Ibid.*

<sup>32</sup> The Pew Charitable Trusts, "The Impact of Parole in New Jersey," November 2013. Available at: [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2013/PSPP\\_NJParole-Brief.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_NJParole-Brief.pdf)

<sup>33</sup> "A Living Death: Life Without Parole for Nonviolent Offenses," American Civil Liberties Union, November 2013, <https://www.aclu.org/files/assets/111213a-lwop-complete-report.pdf>.

Mr. Malcolm, you're now recognized for 5 minutes.

**STATEMENT OF JOHN G. MALCOLM**

Mr. MALCOLM. Chairman Chaffetz, Ranking Member Cummings, distinguished Members of Congress. As you heard, I am the Director of the Meese Center for Legal and Judicial Studies at the Heritage Foundation, although my remarks today, the views that I express, are my own. I also spent a good deal of my career as a Federal prosecutor and a criminal defense attorney.

Sentencing reform, which will be the focus of my remarks today, is a very difficult issue. Some believe that too much discretion has been removed from judges, and that increased incarceration has led to inequities in our society. Others believe that harsh sentences have taken some very dangerous people off of the streets, and that if such sentences are cut, crime rates may well increase. I understand why people of goodwill disagree passionately about this issue. When crime rates soared in the 1960s or 1970s, the idea of putting more people in prison for longer periods of time made a lot of sense, and to some extent it worked. Crime rates leveled off, and since the 1990s, have dropped precipitously. While there are places in this country where crime rates remain staggeringly and persistently high, we are, for the most part, much safer.

Increased incarceration, especially of violent offenders, certainly deserves some of the credit, but how much credit is a matter of debate. While some experts estimate that increased incarceration may be responsible for as much as 35 percent of the reduction in violent crime, this means that other factors would be responsible for the remaining 65 percent or more of that reduction.

Moreover, incarceration, while necessary, is a very expensive option. Indeed, the costs of incarceration have risen steadily over the past 15 years, but perhaps of even greater importance, increased incarceration also comes with a human cost. There are now over 2 million adults behind bars in this country, which impacts not only the offender's prospects, but also that of their family members. Parents who commit crimes may not be the best role models, but they are breadwinners and are usually better than having no role model at all. Many studies indicate that children with incarcerated parents struggle and often end up turning to crime themselves.

Today, the Bureau of Prisons constitutes 26 percent of DOJ's budget, and it is projected to grow. That is up from 18 percent in 2000. This means less money for investigators, prosecutors, victims' services, grants to State and local law enforcement authorities, and other priorities. Given this reality, I see each prison cell as very valuable real estate that ought to be occupied by those who pose the greatest threat to public safety.

Now, nobody disputes that there are some people who should go to prison and never return to society. Most inmates, however, do not fall into that category, and approximately 95 percent of them will, in fact, eventually return to our communities.

Congress is currently considering a number of front-end proposals which would reduce the amount of time that certain offenders are sentenced to. Most of these proposals focus on drug offenders and involve reducing mandatory minimum sentences.

Now, let me be clear, that I believe drug dealing poses a threat to public safety. The potential for violence, gang involvement, and lethal overdose is inherent in most drug transactions. Nonetheless, while drug dealers ought to be punished, I believe the pendulum has swung too far. Too many low-level offenders are being locked up for 5, 10 and 20 years, when lesser sentences would suffice.

Front-end reforms could involve reducing the length of mandatory minimum sentences for most drug offenders, expanding the number of low-level offenders who qualify for the safety valve, or some combination thereof.

Congress is also considering back-end reform proposals, which would enable an offender either to get time off of his or her sentence, or a change in his or her conditions of confinement. I support these efforts too.

Such proposals involve three things: First, expanding prison programs likely to reduce the risk of recidivism, such as educational job skills, mental health and substance abuse program; second, encouraging inmates to avail themselves of such programs; and third, along with using needs and risk assessment tools, matching inmates with programs based on their needs and providing incentives for inmates to complete such programs. This type of reform is important, because huge numbers of inmates have mental health problems, substance abuse issues, or both. Both conditions are associated with staggeringly high rates of recidivism, and prison programs addressing these conditions are sparse. Until that changes, prisons are likely to remain a revolving door.

Many offenders, particularly those with only modest records who take advantage of such programs, could end up becoming productive, law-abiding members of society. So long as we are realistic and methodical in our approach, we should not give up on those whose lives can be salvaged.

Now, in addition to sentencing proposals, Congress is considering important proposals related to over-criminalization, mens rea reform, civil asset forfeiture, collateral consequences, and juvenile justice, among others. These are all serious issues worthy of serious consideration, and I look forward to working with each of you on these and other proposals to reform our criminal justice system.

I thank you for inviting me here today and I look forward to answering any questions you might have.

[Prepared statement of Mr. Malcolm follows:]



**LEGISLATIVE TESTIMONY**

**CRIMINAL JUSTICE REFORM**

**Testimony before the Committee on Oversight and Government  
Reform  
U.S. House of Representatives  
July 15, 2015**

John G. Malcolm  
Director and the  
Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow  
Edwin Meese III Center for Legal and Judicial Studies  
The Heritage Foundation

Chairman Chaffetz, Ranking Member Cummings, and distinguished Members of Congress:

Thank you for the opportunity to speak to you today about criminal justice reform, and, more particularly, sentencing reform. I applaud you for convening this hearing.

My name is John Malcolm. I am the Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.<sup>1</sup> The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I have also spent a good deal of my career involved in the criminal justice system—as an Assistant United States Attorney, an Associate Independent Counsel, a Deputy Assistant Attorney General in the Criminal Division at the U.S. Justice Department, and a criminal defense attorney. Therefore, I can speak to you today as someone who has experience on both sides of the courtroom.

I would like to stress at the outset that sentencing reform is a difficult issue. Some believe that our current sentencing regime is unfair, that too much discretion has been removed from judges, that the pendulum has swung too far in terms of imposing harsh sentences, and that increased incarceration has led to other inequities in our society. Others believe that increased incarceration and harsh sentences have taken some very dangerous people off of the streets and have resulted in dramatic decreases in crime, and that if such sentences are cut, crime may well increase to the detriment of society. I understand both of these perspectives and understand why people of good will passionately disagree about this issue.

When crime rates soared in the 1960's, the idea of putting more people in prison for longer periods of time made a lot of sense, and, at least to some extent, it worked. Crime rates eventually leveled off and, since the 1990s, have dropped rather precipitously. While there are certainly places in this country where crime rates remain staggeringly and persistently high, we are, for the most part, much safer.

According to the Bureau of Justice Statistics, from 1993 to 2013, violent crime rates fell from 80 to 23 victimizations per 1,000 people, and property crimes fell from 352 to 131

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<sup>1</sup> The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees, and do not reflect support or opposition for any specific legislation. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2013, it had nearly 600,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2013 income came from the following sources: 80% from individuals, 17% from foundations, and 3% from corporations. The top five corporate givers provided The Heritage Foundation with 2% of its 2013 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey, LLP.

victimizations per 1,000 households.<sup>2</sup> Increased incarceration, especially of violent offenders, certainly deserves some of the credit for this steep drop in crime rates, along with other factors like advances in policing techniques such as hot-spot policing in high-crime areas and greater attention by homeowners to self-protection through the installation of locks, burglar alarms, and other measures.<sup>3</sup> How much credit these factors deserve, though, is a matter of some debate among criminologists.

At the high end, University of Chicago economist Steven Levitt has estimated that approximately 25% of the decline in violent crime can be attributed to increased incarceration.<sup>4</sup> William Spelman of the University of Texas at Austin estimates that the figure may be as high as 35%.<sup>5</sup> While hardly insignificant, this means that there are other factors that would account for

<sup>2</sup> The FBI's numbers, although different, support this conclusion. The primary reason for the differences is that the BJS and the FBI use different definitions. For example, the BJS includes simple assault but not homicide when calculating violent crime rates, whereas the FBI does just the opposite. Similarly, BJS includes simple theft when calculating property crime rates, whereas the FBI does not. See JENNIFER L. TRUMAN & LYNN LANGTON, DEPT. OF JUST., BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION, 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/cv13.pdf>. See also FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, 2013 (2014), Table 1 Data Declaration, available at [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacoverviewpdf/table\\_1\\_crime\\_in\\_the\\_united\\_states\\_by\\_volume\\_and\\_rate\\_per\\_100000\\_inhabitants\\_1994-2013.xls/@template-layout-view?override-view=data-declaration](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls/@template-layout-view?override-view=data-declaration). Furthermore, while the BJS calculates violent and property crime rates per 1000 victims and households, respectively, the FBI calculates crime rates per 100,000 people in the entire United States. According to the FBI's Uniform Crime Reporting (UCR) Program, the total number of violent crimes dropped from an estimated 1,857,670 in 1994 (a rate of 714 violent crimes per 100,000 people) to an estimated 1,163,146 in 2013 (a rate of 368 violent crimes per 100,000 people), and the total number of property crimes also dropped from an estimated 12,131,873 in 1994 (a rate of 4,660 property crimes per 100,000 people) to an estimated 8,632,512 in 2013 (a rate of 2,731 property crimes per 100,000 people). See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, 2013 (2014), Table 1, available at [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacoverviewpdf/table\\_1\\_crime\\_in\\_the\\_united\\_states\\_by\\_volume\\_and\\_rate\\_per\\_100000\\_inhabitants\\_1994-2013.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls). Preliminary data indicates that violent crime and property crime continued to drop through the first half of 2014. The FBI estimates that the number of violent crimes dropped by 4.6 percent through the first six months of 2014 as compared to figures from the first six months of 2013, and that the number of property crimes dropped by 7.5 percent through the first six months of 2014 as compared to figures from the first six months of 2013. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, PRELIMINARY SEMI-ANNUAL UNIFORM CRIME REPORT, JANUARY – JUNE 2014 (2015), available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/preliminary-semiannual-uniform-crime-report-january-june-2014>.

<sup>3</sup> See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2012).

<sup>4</sup> Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPS. 163 (2004). In another paper, however, Levitt acknowledged that the continued increase in the number of drug offenders in prisons may lead to a "crowding out" effect in which the high number of incarcerated drug offenders prevents the incarceration of offenders prone to more serious crime, thereby reducing the effectiveness of incarceration to reduce crime. Ilyana Kuziemko & Steven Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2056 (2004), available at <http://pricetheory.uchicago.edu/levitt/Papers/KuziemkoLevitt2004.pdf>.

<sup>5</sup> William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97 (Alfred Blumstein & Joel Wallman eds., 2000).

the remaining 65% or more of the reduction in violent crime. Moreover, incarceration, while certainly necessary, is a very expensive option.<sup>6</sup>

The cost of incarcerating a single federal prisoner has steadily risen over the past 15 years. In Fiscal Year 2000, the per capita cost of incarceration for federal prisoners was \$21,603.<sup>7</sup> Today, it costs \$30,620 per year to incarcerate each federal prisoner.<sup>8</sup> It costs even more to incarcerate a prisoner in the state system. As of Fiscal Year 2010, the average annual cost of incarcerating a state prisoner was \$31,286, with the costs ranging from \$14,603 in Kentucky to \$60,076 in New York.<sup>9</sup>

In addition to budgetary expenditures, increased incarceration comes with a human cost that we should not ignore. There are now over two million adults behind bars in this country. As of March 2009, roughly one out of every 31 adults was under some form of correctional control, either through incarceration or supervision; this compares to one out of every 77 adults during the presidency of Ronald Reagan.<sup>10</sup> This has an impact not only on the life prospects of the offenders themselves, but also on their family members, who are often unintended casualties when a loved one is sent away to prison for a long time. The Pew Charitable Trusts estimates that as of 2010, one out of every 28 children had a parent behind bars, up from one out of every 125 children in 1985.<sup>11</sup>

Some parental figures, of course, are violent or commit crimes that endanger their children. Not surprisingly, when such a parent is incarcerated, family prospects may actually improve. That is not the case for the vast majority of families, however. Parents who commit crimes may not be the best role models, but they are bread winners, and are usually better than having no role model at all.<sup>12</sup> Poverty and homelessness rates are higher among families when

<sup>6</sup> Moreover, Prof. Levitt has recognized that the continued increase in the number of drug offenders in prisons may lead to a "crowding out" effect in which the high number of incarcerated drug offenders prevents the incarceration of offenders prone to more serious crime, thereby reducing the effectiveness of incarceration to reduce crime. Ilyana Kuziemko & Steve Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2056–62 (2004), available at <http://pricetheory.uchicago.edu/levitt/Papers/KuziemkoLevitt2004.pdf>.

<sup>7</sup> NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS (2014), available at <https://www.fas.org/spp/crs/misc/R42937.pdf>.

<sup>8</sup> Annual Determination of Average Cost of Incarceration, Bureau of Prisons Notice, 80 Fed. Reg. 45, 12523 (Mar. 9, 2015), available at <http://regulations.justia.com/regulations/fedreg/2015/03/09/2015-05437.html>.

<sup>9</sup> Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST., OF JUST., (Jan. 2012) (updated July 20, 2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

<sup>10</sup> See *One in 31: The Long Reach of American Corrections*, PEW CTR. ON THE STATES (Mar. 2009), available at <http://www.convictcriminology.org/pdf/pew/onein31.pdf>.

<sup>11</sup> *Collateral Costs: Incarceration's Effect on Economic Mobility*, PEW CHARITABLE TRUSTS (Sep. 2010), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/CollateralCosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf). See also TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 103 (2007); Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in *THE FUTURE OF IMPRISONMENT* 27, 42–47 (Michael Tonry ed., 2004).

<sup>12</sup> Two-thirds of men in state prisons were employed at the time of their incarceration, 44% lived with their children prior to incarceration, and more than half (52% of mothers and 54% of fathers) were the primary earners for their children. The average child's family income decreased by 22% the year after a father was incarcerated. *Collateral*



the father is in prison. Without a positive role model in their lives, many children flounder. Studies show that the children of an incarcerated father struggle more in school, act more aggressively, and have difficulty forming positive relationships with their peers.<sup>13</sup> Many studies indicate that children with incarcerated parents struggle and often turn to crime themselves.<sup>14</sup>

Nobody in his right mind disputes the fact that there are some people who should go to prison and never return to society because of the continuing threat that they pose to public safety. Most inmates do not fall into that category, though, and most (approximately 95%) of them will, in fact, return to our communities.<sup>15</sup>

Congress is currently considering a number of proposals to address what I call front-end and back-end reforms, although some refer to the latter as prison reform. Front-end reform involves proposals that would reduce the amount of time that certain offenders are sentenced to, most prominently, proposals to reform federal mandatory minimum laws. The major front-end reform proposals currently being considered by Congress are the sweeping Justice Safety Valve Act of 2015<sup>16</sup>, and the more-limited Smarter Sentencing Act of 2015<sup>17</sup>, as well as portions of the Safe, Accountable, Fair, and Effective (SAFE) Justice Act.<sup>18</sup>

Back-end reform involves proposals that would enable an offender to get time cut off his or her sentence or to change his or her conditions of confinement. Such proposals usually involve three things: (1) expanding prison programs likely to reduce the risk of recidivism, such as educational, job-skills, mental health, and substance abuse programs; (2) encouraging inmates to avail themselves of those programs; and, (3) along with using needs and risk-assessment tools, matching inmates with programs based on their needs and providing incentives such as the prospect of early release to low- and moderate-risk inmates, and other benefits for high-risk inmates, who complete such programs. The major back-end proposals currently being

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*Costs: Incarceration's Effect on Economic Mobility*, PEW CHARITABLE TRUSTS (Sep. 2010), at 21, available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/CollateralCosts1.pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/CollateralCosts1.pdf.pdf).

<sup>13</sup> *Id.*; Amanda Geller, et al., *Beyond Absenteeism: Father Incarceration and Child Development*, 1 DEMOGRAPHY 49 (Feb. 2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3703506/pdf/nihms474354.pdf>.

<sup>14</sup> Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIM. AND JUST.: A REVIEW OF RESEARCH 133 (2008), available at <https://www.i-hop.org.uk/ci/fattach/get/2010/0/filename/Murray+and+Farrington+->

[Effects+of+Parental+Imprisonment+on+Children.pdf](https://www.i-hop.org.uk/ci/fattach/get/2010/0/filename/Murray+and+Farrington+-Effects+of+Parental+Imprisonment+on+Children.pdf); Joseph Murray, David P. Farrington, & Ivana Sekol, *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOLOGICAL BULLETIN 175 (Jan. 9, 2012), available at <http://psycnet.apa.org/journals/bul/138/2/175.pdf&uid=2012-00399-001&db=PA>; Elizabeth Davies, et al., *Understanding the Experiences and Needs of Children of Incarcerated Prisoners: View From Mentors*, URBAN INST. (2008), available at [http://www.urban.org/research/publication/understanding-needs-and-experiences-children-incarcerated-parents/view/full\\_report](http://www.urban.org/research/publication/understanding-needs-and-experiences-children-incarcerated-parents/view/full_report).

<sup>15</sup> See TIMOTHY HUGHES & DORIS JAMES WILSON, DEPT. OF JUST., BUREAU OF JUST. STATS., REENTRY TRENDS IN THE U.S., (updated July 8, 2015), available at <http://www.bjs.gov/content/reentry/reentry.cfm#highlights>.

<sup>16</sup> The Senate version of this bill, which was introduced by Sen. Rand Paul (R-KY) and Sen. Patrick Leahy (D-VT), is S. 383, and the House version of this bill, which was introduced by Rep. Bobby Scott (D-VA), is H.R. 706.

<sup>17</sup> The Senate version of this bill, which was introduced by Sen. Mike Lee (R-UT) and Sen. Richard Durbin (D-IL), is S. 502, and the House version of this bill, which was introduced by Rep. Raul Labrador (R-ID), is H.R. 920.

<sup>18</sup> The SAFE Act, which was introduced by Rep. James Sensenbrenner (R-WI) and Rep. Bobby Scott (D-VA), is H.R. 2944.

considered by Congress are the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System (CORRECTIONS) Act of 2015<sup>19</sup>, the Recidivism Risk Reduction Act<sup>20</sup>, as well as portions of the SAFE Justice Act.

Let me address front-end sentencing reform proposals first.

Since the enactment of mandatory minimum sentencing laws for drug offenses in the 1980s, the federal prison population has increased by more than 850%. In 1980, there were just over 24,000 offenders in federal prison.<sup>21</sup> As of July 2, 2015, there are over 208,000 people incarcerated in federal prisons, roughly 49% of them for drug-related offenses.<sup>22</sup>

In 2014, 50.1% of all federal drug offenders were convicted of an offense carrying a mandatory minimum sentence<sup>23</sup> (62.1% in 2013).<sup>24</sup> In 2014, 66.7% of drug offenders received no relief under the currently existing safety valve<sup>25</sup> (65.3% in 2013).<sup>26</sup> In 2014, 48.6% of drug offenders had little or no criminal history<sup>27</sup> (49.6% in 2013).<sup>28</sup> And only 7% of drug offenders in both 2013 and 2014 were sentenced under the “career offender” sentencing guideline, which requires two prior convictions for a drug offense or a crime of violence.<sup>29</sup>

<sup>19</sup> The CORRECTIONS Act, which was introduced by Sen. John Cornyn (R-TX) and Sen. Sheldon Whitehouse (D-RI), is S. 467.

<sup>20</sup> The Recidivism Risk Reduction Act, which was introduced by Rep. Jason Chaffetz (R-UT), is H.R. 759.

<sup>21</sup> *Federal Prison System Shows Dramatic Long-Term Growth*, PEW CHARITABLE TRUSTS (Feb. 2015), available at [http://www.pewtrusts.org/~media/Assets/2015/02/Pew\\_Federal\\_Prison\\_Growth.pdf](http://www.pewtrusts.org/~media/Assets/2015/02/Pew_Federal_Prison_Growth.pdf).

<sup>22</sup> See FED. BUREAU OF PRISONS, STATISTICS: TOTAL FEDERAL INMATES, available at [http://www.bop.gov/about/statistics/population\\_statistics.jsp](http://www.bop.gov/about/statistics/population_statistics.jsp); FED. BUREAU OF PRISONS, STATISTICS: OFFENSES, available at [http://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last accessed July 6, 2015).

<sup>23</sup> U.S. SENTENCING COMM’N, ANNUAL REPORT, FISCAL YEAR 2014, at A-5, available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/2014-Annual-Report.pdf>.

<sup>24</sup> U.S. SENTENCING COMM’N, ANNUAL REPORT FISCAL YEAR 2013, at A-42, available at [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013\\_Annual\\_Report\\_Chap5\\_0.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013_Annual_Report_Chap5_0.pdf).

<sup>25</sup> U.S. SENTENCING COMM’N, 2014 SOURCEBOOK OF FED. SENTENCING STATS., Table 44, available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table44.pdf>. See also *infra* note 38.

<sup>26</sup> ANNUAL REPORT, FISCAL YEAR 2013, *supra* note 24.

<sup>27</sup> 2014 SOURCEBOOK OF FED. SENTENCING STATS., *supra* note 25, at Table 37, available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table37.pdf>.

<sup>28</sup> U.S. SENTENCING COMM’N 2013 SOURCEBOOK OF FED. SENTENCING STATS., Table 37, available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table37.pdf>.

<sup>29</sup> See *id.* at Figure B & Table 22, available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureB.pdf> and <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table22.pdf>. See also U.S. SENTENCING COMM’N, 2014 SOURCEBOOK OF FED. SENTENCING STATS., Figure & Table 22, available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureB.pdf> and <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table22.pdf>.

Let me be clear that I believe that drug dealing is harmful to society and poses a threat to public safety. The potential for violence, gang involvement, and lethal overdose is inherent in most drug transactions. Indeed, although my primary focus was on fraud and public corruption, I prosecuted several drug dealers when I was an Assistant United States Attorney. I believe drug dealers should be punished, but the question is for how long.

In a speech last year at Georgetown Law School, Patti Saris, Chief Judge of the United States District Court for the District of Massachusetts and current Chair of the United States Sentencing Commission, stated:

[M]andatory minimum penalties sweep more broadly than Congress likely intended. Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations. Yet the Commission found that 23 percent of federal drug offenders were low-level couriers who transported drugs, and nearly half of these were charged with offenses carrying mandatory minimum penalties. The category of offenders most often subject to mandatory minimum penalties were [sic] street level dealers—many levels down from kingpins and organizers.<sup>30</sup>

Similarly, appearing before the House Judiciary Committee's Subcommittee on Crime and Criminal Justice in 1993, former federal judge Vincent Broderick testified that:

[t]here are few Federal judges engaged in criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.<sup>31</sup>

In Fiscal Year 2000, the Bureau of Prisons constituted roughly 18% of the Department of Justice's discretionary budget.<sup>32</sup> Today, it is 26% of DOJ's budget<sup>33</sup> and is projected to exceed

<sup>30</sup> See Hon. Patti B. Saris, *A Generational Shift For Drug Sentences*, Address at the Georgetown University Law Center (Mar. 26, 2014) at 4, available at <http://www.uscc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Saris-Georgetown-Law-Center-Speech-20140326.pdf>.

<sup>31</sup> A transcript of the hearing is available at [http://archive.org/stream/federalmandatory00unit/federalmandatory00unit\\_djvu.txt](http://archive.org/stream/federalmandatory00unit/federalmandatory00unit_djvu.txt).

<sup>32</sup> See Memorandum from Michael E. Horowitz, Inspector General, to the Attorney General, on Top Management and Performance Challenges Facing the Department of Justice (Nov. 10, 2014), available at <https://oig.justice.gov/challenges/2014.htm>.

<sup>33</sup> See DEPT. OF JUST., *FED. PRISON SYS., FY 2016 BUDGET REQUEST AT A GLANCE*, available at [http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/30\\_bs\\_section\\_ii\\_chapter\\_-\\_bop.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/30_bs_section_ii_chapter_-_bop.pdf); See also DEPT. OF JUST., *FY 2016 BUDGET SUMMARY*, available at [http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/2016\\_budget\\_summary\\_pages\\_5-12.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/2016_budget_summary_pages_5-12.pdf).

28% by Fiscal Year 2018.<sup>34</sup> This does not include the costs of the U.S. Marshals Service to detain and transfer prisoners, which is currently 6.5% of the Department's budget.<sup>35</sup> This means less money for investigators, prosecutors, victims' services, grants to state and local law enforcement authorities, and other Departmental priorities. Federal prisons are 33% over capacity and, at the current rate of incarceration, are projected to climb to 38% over capacity by 2018.<sup>36</sup>

The problem, by the way, is even worse in many states, where prisons are overcrowded and prison costs are the second largest item in their budgets, behind only Medicaid. Necessity being the mother of invention, a number of states, including conservative states like Texas, Georgia, Mississippi, South Carolina, Alabama, and North Dakota, have started experimenting with different ways of addressing the problem in ways which lower costs and do no harm to (indeed, may improve) public safety. Some of the results look very promising.

With the exception of last year, when the Department of Justice's budget increased slightly, the Department of Justice's budget has declined every year since 2010.<sup>37</sup> Given current fiscal constraints, I think it is safe to say that the federal government will not be embarking on a federal prison expansion project for the foreseeable future. Much as some might wish that the federal government would make cuts elsewhere (while others might wish for tax increases) in order to increase the Justice Department's budget for prison expansion, wishing will not make it so.

Given this reality, I see each prison cell as very valuable real estate that ought to be occupied by individuals who pose the greatest threat to public safety. In my opinion, under our current system, too many relatively low-level drug offenders are locked up for 5, 10, and 20 years when lesser sentences would, in all likelihood, more than satisfy the legitimate penological goals of general deterrence, specific deterrence, and retribution.

I would also note that there are many ways to reform mandatory minimum laws. One way would be to restore the discretion of federal judges to sentence an offender below a mandatory minimum sentence, regardless of the type of offense, if the judge believes it would be appropriate to do so, which is the approach taken by the Justice Safety Valve Act. Another would be to focus on drug offenders, which is the approach taken by the Smarter Sentencing Act and the SAFE Act, and either reduce the length of the mandatory minimum sentences for all drug

<sup>34</sup> See Memorandum from Michael E. Horowitz, Inspector General, to the Attorney General, on Top Management and Performance Challenges Facing the Department of Justice (Dec. 2013, updated May 2014), available at <https://oig.justice.gov/challenges/2013.htm>.

<sup>35</sup> See DEPT. OF JUST., U.S. MARSHALS SERVICE, FY 2016 BUDGET REQUEST AT A GLANCE, available at [http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/23\\_bs\\_section\\_ii\\_chapter\\_-\\_usms.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/23_bs_section_ii_chapter_-_usms.pdf). See also DEPT. OF JUST., FY 2016 BUDGET SUMMARY, available at [http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/2016\\_budget\\_summary\\_pages\\_5-12.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/2016_budget_summary_pages_5-12.pdf).

<sup>36</sup> See Memorandum, *supra* note 32.

<sup>37</sup> DEPT. OF JUST., TOTAL DISCRETIONARY BUDGET AUTHORITY AND FULL-TIME EQUIVALENT, FY 2006 – FY 2016, available at [http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/1\\_ba\\_by\\_position\\_and\\_organization\\_fy06-fy16.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/1_ba_by_position_and_organization_fy06-fy16.pdf).

offenders or expand the number of relatively low level offenders with a modest criminal history who qualify for the “safety valve” that currently exists,<sup>38</sup> or some combination thereof.

Some people fear that reforming mandatory minimum laws will reduce the incentives of low level drug dealers (so-called “little fish”) to cooperate with law enforcement authorities in their efforts to go after the organizers and leaders of such activity (so-called “big fish”). Others fear that loosening mandatory minimum laws will result in dangerous criminals being released too soon, thereby threatening to undermine the gains we have made in terms of reduced crime rates.<sup>39</sup> Both concerns are, of course, understandable and legitimate.

I do not mean to underestimate the argument that reforming mandatory minimum laws will reduce the incentives for little fish to cooperate against big fish and would concede that lowering mandatory minimum sentences or expanding the currently existing safety valve would reduce some of the leverage that prosecutors currently enjoy to induce cooperation. I would contend, however, that even if our federal mandatory minimum laws were revised, there would still be plenty of incentives for defendants to cooperate against “bigger fish.” First, those who wish to qualify for the existing (or any expanded version of) the safety valve would still have to provide complete and truthful information to the government, since that is one of the conditions for qualification.<sup>40</sup> Second, with the exception of the Justice Safety Valve Act, while some of the proposals under consideration would reduce the level of mandatory minimum sentences, they would not eliminate them. Third, it is worth remembering that what we are talking about here is the minimum sentence that a judge must impose. Drug crimes invariably carry statutory maximum sentences that are well above these minimums, so a sentencing judge is always free to impose a higher sentence if he or she believes it is warranted under the circumstances. Fourth, I would note that even if there were no mandatory minimum sentences at all, there would still be incentives for defendants to cooperate in order to obtain a favorable recommendation from the prosecutor, which often carries considerable sway with a sentencing judge. Sentencing judges are far more likely to look favorably on a defendant when the prosecutor says, “Your honor, the defendant has told us everything he knows and is cooperating with our ongoing investigation,” as opposed to when the prosecutor says, “Your honor, we have reason to believe that the defendant has a lot of useful information which we could use, but he has refused to cooperate with our ongoing investigation.” And finally, regardless of the merits of this argument, as a general matter, in this country, people are sentenced based on what they deserve considering the gravity of the crimes they committed. If all we cared about was

<sup>38</sup> The safety valve is codified at 18 U.S.C. § 3553(f). Under the current “safety valve,” the offender may qualify for a sentence below the mandatory minimum if he or she satisfies five objective criteria. First, a defendant cannot be an organizer, leader, manager, or supervisor of the drug activity (i.e., he or she must be a “mule” or street dealer, in other words, someone at the very bottom of the totem pole in the drug ring). Second, the defendant must provide complete and truthful information to the government (although since the defendant is at the lowest level in the organization, the government is likely to know already what the defendant has to say). Third, the offense cannot have resulted in death or serious bodily injury to anyone. Fourth, the offense cannot have involved the use or possession of a dangerous weapon or the making of a credible threat of violence. And fifth, the defendant must have no more than one criminal history point (i.e., no more than one prior conviction which resulted in a sentence of 60 days’ incarceration or less).

<sup>39</sup> William G. Otis, *The Case Against the Smarter Sentencing Act*, 26 FED. SENTENCING REP. 302 (June 2014), available at [http://www.jstor.org/stable/10.1525/fsr.2014.26.5.302?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/10.1525/fsr.2014.26.5.302?seq=1#page_scan_tab_contents).

<sup>40</sup> See *supra* note 38.

leveraging cooperation against other wrongdoers, then we would make all federal crimes involving more than one person, including all “conspiracy” charges, into mandatory minimum offenses. The reason we don’t do that is because it would result in lots of disproportionate sentences, which is precisely what happens now to too many “little fish” involved in the drug trade.

I would further note that to the extent Congress pursues front-end reform by expanding the number of people who might qualify for the safety valve, rather than lowering mandatory minimum sentences, this ought to ameliorate the concerns of law enforcement officials for two reasons. First, as noted above, it is already a requirement that anyone hoping to qualify for the current or any expanded safety valve must provide complete and truthful information to the government. And second, by limiting the safety valve expansion to relatively low level drug dealers, the government could be reasonably assured that it would still be able to exert the same pressure it currently does on those with the most information to provide, specifically, more involved individuals who would not qualify for the expanded safety valve, and who would therefore be subject to the current mandatory minimum penalties unless they render “substantial assistance”<sup>41</sup> to the government.

To those who fear that reforming mandatory minimum laws will invariably lead to increases in crime, I would note that over 30 states have taken steps to roll back mandatory sentences, especially for low level drug offenders, since 2000.<sup>42</sup> Crime rates have, for the most part, continued to drop in those states. For example, Michigan eliminated mandatory minimum sentencing for most drug offenses in 2002 and applied the change retroactively (nearly 1,200 inmates became eligible for immediate release), yet between 2003 and 2012, violent crime rates dropped 13 percent and property crime rates dropped 24 percent. Texas has implemented a number of changes, including reduced sentences for drug offenders,<sup>43</sup> and crime rates are their lowest level in that state since 1968.<sup>44</sup>

<sup>41</sup> See USSG § 5K1.1; 18 U.S.C. § 3553(e); 28 U.S.C. § 994(n), as amended.

<sup>42</sup> According to the Vera Institute of Justice, at least 29 states have revised their mandatory sentences since 2000. See Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, VERA INST. OF JUST. (updated April 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v3.pdf>. Since then, at least two states (Maryland and Florida) have also revised their mandatory minimum laws. See also *The State of Sentencing 2014: Developments in Policy and Practice*, SENTENCING PROJECT (Feb. 2015), available at [http://sentencingproject.org/doc/publications/sen\\_State\\_of\\_Sentencing\\_2014.pdf](http://sentencingproject.org/doc/publications/sen_State_of_Sentencing_2014.pdf); Mike Riggs, *Maryland Passes Mandatory Minimum Sentencing Reform*, FAMILIES AGAINST MANDATORY MINIMUMS (May 26, 2015), available at <http://famfam.org/maryland-passes-mandatory-minimum-sentencing-reform/>. For additional information about new sentencing initiatives recently enacted by various states, see Ram Subramanian, Rebecka Moreno & Sharyn Broomhead, *Recalibrating Justice: A Review of 2013 State Sentencing and Correction Trends*, VERA INST. OF JUST. (July 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/state-sentencing-and-corrections-trends-2013-v2.pdf>.

<sup>43</sup> Other changes include more substance abuse and mental health treatment programs in prison and post-release programs in communities, intermediate sanctions facilities for probation and parole violators giving them a short-term alternative instead of a direct return to prison for longer periods of incarceration, expanded use of specialty courts (mental health, drugs, veterans, and prostitution), and alternatives for low-level, nonviolent offenders, including some drug offenders.

<sup>44</sup> See *Hearing on Prison Reform before Subcomm. on Crime, Terrorism, Homeland Security of the H. Comm. on the Judiciary*, 113th Cong. 2014 (statement of Jerry Madden, Right on Crime), available at

Indeed, in a recent report, The Pew Charitable Trusts found that over a five-year period (from 2008 to 2013), the ten states that instituted reforms and *cut* their imprisonment rates the most experienced *greater* drops in crime (13% average crime rate reduction) than the ten states that *increased* their imprisonment rates the most (8% average crime rate reduction).<sup>45</sup> Of course, every state is different, and some anomalies exist. What this demonstrates, however, is that we should no longer take it as a given that simply putting more offenders away for longer periods of time is the only -- or even the best -- way of reducing crime in our communities.

Let me turn now to back-end reform proposals.

Our faith in our correction system's ability to successfully rehabilitate offenders has waxed and waned over the years between viewing prison primarily as a place of confinement or as a place that should serve (or at least attempt to serve) as a "correctional" institution for those amenable to and capable of being "corrected." While some hardened and violent offenders will likely always pose a threat to public safety and should remain incarcerated, many offenders, particularly those with only a modest prior record who take advantage of prison rehabilitation and skills training programs, could end up becoming productive, law-abiding members of society, breaking the revolving door cycle that currently exists. In my view, so long as we are realistic and methodical in our approach, and so long as the results are rigorously analyzed and our approaches continuously re-evaluated, we should not give up on those whose lives can be salvaged.

The back-end proposals currently being considered by Congress, including the Recidivism Risk Reduction Act that was introduced by Chairman Chaffetz, (1) direct the Attorney General to develop a robust, scientifically-sound and statistically-valid, post-sentencing risk and needs assessment tool that incorporates both static and dynamic factors; (2) require all eligible offenders (some categories of offenders, such as terrorists, certain repeat offenders, sex offenders, and violent offenders, are ineligible under these proposals) to undergo regular risk assessments to determine whether they are a low, moderate, or high risk of re-offending; and (3) provide incentives to eligible offenders who participate in and successfully complete programs or engage in other productive activities that are designed to meet their particular needs and which will, it is hoped, decrease the likelihood that they will recidivate once released. The incentives are in the form of "earned time credit"<sup>46</sup> for low and moderate-risk offenders (with low-risk

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[http://judiciary.house.gov/\\_cache/files/b214ccf1-503c-4852-ade7-35df2862dd35/madden-testimony.pdf](http://judiciary.house.gov/_cache/files/b214ccf1-503c-4852-ade7-35df2862dd35/madden-testimony.pdf)

<sup>45</sup> *Most States Cut Imprisonments and Crime*, PEW CHARITABLE TRUSTS (Nov. 10, 2014), available at <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment-and-crime>. Overall, imprisonment rates among the states declined by 6% over this time period, while crime rates declined by 16% over this time period.

<sup>46</sup> Earned time credit should be distinguished from good time credit, which is awarded based on being compliant with prison rules and not causing problems, rather than completing programs or engaging in other productive activities designed to improve the skill sets of inmates, making it less likely that they will recidivate upon release. See 18 U.S.C. § 3624(b) ("a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.").

offenders receiving a greater benefit) or other benefits such as increased phone use or visitation privileges for high-risk offenders.

Predicting the future about anything, including the risk that a particular offender will re-offend upon release, is a difficult undertaking, especially when that prediction is made by someone on a subjective basis. Risk and needs assessment tools, which are already being used by several states,<sup>47</sup> are designed to help predict in an objective way the recidivism risks for different offenders at different points in the criminal justice system.<sup>48</sup> Although such tools vary somewhat, they typically utilize an actuarial approach, based on data compiled in a large number of cases, that is designed to assess risks and needs associated with an offender accompanied by an evaluation by professionals of answers to questions on a variety of criminogenic risk factors associated with that offender including criminal history, employment history, financial stresses, educational background, familial relations, residential stability, substance abuse history, associations with criminal peers, anti-social thinking, mental health history, emotional control and aggression, coping mechanisms, problem solving abilities, and other pertinent personality traits.<sup>49</sup>

The various proposals under consideration envision incorporating both “static” and “dynamic” risk factors. The former are factors related to a defendant’s background, past actions, and current conditions that might be predictive of future criminal behavior, while the latter are factors that an individual can change over time through positive (or negative) behavior.

<sup>47</sup> For a list of some states that have recently expanded their use of risk and needs assessments, see Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, VERA INST. OF JUST. (updated April 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v3.pdf>.

<sup>48</sup> For a general discussion of risk and needs assessment tools and good time credits, see Paul J. Larkin, Jr., *Managing Prison By The Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J.L. & PUB. POL’Y 1 (2014). It should be noted that some, including former U.S. Attorney General Eric Holder, have questioned whether the use of such assessments might undermine the values of individualized and equal justice and might exacerbate unjust disparities in sentencing practices. See, e.g., Eric Holder, U.S. Attorney General, Remarks Before the Nat’l Ass’n of Criminal Defense Lawyers 57<sup>th</sup> Annual Meeting (Aug. 1, 2014), available at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html>; Jesse Jannetta, Justin Breau & Helen Ho, *Could Risk Assessment Contribute to Racial Disparity in the Justice System?* URBAN INST. (Aug. 11, 2014), available at [http://blog.metrotrends.org/2014/08/risk-assessment-contribute-racial-disparity-justice-system/?utm\\_source=iContact&utm\\_medium=email&utm\\_campaign=Justice%20Policy%20Center&utm\\_content=September+2014+newsletter](http://blog.metrotrends.org/2014/08/risk-assessment-contribute-racial-disparity-justice-system/?utm_source=iContact&utm_medium=email&utm_campaign=Justice%20Policy%20Center&utm_content=September+2014+newsletter); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 4 STAN. L. REV. 66 (2014); Margaret Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAP. J. CRIM. JUST. 43 (2009). Although not as accurate as the “precogs” in the 2002 movie *Minority Report* when it comes to predicting criminal conduct, the evidence strongly supports the notion that risk assessments can be very effective at identifying risk factors that can be of invaluable assistance in devising educational or treatment programs that are likely to reduce the likelihood of recidivism and increase the likelihood of successful re-entry into society. And, of course, if certain controversial, but predictive, variables associated with protected categories are eliminated from risk assessment tools, the less useful those tools become in terms of assessing the risks of recidivism and the need for certain treatments.

<sup>49</sup> See, e.g., John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006); Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203 (2010); FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND SETERTYPES 96–97, 318 n.19 (2006) (listing studies favoring actuarial assessments).



Dynamic factors are, of course, important -- at least to the extent they are scientifically-sound and statistically-valid -- because they give an inmate hope that by taking positive steps to improve their prospects, they can increase the likelihood of ultimately becoming a productive member of society and can shorten the amount of time it will take before he or she can leave prison to be reintegrated into society.

This type of reform also has critics. Some fear that white collar criminals will end up spending very little time in prison and that this may exacerbate racial disparities among the prison population.<sup>50</sup> I acknowledge that these are possibilities, but still support back-end reforms.

“Back-end” reform is important because huge numbers -- probably over half -- of state and federal inmates have mental health problems, substance abuse issues, and, in many cases, both.<sup>51</sup> Both conditions are associated with staggeringly high rates of recidivism and, prison programs addressing these conditions are sparse. As things stand, we are spending billions of dollars cleaning up the mess left by recidivating offenders who suffer from untreated alcohol, drug dependency, and mental illness issues. In my opinion, we should be spending some of that money helping people overcome these problems at a time when we actually have control over them and can provide incentives, both positive (in the case of prisoners) and negative (in the case of probationers), to participate in and complete such programs.<sup>52</sup> Until that changes, prisons are likely to remain what they too often are today -- a revolving door.

Helping inmates to overcome addiction and problems with mental illness and teaching them job skills or parenting skills or to be able to read and write, to draft a resume, to complete a job application, to know how to dress for an interview, to know how to respond to questions during an interview, to learn how to balance a checkbook, to know how to respond appropriately to adverse situations at work or in their personal lives — these are all worthwhile ventures that can change their lives, and are certainly a better use of inmates’ time than watching TV.

This is an exciting time for those of all political stripes seeking to reform some of our criminal justice system. In addition to the sentencing proposals I have discussed, Congress is considering, among other things, important regulatory and mens rea reform proposals, proposals

<sup>50</sup> See, e.g., Dara Lind, *The Best Hope for Federal Prison Reform: A Bill That Could Disproportionately Help White Prisoners*, VOX (Feb. 12 2015), available at <http://www.vox.com/2015/2/12/8019711/corrections-act-prison-race>.

<sup>51</sup> It is estimated that 65% of all inmates meet the medical criteria for substance abuse or addiction, but only 11% receive treatment at federal and state prisons and local jails. See *Behind Bars II: Substance Abuse and America's Prison Population*, NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV. (Feb. 2010), available at <http://www.casacolumbia.org/addiction-research/reports/substance-abuse-prison-system-2010>.

<sup>52</sup> Various states have, for example, adopted innovative programs designed to help probationers with substance abuse problems through rigorous testing with the threat of swift and certain, but measured, punishment for those who fail those tests. Such programs include Hawaii's Opportunity Probation with Enforcement (HOPE) program and South Dakota's 24/7 sobriety program. A videotaped program with Hon. Larry Long (who devised South Dakota's 24/7 program) and Hon. Steven Alm (who devised the HOPE program) is available at <http://www.heritage.org/events/2014/08/24-7-sobriety-and-hope>. See also Paul Larkin, *The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 116 (Feb. 28, 2014), available at <http://www.heritage.org/research/reports/2014/02/the-hawaii-opportunity-probation-with-enforcement-project-a-potentially-worthwhile-correctional-reform>.

to reform civil asset forfeiture laws, and proposals to reform our juvenile justice system. These are all important issues, worthy of serious debate and consideration. I look forward to working with each of you as you consider these and other proposals to reform our criminal justice system.

I thank you for inviting me here to testify today, and I look forward to answering any questions you might have.

Chairman CHAFFETZ. Thank you.  
Ms. Ryan, you're now recognized for 5 minutes.

#### STATEMENT OF LIZ RYAN

Ms. RYAN. Thank you, Chairman Chaffetz and Ranking Member Cummings. My name is Liz Ryan and I'm President and CEO of the Youth First Initiative.

I'd like to start with a story. Kalief Browder, a 16-year-old boy, was arrested in 2010 and accused of stealing a backpack. He was automatically charged as an adult. He could not afford to pay the \$3,000 bail, so he was held at the jail at Rikers Island. He was assigned a public defender, and because of backlogged courts, he was at Rikers for 3 years awaiting trial. He was beaten and starved by guards. For a year at Rikers, he was placed in solitary confinement. In 2013, the charges were dismissed. After he was released, he struggled to go to school. He took his life on June 6, 2015.

Kalief Browder's tragic death underscores three of the most pressing issues we're facing in juvenile justice: First, the overuse of incarceration of youth. In the United States on any given day, there are 80,000 youth in a detention or correctional facility. Like Kalief, most of these youth do not pose a serious threat to public safety, yet they are exposed to harm while incarcerated, such as physical abuse, sexual abuse, restraints, isolation, and solitary confinement. Kalief Browder's case underscores the youth in adult jails in prisons are especially at risk.

Research shows that placing youth in correctional settings increases the likelihood that youth will reoffend. Yet States and localities spend \$6 billion a year to detain and incarcerate youth. By contrast, community-based alternatives to incarceration could more effectively serve youth and at substantially less cost.

A second pressing issue is the prosecution of youth in adult criminal court. Kalief Browder was one of the estimated 250,000 young people who are processed in adult courts every year. Contrary to popular perception, the overwhelming majority of youth who enter adult criminal court and even those who are ultimately convicted are not there for serious violent crimes. For example, a Baltimore study showed that nearly three-quarters of the youth charged as adults were either transferred back to the juvenile system or had their cases dismissed. The research demonstrates unequivocally that trying and sentencing children in adult court decreases public safety; that is why the overwhelming consensus of justice systems stakeholder organizations, as well as the U.S. Attorney General's Task Force on Children Exposed to Violence, recommend against prosecuting kids in adult court and against placing kids in adult jails and prisons.

A third issue underscored in Kalief Browder's case is the pervasive unfairness, inequities, and racial and ethnic disparities in the juvenile justice system. Youth of color are treated much more harshly than white youth in the justice system, even when charged with similar offenses. Youth of color are much more likely to be arrested, formally processed, detained in juvenile detention centers, incarcerated in youth prisons, and transferred to adult court than white youth. And it's not because youth of color commit more crime

than white youth. Results from self-report surveys indicates otherwise. And new research now shows that while youth incarceration rates are decreasing, racial and ethnic disparities are on the rise.

Today, we have a unique opportunity to reform the juvenile justice system, because there's now a rich body of research on adolescent development and on what works to reduce juvenile delinquency. Public opinion polling shows that the public strongly supports juvenile justice reforms, and in the last decade, States have undertaken reforms. Nearly half the States have enacted reforms to reduce the automatic prosecution of youth in adult court, increase the age of criminal responsibility, and remove youth from adult jails and prisons. Utah and Maryland are among these States.

Another group of States have enacted reforms to close youth prisons and reallocate resources to community-based alternatives to incarceration. These States include Texas, Ohio, California, New York, Alabama, and the District of Columbia.

To build on these State reforms and prevent tragedies such as Kalief Browder's death, Congress could take action. First, accelerate State reforms by supporting States and shifting their resources from incarceration to community-based alternatives; second, reauthorize and strengthen the juvenile justice and Delinquency Prevention Act; third, support States in increasing the age of criminal court responsibility to age 18; fourth, provide adequate resources for States to enact these reforms; and finally, engage directly impacted youth and their families in these discussions and in reforms.

Thank you for your time and consideration.

[Prepared statement of Ms. Ryan follows:]

**STATEMENT  
SUBMITTED BY LIZ RYAN  
YOUTH FIRST! INITIATIVE  
JULY 15, 2015**

Thank you for providing me the opportunity to testify today on behalf of the Youth First! Initiative. My name is Liz Ryan and I am the President and CEO of the Youth First! Initiative, a national campaign to end the incarceration of youth in youth prisons and reallocate resources to community-based alternatives to incarceration.

I'd like to start by highlighting a case of a youth in the justice system. Kalief Browder, a sixteen-year-old boy from the Bronx, was arrested in the spring of 2010 and accused of stealing a backpack.<sup>1</sup> He was automatically charged as an adult. He could not afford to pay the \$3,000 bail so he was held at the jail at Rikers Island. He was assigned a public defender and because of the backlogged and overwhelmed courts, he was at Rikers for three years awaiting trial. He was beaten and starved by guards. For a year during his stay at Rikers, he was placed in solitary confinement. In 2013 the charges were dismissed. After he was released, he struggled to go to school. His story became public last fall in a story in The New Yorker. He took his life on June 6, 2015.<sup>2</sup>

Kalief Browder's tragic death underscores the most pressing issues that we are facing in juvenile justice: Overuse of incarceration of youth in the justice system; The prosecution of youth in adult courts; and Unfairness, inequities, and racial and ethnic disparities in the juvenile justice system.

**OVERUSE OF INCARCERATION OF YOUTH**

In the U.S. on any given day, there are nearly 80,000 youth in a detention or correctional facility: 20,000 youth are in juvenile detention centers<sup>3</sup>; 54,000 youth are in youth prisons or other out-of-home confinement<sup>4</sup>; 4,200 youth are in adult jails<sup>5</sup>; and 1,200 youth are in adult prisons.<sup>6</sup>

Like Kalief Browder who was detained for taking a backpack, most youth who are detained or incarcerated in the justice system do not pose a serious threat to public safety.

For example, according to the latest data<sup>7</sup> from the U.S. Department of Justice, three quarters of the youth incarcerated in the juvenile justice system are locked up for offenses that pose little to no threat to public safety such as probation violations, status offenses (e.g. running away, skipping school), property and public order offenses, and drug offenses. Only one in four youth placed in youth prisons and other out-of-home confinement in the juvenile justice

system had committed any of the most serious violent crimes according to the violent crime index (e.g. aggravated assault, robbery, rape or homicide).

The abuse of youth in these facilities is well documented in news reports, lawsuits, studies and from incarcerated youth themselves.

Not a week goes by without a headline in a newspaper in the U.S. citing abuse of a young person in one of these facilities in the juvenile justice system. For example, this past month the tragic death of another youth, 14-year-old Andre Sheffield of Jacksonville, Florida, in the justice system made news. News coverage in Florida reported that six detention facility staff where Andre was held in Brevard County, Florida were disciplined in his death.<sup>8</sup>

The abuse of incarcerated youth is increasing according to a new report that documents an increase in the number of states where youth have been abused since 2000, from 22 states to 29 states.<sup>9</sup> Youth face physical abuse, excessive use of force by facility staff, sexual abuse, over-reliance on isolation and restraints, staff on youth violence, and youth on youth violence.

Surveys<sup>10</sup> of youth also validate these data reports. Incarcerated youth when surveyed by the U.S. Department of Justice showed that 42% of youth were somewhat or very afraid of being physically attacked, 45% said staff used force when they didn't need to, and 30% said staff place youth in solitary confinement or lock them up as discipline.

Youth are especially at risk of abuse in adult jails and prisons. Kalief Browder's case highlights this as Kalief was repeatedly attacked by guards. The National Prison Rape Elimination Commission (NPREC), established by the Prison Rape Elimination Act (PREA) reported<sup>11</sup> in 2009 after a five year exhaustive study that "more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse."

Incarcerating youth breaks crucial family ties and penalizes families. Youth are often placed in facilities far from their families, with limited access and visits.<sup>12</sup> Families are often not included in the treatment plans for youth even though the research confirms that the most effective programs in juvenile justice draw on family strengths. Parents are often charged fees for incarceration of their children as every state allows, with most requiring, parents to be charged for the cost of their children's incarceration.<sup>13</sup> Parents can be assessed fees even if a facility has been the subject of litigation.

Incarceration also puts kids further behind in school. Education for youth inside of correctional facilities often is not aligned with state curricula or quality standards as shown by a ground breaking study released by the Southern Education Foundation in 2014 that says, "The data shows that both state and local juvenile justice systems are failing profoundly in providing adequate,

effective education in the south and the nation."<sup>14</sup> Approximately two-thirds of young people do not return to school after release from secure custody.<sup>15</sup>

Removing youth from their homes and communities and placing them in correctional settings disrupts the healthy psychological development of youth by disconnecting youth from their parents or parent figures, from peers who model and value academic success and positive social behavior, and from participation in activities that require critical thinking and independent decision-making.<sup>16</sup>

By placing youth in correctional settings, research shows that it increases the likelihood that youth will reoffend. For example, recidivism rates for youth in youth prisons are very high: Within three years of release, around 75% of youth are rearrested and 45 to 72 percent are convicted of a new offense.<sup>17</sup>

Research demonstrates that incarcerating youth is iatrogenic. In other words, youth are worse off after being incarcerated. Research shows that once youth are detained, they are more likely to commit more unlawful acts, potentially leading to deeper involvement in the justice system. Incarceration in youth prisons is a significant predictor of involvement in the adult criminal justice system as juvenile incarceration results in large increases in the likelihood of adult incarceration.<sup>18</sup>

The costs of detention and incarceration of youth are in the billions. Localities spend an estimated \$1 billion per year to detain youth in juvenile detention facilities, spending between \$150-\$300 per day to detain a youth and \$70,000 per year.<sup>19</sup> States spend the vast majority of their juvenile justice funding on incarceration in youth prisons and other confinement settings, topping spending at over \$5 billion a year.<sup>20</sup> On average, states spend \$88,000 per year or \$241 per day to place a youth, adjudicated delinquent into a youth prison or other out-of-home confinement. For the deepest end placements, states spend \$150,000 on average. Thirty-four states spend more than \$100,000 or more on the most expensive confinement option for a young person.<sup>21</sup>

By contrast, community-based alternatives to incarceration could more effectively serve youth and at substantially less cost. Community-based programs cost \$75 per day in contrast to \$241 per day for incarcerating a young person.<sup>22</sup> In one study<sup>23</sup> more than 8 out of 10 youth remained arrest free and 9 out-of-10 were at home after completing their community-based program, at a cost that is a fraction of what it would have cost to incarcerate these youth. The findings highlight how high-need youth have been safely and successfully supported in their homes with the help of intensive community-based programs like Youth Advocate Programs, Inc. (YAP).

### **PROSECUTION OF YOUTH IN ADULT CRIMINAL COURT**

A second pressing issue is the prosecution of youth in adult criminal court. Kalief Browder was one of the estimated 200,000 to 250,000 youth who are prosecuted in adult criminal court every year.<sup>24</sup>

Contrary to popular perceptions, the overwhelming majority of youth who enter adult criminal court, and even those who are ultimately convicted, are not there for the serious, violent crimes. The national data show that as many as half of the youth transferred to adult court will be sent back to the juvenile justice system or not convicted at all.<sup>25</sup>

For example, in a report<sup>26</sup> about youth in adult court in Baltimore, Maryland, the study that showed that 68% of youth charged as adults are either transferred back to the juvenile system or have their cases dismissed outright. These youth will have been held in adult jails for many months before being sent back to the juvenile justice system or not convicted.

The consequences of an adult conviction for a youth are serious, negative and life-long. Youth tried as adults face the same punishments as adults. Unfortunately in the majority of states across the country can be placed in adult jails pre- and post-trial, sentenced to serve time in adult prisons, or be placed on adult probation with few to no rehabilitative services. Youth also are subject to the same sentencing guidelines as adults and may receive mandatory minimum sentences or life without parole in non-homicide cases. The only consequence that youth cannot receive is the death penalty. When youth leave jail or prison, are on probation, or have completed their adult sentences, they carry the identical stigma as adults of an adult criminal conviction. They often have difficulty finishing school or gaining access to a college education as they may be denied scholarship funding or admissions to universities.

An overwhelming body of research shows that prosecuting youth as adults does not work. The research demonstrates unequivocally that trying and sentencing children in adult court does not reduce crime; in fact, it does just the opposite. Trying youth as adults has both a detrimental impact on the youth tried as adults and decreases public safety.

For example, the federal Centers for Disease Control and Prevention (CDC) Task Force on Community Preventive Services examined every study on transfer policies that was in a published journal or had been conducted by a government agency, and the task force checked to make sure each study compared the same kind of youth charged with comparable offenses, recognizing that youth who are prosecuted in adult court may be charged with more serious offenses, or may have more serious backgrounds that make them different from youth in the juvenile system. The CDC review made sure that those factors were taken into consideration when it was doing its analysis.



After assessing all the research, the CDC task force recommended against laws or policies facilitating the prosecution of juveniles in the adult judicial system. Among the key findings of the report<sup>27</sup> were the following conclusions:

Prosecution of juveniles in the criminal justice system jeopardizes public safety because youth are more likely to commit additional crimes if prosecuted in the adult system. The task force found that juveniles prosecuted in the criminal system are approximately 34 percent more likely than youth retained in the juvenile court system to be rearrested for violent or other crime.

Widening use of policies prosecuting youth as adults puts youth directly in danger because juveniles are often victimized in adult facilities, and are at a much higher risk for suicide. The review found that youth are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.

The CDC review found insufficient evidence to support the “deterrence theory” used as a common rationale for expanded adult prosecution policies. The “deterrence theory” suggests that expanded adult prosecutions act as a general deterrent to prevent youth from committing crimes in the first place. The review found this not to be true, as well as finding no evidence to support a specific deterrence effect on youth who are tried in the adult system.

The task force thus concluded that to the extent that adult prosecution policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good, and are counterproductive to reducing juvenile violence and enhancing public safety.

Further, the U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention (OJJDP) released a research bulletin<sup>28</sup> and the findings mirrored those in the CDC report also finding that laws that make it easier to transfer youth to the adult criminal court system have little or no general deterrent effect, meaning they do not prevent youth from engaging in criminal behavior.

Youth prosecuted in the adult system are more likely to be rearrested and to reoffend than youth who committed similar crimes, but were retained in the juvenile justice system. In addition, the report explored why youth have higher recidivism rates. Higher recidivism rates are due to a number of factors including:

- Stigma and negative labeling effects of being labeled as a convicted felon.
- A sense of resentment and injustice about being tried as an adult.
- Learning more criminal behaviors from incarceration with adults.
- Decreased access to rehabilitation and family support in the adult system.

Decreased employment and community integration opportunities due to a felony conviction.

After reviewing the research, OJJDP also concluded, "To best achieve reductions in recidivism, the overall number of juveniles prosecuted as adults in the criminal justice system should be minimized. Moreover, those who are prosecuted as adults in the criminal justice system should be chronic repeat offenders – rather than first-time offenders – particularly in cases where the first-time offense is a violent offense."

The overwhelming consensus of professional organizations ranging from the American Correctional Association to the National Association of Counties is that youth should never be automatically prosecuted in the adult criminal court, youth charged with non-violent offenses and first-time offenders should not be prosecuted in adult criminal court, youth should be removed from adult jails and prisons, youth should be treated in a developmentally appropriate manner throughout the justice system, and harsh sentences for youth such as mandatory minimums should be eliminated.<sup>29</sup>

After an exhaustive year-long examination on best practices and approaches to reducing childrens' exposure to violence, the U.S. Attorney General's Task Force on Children Exposed to Violence recommended in 2012 that, "We should stop treating juvenile offenders as if they were adults, prosecuting them in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore their capacity to grow."<sup>30</sup>

### **UNFAIRNESS, INEQUITIES, RACIAL & ETHNIC DISPARITIES**

A third key issue underscored in Kalief Browder's case is the pervasive unfairness, inequities, and racial and ethnic disparities in the juvenile justice system.

According to the latest data from the U.S. Department of Justice, African-American youth make up only 17% of the nation's total youth population, but African-American youth constitute 30% of the youth arrested nationwide and 62% of all youth in the adult criminal justice system. African-American youth are 4.6 times more likely to be incarcerated than white youth.<sup>31</sup> Latino children, the fastest-growing segment of the American population, represent 23% of all children under the 18. At the same time, Latino youth are 40% more likely than white youth to be admitted to adult prison. Latino youth are 1.8 times more likely to be incarcerated than white youth.<sup>32</sup> Native American youth are 3.2 times more likely to be incarcerated than white youth.<sup>33</sup>

No where are these profound disparities seen more clearly than in the U.S. Department of Justice (DOJ) Civil Rights Division's three-year investigation into the operations of the Juvenile Court of Memphis and Shelby County

Tennessee. DOJ found extensive racial disparities in the treatment of African-American children: African-American youth are twice as likely as white youth to be recommended for transfer to adult court. Of the 390 transfers to adult court in 2010 in Tennessee, approximately one half were from Shelby County, and all but two of the total children transferred were African-American.<sup>34</sup>

These facts are often undermined by a false impression that youth of color commit more crime than white youth. That is simply not true. Results from self-report surveys indicate that white youth are in fact significantly more likely than youth of color to engage in delinquent behavior such as using drugs and alcohol.

Unfortunately racial and ethnic disparities in the incarceration of youth are increasing. Recent research shows that, "While the total number of incarcerated youth has declined in many states, the proportion of youth of color among all youth reentering court dispositions grew substantially between 2002 and 2012."<sup>35</sup>

Unfairness and inequities in the justice system also extends to other youth populations such as girls, LGBT youth, and youth with disabilities.

Girls presence in the juvenile justice system has been steadily increasing - growing from 20 percent of arrests in 1992 to 29 percent in 2012 and from 15 percent of detentions in 1992 to 21 percent in 2011.<sup>36</sup> In 2011, 36 percent of girls' detentions in the US were for status offenses or technical violations of probation. By comparison, 22% of boys were detained for status offenses and technical violations.<sup>37</sup>

Additionally, research shows that LGBT youth are significantly over-represented in the juvenile justice system. LGBT youth represent 5 percent to 7 percent of the nation's overall youth population, but they compose 13 percent to 15 percent of those currently in the juvenile justice system.<sup>38</sup> LGBT youth are two times as likely to be detained for status offenses such as running away or skipping school, and LGBT youth face higher risks of detention or residential placement for numerous reasons such as courts' perceiving a lack of family support for youth.<sup>39</sup>

Additionally, youth with educational disabilities (as defined in the Individuals with Disabilities Education Act) are overrepresented in the juvenile justice system at an alarming rate, with as many as 65-70% of youth in the system meeting the criteria for a disability, a rate that is more than three times higher than that of the general population.<sup>40</sup>

### **OPPORTUNITY FOR REFORM**

We have a unique opportunity for reform in juvenile justice because of the new research, the public's support, and the trends and political climate in the states.

There is now a rich body of research on adolescent development and evidence-informed programs that effectively reduce juvenile delinquency. The National Academy of Sciences (NAS) conducted an exhaustive four year study on juvenile delinquency and their report on the research states that youth are less able to regulate their own behavior in emotionally charged contexts, are more sensitive to external influences (e.g. peer pressure) and they show less ability to make judgment and decisions about the future.<sup>41</sup> This research underscores that youth have the capacity to change and are capable of rehabilitation as they are still growing and developing.

In addition to the research, the public strongly supports juvenile justice reforms. Recent public opinion polling shows that juvenile justice reform is strong across all political parties, regions, ages, gender and racial and ethnic groups.<sup>42</sup> Polling also shows that the public strongly favors rehabilitation and treatment approaches, such as counseling, education, treatment, restitution and community service, over incarceration. The public also strongly favors involving youths' families in treatment, keeping youth close to home, and ensuring youth are connected with their families.<sup>43</sup>

In the last decade, a number of states have enacted juvenile justice reforms to address these issues. These reforms have been led by a bipartisan group of state policymakers and been enacted in all regions of the country in the last decade. The National Conference of State Legislatures (NCSL) has documented a number of these reforms.<sup>44</sup>

For example, nearly half the states have enacted reforms in the last decade to reduce the automatic prosecution of youth in adult criminal court, increase the age of criminal responsibility, and/or remove youth from adult jails and prisons. These states include Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nevada, Ohio, Oregon, Utah, Virginia and Washington.

In addition, a handful of states have enacted reforms to close youth prisons, remove youth from confinement in youth prisons, and reallocate resources to community-based alternatives to incarceration. These states include Texas, Ohio, California, New York, Alabama, and the District of Columbia.

These reforms have produced impressive results. In one study<sup>45</sup> on the impact of Texas juvenile justice reforms found that as a result, Texas slashed the number of youth locked in the state-run secure facilities by 61 percent between 2007-2012, and results for youth under community supervision are much better than those incarcerated. The Texas study found that youth incarcerated in state facilities are 21% more likely to be arrested and three times more likely to commit a felony than youth kept under community supervision.

This study underscores the opportunity to build on these trends and expand these bipartisan reforms in more states.

### **RECOMMENDATIONS**

Congress could undertake a number of steps to prevent tragedies such as Kalief Browder's death and to ensure that the juvenile justice system is more effective, fair, and promotes the well-being of children.

The National Juvenile Justice & Delinquency Prevention Coalition (NJJJPC) has put forward a comprehensive set of recommendations<sup>46</sup> for Congress to consider, including:

(1) Accelerate state reforms by supporting states to shift their resources from incarceration to evidence-informed, community-based, non-residential alternatives to incarceration through technical assistance, training, research and resources;

(2) Reauthorize the Juvenile Justice & Delinquency Prevention Act (JJJPA) by strengthening the core protections for youth to eliminate the detention and incarceration of status offenders, ban the placement to youth in adult jails and prisons, and reduce racial and ethnic disparities;

(3) Support states in increasing the age of criminal court responsibility to age 18;

(4) Provide adequate resources for states to fully implement the JJJPA, to enact the Prison Rape Elimination Act (PREA), especially the Youthful Inmate Standard, and to catalyze other efforts to reduce the incarceration of youth, the prosecution of youth in adult court, and racial and ethnic disparities in the justice system; and

(5) Engage directly impacted youth and their families impacted by the justice system by establishing an independent National Technical Assistance Center on Family & Youth Engagement to provide support to state/local justice and child-serving agencies interested in expanding family engagement programs in juvenile justice, creating incentives for state and regional Parental Information Resource Centers to integrate support services for families involved in the justice system, and explicitly requiring the inclusion of family members on the Federal Coordinating Committee on Juvenile Justice & the JJJPA required State Advisory Groups (SAGs); and

(6) Increase access to education for young people in the justice system, especially youth who are in correctional facilities and upon their reentry back into the community through the reauthorization of the Elementary and Secondary Education Act (ESEA) and reduce the negative impact of collateral consequences on the educational and employment opportunities for youth in the justice system by enhancing access to community college, post-secondary career and technical education, and four year college course work; reinstating Pell grants and the "ability to benefit" program to provide financial support and increased access to post-secondary education and technical/career training

programs; and providing guidance, technical assistance, and training to instruct administrators for colleges and other post-secondary education and technical/career training programs about how to appropriately inquire and use information about juvenile and criminal-justice involvement for youth who are applying for entrance into these programs.

Altogether, these reforms would reduce the over-use of youth incarceration, prosecution of youth in adult court, and the unfairness, inequities and racial and ethnic disparities in the juvenile justice system and ultimately contribute to reduced state spending on ineffective solutions and to reduced federal prison spending.

I applaud this committee for considering these issues and am pleased to be a resource to this committee as you consider these issues and potential policy reforms on juvenile justice. Thank you for your time and consideration.

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- <sup>43</sup> *Youth Justice System Survey* (2011). Washington, D.C.: GBA Strategies: Available at: [http://www.gbastrategies.com/public\\_files/cfyj101111m1.pdf](http://www.gbastrategies.com/public_files/cfyj101111m1.pdf).
- <sup>44</sup> *Trends in Juvenile Justice State Legislation: 2001-2011*. (2012) Denver, CO: National Conference of State Legislatures. Available at: <http://www.ncsl.org/documents/cj/trendsinjuvenilejustice.pdf>.
- <sup>45</sup> *Closer to Home: An Analysis of the State and Local Impact of the Texas Juvenile Justice Reforms*. (2014). New York, NY: Council of State Governments.
- <sup>46</sup> *Recommendations to Congress*. (2015). Washington, D.C.: National Juvenile Justice & Delinquency Prevention Coalition. Available at: [http://www.promotesafecommunities.org/images/pdfs/NJJDPC\\_Recs\\_to\\_114th\\_Congress.pdf](http://www.promotesafecommunities.org/images/pdfs/NJJDPC_Recs_to_114th_Congress.pdf).



Chairman CHAFFETZ. Thank you.  
Mr. Tolman, you're now recognized for 5 minutes.

#### STATEMENT OF BRETT TOLMAN

Mr. TOLMAN. Thank you, Chairman Chaffetz, Ranking Member Cummings, and members of the committee. I am the former United States Attorney for the District of Utah, a position I held for nearly 4 years. As U.S. Attorney, I made it a priority to protect children, aggressively prosecute fraud, to preserve American Indian heritage, and to stem the abuse of illicit and prescription drugs. Prior to my service as U.S. attorney, I was an assistant U.S. attorney. A line prosecutor in the Federal system, I personally prosecuted hundreds of felonies. While I prosecuted mostly violent felonies, I also participated in prosecution of white color criminals, drug traffickers, illegal immigrants, and others. Indeed, in nearly a decade with the Department of Justice, I was responsible for the prosecution of individuals currently serving long prison sentences, some as long as 35 years in Federal prison.

I am here today because my experience reveals the need for Federal criminal justice reforms that are not only meaningful, but that are based on proven reforms carried out in States across this country. These reforms are the result of thoughtful analysis of deficiencies in the administration of justice in the Federal system.

I am not alone in my support of these reforms. Former Federal prosecutors and other government officials have signed policy statements, including former U.S. attorneys, judges, and former government law enforcement officials that support H.R. 759, the Recidivism Risk Reduction Act, which is before the House Judiciary Committee, and the Corrections Act in the Senate. Many of us who signed this statement are noted conservatives who were some of the most aggressive appointees in pursuing crime. Because of our backgrounds as former prosecutors, judges, and other law enforcement officials whose service for this country is focused on law and order, we have come to realize the criminal justice system must be reformed.

There are two meaningful ways the justice systems needs to be reformed to begin addressing the issues facing us today: First, to address a back-end fix that efficiently uses incarceration resources. Accordingly, I speak in favor, strongly in favor of H.R. 759 and S. 467, the Corrections Act. Both bills enjoy broad bipartisan support. Though some of the bills differ, the broad prescriptions found in both parallel and would begin addressing the issues of overcrowding in our Federal prison systems immediately. These bills would better prepare low-risk-of-recidivism inmates back into society. It would help ensure that first-time offenders do not become repeat offenders. It is my opinion these bills are the most likely of any proposal to date to not only have such an impact, but to have an immediate impact.

Recidivism in our criminal system is endemic. Most of the low level, nonviolent offenders in our prisons are not rehabilitated during their incarceration, and too often return to prison.

Another result is a prison budget that is consuming an ever-increasing percentage of the DOJ's budget. The overall cost of detain-

ing Federal offenders consumes nearly 30 percent of the DOJ budget.

During my tenure as U.S. attorney, many U.S. attorneys' offices I observed were unable to hire additional prosecutors and were forced to abandon law enforcement obligations and long-time partnerships. The number one complaint I heard from chiefs of police and sheriffs across my State was the absence and loss of Federal partnerships on important programs they were working.

In 2009, California using a three-judge panel, issued rulings that required tens of thousands of inmates to be released, with no thought to rehabilitation or reduction of recidivism. Rather than addressing its prison issues through careful and deliberate means, California spent years in court battling to reduce its prison population. Time, effort, money spent on these court battles would have undoubtedly been better spent reducing its prison population in a safe, deliberate manner, as other States have done.

In contrast, several States, many of which are among the most conservative in the Nation, have moved in recent years to implement similar legislation found in H.R. 759 and S. 467, States including Texas, Rhode Island, Ohio, Georgia, North and South Carolina, and Utah.

In Texas, similar legislation led to the closure of three prisons and a savings of nearly \$3 billion, all while reducing the risk of recidivism from 26 percent to 4 percent in one case study.

Finally, the other change that is much-needed reform is addressing the expansion of the Federal criminal code and Federal regulations and the associated disappearance of mens rea. Some estimates put the number of Federal regulations carrying criminal penalties over 300,000. It is simply beyond the capacity of any person, or even any organization to keep abreast of the number of regulations.

With the explosion of the regulatory state, the mens rea requirement is all the more important. Throwing people in prison who not only lack the intent traditionally required for incarceration, but who often pose very little risk to society, and have a similarly low risk of recidivism, only serves to exacerbate the challenges of an already expensive and crowded system.

As a former law enforcement official, I know firsthand that our current system is far too costly. It does not focus limited resources on the most crucial areas of enforcement and does not prepare inmates, especially low level offenders, to return to life outside the prison. These problems can be addressed by legislation currently in Congress.

I urge Members of Congress to act quickly before the problem becomes an emergency that must be addressed by drastic, reactionary, emergency measures instead of deliberate, careful measures designed to protect the public. Thank you.

[Prepared statement of Mr. Tolman follows:]

Statement of Brett L. Tolman, former U. S. Attorney for the District of Utah  
Regarding Meaningful Criminal Justice Reform, the Recidivism Risk Reduction  
Act (H.R. 759) and the Senate CORRECTIONS Act (S 467)  
House Oversight Committee, July 15, 2015

The federal criminal justice system currently faces unprecedented and significant challenges. The prison population in the U.S. has increased dramatically over the past several decades, putting immense strain on both the human and financial capital of the Department of Justice. It is universally acknowledged that there has been a shift over the past several decades in investigative and prosecutorial practices. Instead of focusing scarce and valuable resources on the highest level of criminal conduct, today's federal system is too often pursuing the lowest level offenders, who are often over-punished due to over-aggressive guideline calculations and over-reliance on minimum mandatory sentencing laws. The federal system has, unfortunately, been neither thoughtful nor conscientious in its punishment of those it convicts. Tellingly, the U.S. has less than five percent of the world's population, but houses nearly twenty-five percent of the world's prisoners.

For drug offenses, the Department of Justice is expected to use the hammer of mandatory minimum sentences to dismantle drug trafficking. But the reality on the ground is that most prosecutions, despite resulting in significant prison sentences, only net insignificant "mules" or small-time traffickers. Long federal sentences routinely go to the lower-level targets while the "kingpins" and their drug trafficking operations continue to thrive.

This problem is not confined to the punishment of drug offenses. In the white collar world, for example, long sentences are too easily the product of manipulating the "dollar-loss figure" guideline calculations—resulting in baffling and unfortunate prosecutions. One example of this is Sholom Rubashkin, a 52-year old Jewish Rabbi with no criminal history who is serving 27 years in federal prison for financial fraud despite there being no actual financial victim of the alleged fraud.

This obsession with count stacking and maximizing every prison sentence also endangers the integrity of the criminal justice system. Law enforcement is incentivized to allow the commission of multiple offenses in order to enable federal prosecutors to stack charges and get the longest possible mandatory minimum sentence. Rather than make an arrest as soon as they have evidence of an offense, agents may watch the offenders commit one or more further crimes, which unnecessarily increases the potential for further crime victims.

Not only is the overall prison population a problem, but recidivism is endemic. Most of the low-level, non-violent offenders in our prisons are not rehabilitated during their incarceration and too often return to prison, exponentially increasing the cost to the federal system. A Bureau of Justice study from 2005 to 2008 tracked 404,638 prisoners in thirty states. The study found that 67.8 percent of prisoners were rearrested within three years of release and 76.6 percent were rearrested within five years of release. Of those who were rearrested, more than half were rearrested within the first year of their release. The study also found that property and drug offenders were the most likely to be rearrested – 82.1 percent and 76.9 percent, respectively. The result of this recidivism and the focus on incarceration instead of rehabilitation, especially

for low-level offenders, is a prison population that is becoming a real and immediate threat to public safety.

The growing prison budget is consuming an ever-increasing percentage of the DOJ's budget. Over the last 15 years, the Bureau of Prison's budget has increased from 15 percent of the DOJ's budget to more than 25 percent. The overall cost of detaining federal offenders consumes more than 30 percent of the DOJ's budget. This number has doubled since 2000. During my tenure as U.S. Attorney for the District of Utah I saw first-hand the effects of budget constraints within the DOJ. Many U.S. Attorneys' offices were unable to hire additional prosecutors and were forced to abandon law enforcement obligations and longtime partnerships. The budget, instead of law enforcement, all too often has become the absolute center of focus of the DOJ and its U.S. Attorneys.

Another troubling trend that has exacerbated the problems facing the federal prison system is the expansion of the federal criminal code and federal regulations and the associated disappearance of *mens rea*. Not only are there thousands more criminal laws than in the past, but it is easier to violate them, often without any intent. This has led to the incarceration of people who not only lack the intent traditionally required for incarceration but who often pose very little risk to society and have a similarly low risk of recidivism.

One well-known example of the federal criminal code run amok is the story of Wade Martin. In 2003, Mr. Martin, a native Alaskan fisherman, sold ten sea otter pelts to a person he believed to also be a native Alaskan, as was allowed under federal law. In fact, the person to whom he sold the otters was not a native Alaskan and Mr. Martin was arrested for violating the Marine Mammal Protection Act, which did not contain a meaningful *mens rea* element sufficient to protect Mr. Martin. Mr. Martin, facing federal criminal prosecution, pleaded guilty in 2008 to the federal offense. Though his punishment was relatively light, he carries around with him the stigma of a federal criminal record for an arguably innocent mistake and for which the statute may not have intended to meet out any punishment.

Perhaps a more extreme example is that of Dane A. Yirkovsky. In 1998, Mr. Yirkovsky, who had a felony criminal record, was working as a drywall installer and found a .22 caliber bullet underneath a carpet where he was working. He kept the bullet and put it in a box in his room. A few months later, police found the bullet during a search of Mr. Yirkovsky's room. Federal officials charged him with possession of a firearm by a felon, solely based on the .22 caliber bullet. Mr. Yirkovsky received a 15 year sentence for possession of that single .22 caliber bullet. It did not matter that Mr. Yirkovsky did not know that possession of the bullet violated the prohibition of him possessing a firearm. The mere act, without knowledge he was violating any law or associated intent, was enough to send him to prison for 15 years – exacting immense human and financial cost.

It is beyond the capacity of any person – or even any organization – to keep abreast of the ways in which they might run afoul of the more than 4000 federal criminal statutes. Moreover, a person can run afoul of many of those laws without having any knowledge the law exists or any intent whatsoever of breaking the law. Some estimates put the number of federal regulations which carry criminal penalties at over 300,000, with more promulgated every year. The Code of

Federal Regulations is over 80,000 pages. Many of these criminal regulations lack sufficient, or any, *mens rea* element. One example is the Migratory Bird Treaty Act, in which technically one could potentially be prosecuted for violating by unintentionally hitting a pigeon with a car or merely owning a cat that attacks or kills such bird. Another example is the Foreign Corrupt Practices Act, which corporations refuse to litigate because of its non-existent *mens rea* requirement. As a result, FCPA claims always settle, leaving the act unclarified and without interpretation by the courts.

According to a study by the Heritage Foundation and the National Association of Criminal Defense Lawyers, 40 percent of nonviolent offenses created or amended during the 109<sup>th</sup> and 111<sup>th</sup> Congresses had “weak” *mens rea* requirements at best. Minimal *mens rea* requirements may make sense for some crimes, such as murder, but, it is unrealistic and dangerous to reduce the standard of intent when coupled with the explosion in the number of criminal statutes. When so much conduct is made illegal, it is unrealistic to expect people to be fully apprised of what constitutes illegal conduct under the criminal code. According to a study of the American Bar Association, as of 1998, more than 40 percent of the federal criminal code created since the Civil War was enacted, was created after 1970. Two follow-up studies showed that the post-1970 pace continues unabated.

All of this violates the most basic sense of justice upon which our system is built, as the Supreme Court described in *Morissette v. United States*:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle . . . .

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.<sup>1</sup>

With the explosion of the regulatory state and its gravitation toward pursuing parallel criminal investigation and charges, the *mens rea* requirement is all the more important. Virtually all of

<sup>1</sup> *Morissette v. United States*, 342 U.S. 246, 250-52, 72 S. Ct. 240, 243-44, 96 L. Ed. 288 (1952); see also *United States v. Staples*, 511 U.S. 600, 619 (1994); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971).

these new crimes are *malum prohibitum* – wrong only because prohibited – instead of the historical *malum in se* – wrong in itself. The protection of *mens rea* for *malum prohibitum* crimes is important, as the only indication that they are criminal is the fact that they are found in the criminal code; basic morals or senses of right and wrong are now insufficient to escape the clutches of the federal criminal code. As Justice Scalia once put it, this is “[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation” that does not deal “with the nitty-gritty.”<sup>2</sup> But as recently affirmed by the Supreme Court, “no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed.”<sup>3</sup> Moreover, throwing people in prison who lack any intent of wrongdoing only serves to exacerbate the challenges of an already crowded prison system.

Department heads and congressional leaders have becoming painfully aware that the growing prison population presents numerous challenges, including consuming an ever-increasing percentage of the Department of Justice’s budget. According to the Statement of the Department of Justice’s Inspector General before Congress on February 25, 2015, concerning the Department of Justice’s budget request:

The Department continues to face two interrelated crises in the federal prison system. First, despite a decrease in the total number of federal inmates in FY 2014, the Department projects that the costs of the federal prison system will continue to increase. Second, federal prisons remain significantly overcrowded and therefore face a number of important safety and security issues.

The costs to operate the federal prison system continue to grow, resulting in less funding being available for the Department’s other critical law enforcement missions. . . . For example, in FY 2000, the budget for the BOP totaled \$3.8 billion and accounted for about 18 percent of the Department’s discretionary budget. In comparison, in FY 2015, the BOP’s enacted budget totaled \$6.9 billion and accounted for about 25 percent of the Department’s discretionary budget. During this same period, the rate of growth in the BOP’s budget was almost twice the rate of growth of the rest of the Department. The BOP currently has more employees than any other Department component, including the FBI, and has the second largest budget of any Department component, trailing only the FBI.

...

Given this crisis in the prison system, the Department needs to better utilize programs that can assist in prison population management . . . .

...

In its FY 2014 Agency Financial Report, the Department once again identified prison overcrowding as a programmatic material weakness, as it has done in every such report since FY 2006. Yet, the federal prisons remain only slightly less crowded today than they were in FY 2006. As of October 2014, federal prisons operated at 30 percent overcapacity (as compared to 36 percent overcapacity in FY 2006), with 52 percent overcrowding at higher security facilities and 39 percent at medium security facilities. Overcrowding in the federal prison system has prevented the BOP from reducing its inmate-to-correctional officer ratio, which according to the Congressional Research Service has remained at approximately 10-to-1 for more than a decade – greater than the ratio found in the 5 largest state prison facilities.<sup>4</sup>

<sup>2</sup> *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

<sup>3</sup> *United States v. Santos*, 533 U.S. 507, 514 (2008).

<sup>4</sup> <https://oig.justice.gov/testimony/t150225.pdf>. See also <https://oig.justice.gov/testimony/t150507.pdf>.

Further, according to the Department's official viewpoint as of May 2015:

At the same time it focuses on prison costs, the Department must continue its efforts to ensure the safety and security of staff and inmates in federal prison and detention facilities. Prison overcrowding presents the most significant threat to the safety and security of BOP staff and inmates. In its FY 2013 Agency Financial Report, the Department once again identified prison overcrowding as a programmatic material weakness, as it has done in every such report since FY 2006. Yet, the federal prisons remain almost as crowded today as they were in FY 2006. As of June 2014, federal prisons operated at 33 percent overcapacity, with 42 percent overcrowding at higher security facilities and 40 percent at medium security facilities. Overcrowding in the federal prison system has prevented the BOP from reducing its inmate-to-correctional officer ratio, which according to the Congressional Research Service has remained at approximately 10-to-1 for more than a decade. The Department's FY 2014-2018 strategic plan includes an outcome goal to reduce system-wide crowding in federal prisons to 15 percent by FY 2018. However, as of June 2014, the BOP's Long Range Capacity Plan projects prison overcrowding to be 38 percent by FY 2018, higher than it is today. To reach the long-term outcome goal in the strategic plan, without expending additional funds to build more federal prison space or to contract for additional non-federal bed space, the Department would have to achieve a net reduction of about 23,400 federal prisoners from the June 2014 prison population, based on the existing bed space available within the federal prison facilities.<sup>5</sup>

There are two meaningful ways the justice system needs to be reformed to begin addressing these issues: first, on the front end, through a thoughtful editing and redrafting of current federal criminal laws and sentencing policies, including addressing the *mens rea* elements of the federal criminal code, and second, on the back end, through attentive implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to reduce the risk of recidivism, control corrections spending, and manage the prison population.

Focusing on sentencing reforms is simply not enough. The issues associated with risk and recidivism reduction must also be addressed in order to offset the out-of-control incarceration costs plaguing the federal system. In fact, increases in public safety will only come from recidivism reduction. The Department of Justice has recognized the need for such reforms.<sup>6</sup>

According to the Department's official viewpoint as of May 2015:

The Department also has indicated its support for programs that provide alternatives to incarceration, coupled with treatment and supervision, in an attempt to reduce recidivism. In an August 2013 speech, the Attorney General identified state-sponsored initiatives that he said served as effective alternatives to incarceration by providing offenders the treatment and supervision designed to reduce recidivism while also reducing states' prison populations. The Attorney General also instructed all U.S. Attorneys' Offices (USAOs) to designate a Prevention and Reentry Coordinator in their respective Districts to expand on existing programs that promote the implementation of the Smart on Crime initiative. The OIG is currently conducting an audit that

<sup>5</sup> <https://oig.justice.gov/challenges/2014.htm#1>.

<sup>6</sup> <http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf>. "Various efforts to reduce reoffending have yielded promising results, and legislators, prosecutors, courts, and probation offices around the country are focusing more and more on effective prisoner reentry."

will evaluate the design and implementation of pre-trial diversion and drug court programs, variances in the usage of the programs among the USAOs, and costs savings associated with successful program participants.<sup>7</sup>

As such, Congress should take quick and decisive action to address the growing cost of the federal prison system and ensure that the Department of Justice can continue to run our prisons safely and securely without compromising the scope or quality of the Department's many other critical law enforcement missions.

The House of Representatives and Senate should, therefore, move swiftly to debate, markup, and pass into law H.R. 759, the Recidivism Risk Reduction Act and S.467, the CORRECTIONS Act, respectively. Both bills enjoy broad bipartisan support.<sup>8</sup> Though some details of the bills differ, the broad prescriptions found in both are parallel and would begin addressing the issues of overcrowding in our federal prisons, would make our communities safer, and would save millions of dollars a year. Additionally, these bills would better prepare inmates to re-enter society and would help ensure that first-time offenders do not become repeat offenders. It is my opinion that these bills are the most likely of any proposal to date to have such an impact.

California offers a stark warning of the potential consequences of failing to deal with these issues through thoughtful, planned out measures – by passing H.R. 759 and S.467 – and instead allowing the terms to be dictated by the courts. This is exactly what happened in California. By 1998, California began facing pressure through lawsuits to reform its prison population, which was bursting at the seams. By October of 2006, then Governor Schwarzenegger declared a state of emergency for California's prisons, yet neither the governor nor the legislature took action to remedy the problem. Instead, in July of 2007, the Court of Appeals for the Ninth Circuit convened a three-judge panel to address the issue of California's prison population. The panel found that California's prison population violated prisoners' constitutional rights. In August of 2009, the three-judge panel ordered California to submit a plan within 45 days that would, in no more than two years, reduce the California's prison population to no more than 137.5 percent of its adult institution's design capacity. To meet that goal, California would have to release a staggering 46,000 of its 156,000 prisoners. In 2011, the Supreme Court upheld in a 5-4 ruling the panel's decision.

After releasing some 25,000 prisoners, in February of 2014, the state was allowed to extend the timetable for compliance with the order on reduction to February of 2016. However, California was ordered to immediately implement expanded parole programs and early release credits, including allowing non-violent second strike offenders to have their sentences reduced by up to one-third and to be eligible for parole when they had served half their sentences. If California were to miss any of the benchmarks on the way to its final February 2016 goal, a court-appointed

<sup>7</sup> <https://oig.justice.gov/challenges/2014.htm#1>.

<sup>8</sup> S.467 was introduced by Sen. John Cornyn (R-TX) and is co-sponsored by Sens. Richard Blumenthal (D-CT), Christopher Coons (D-DE), Al Franken (D-MN), Lindsey Graham (R-SC), Orrin Hatch (R-UT), Mike Lee (R-UT), Marco Rubio (R-FL), Charles Schumer (D-NY), and Sheldon Whitehouse (D-RI). H.R. 759 was introduced by Rep. Jason Chaffetz (R-UT) and is co-sponsored by Reps. Cedric Richmond (D-LA), Trey Gowdy (R-SC), and Hakeem Jeffries (D-NY).



officer was given the power to release as many inmates as needed to bring the state into compliance.

In November of 2014, California had still not implemented the parole program it had agreed to in February of that same year. Because of this, the court ordered that California do so by the beginning of January 2015. Rather than addressing the issue through careful and deliberate means, California spent years in court battling efforts to reduce its prison population. The time, effort, and money spent on these court battles would have undoubtedly been better spent devising systematic ways of reducing its prison population in a safe, deliberate manner, as other states have done. Instead, California was forced to mass release tens of thousands of inmates in a short period of time; California also started transferring much of the population burden on county jails, which were ill-equipped to take on the burden. At the end of 2014, over five years after the Ninth Circuit had ordered it to reduce its prison population, California voters passed a ballot measure easing punishment for some property and drug crimes, reducing certain felonies to misdemeanors. While the ballot initiative allowed California to meet its benchmark goal, it also resulted in an uptick in property crime, including shoplifting, grand theft, and writing bad checks. For example, in San Francisco burglaries are up 20 percent, larceny and theft are up 40 percent, and auto theft is up more than 55 percent between 2010 and 2014.

While California has been able to significantly reduce its prison population, even doing so ahead of schedule, by not getting ahead of the problem and waiting to be forced by the courts to act, it wasted valuable time and resources. When it finally started to release prisoners, it had to do it in a haphazard way, putting the public at risk and doing nothing to reduce the risk of recidivism of those it was releasing. Even the recent ballot measure and other measures by the governor's office affect only the symptom – overcrowding – while doing little if anything to alleviate the actual cause of California's massive prison population. The key ingredient missing in California's approach are effective rehabilitation programs that better prepare inmates to return to life outside of prisons, making them less likely to reoffend – which in turn reduces the prison population and associated cost to the taxpayers, and keeps the public safe.

In contrast, several states, many of which are among the most conservative in the nation, have moved in recent years to implement similar legislation as is now before Congress in H.R. 759 and S.467. Accordingly, the underlying, evidence-based reform practices found in this legislation have already been proven successful in states such as Texas, Rhode Island, Ohio, Georgia, and North and South Carolina. In Texas, for example, similar legislation led to the closure of a prison for the first time in the state's history in 2011 and another in 2013. The financial benefits were significant; in the two years after the legislation was enacted in 2007, Texas saved over \$443 million. Since 2008, when the legislation was enacted in Rhode Island, the state has seen a nine percent decline in its prison population and a seven percent decrease in the crime rate. One reason for the reduction in crime is that inmates that are better prepared to re-enter communities are at a lower risk for recidivism.

At the same time, for the longer term, I also urge Congress, the Judiciary, and the Executive Branch to work together to perform fact-finding, identify, and study the effects of the front-end policies that have created imbalance, and then develop thoughtful reforms that will allow us to achieve a more appropriate balance in the federal criminal justice system.

Moreover, I urge Congress to address the oppressive, costly, and burdensome regulatory regime set forth in the federal criminal code. A few ways to begin to remedy the situation include requiring regulatory agencies to identify and list all regulations that include criminal penalties, pass a default *mens rea* provision that would apply to all regulations to which no *mens rea* element would otherwise apply, and otherwise reign in the ability of federal agencies to promulgate regulations that include criminal elements without the involvement of Congress.

The U.S. federal justice system locks up far too many people for far too long. The practice of charge stacking too often leads to sentences that are grossly disproportionate to any actual offense committed. The lowest level offenders are swept up while those who are at the head of the criminal activity are free to continue their illicit behavior. In designing our criminal justice system we must balance the interests of justice, economy, and safety. Prosecuting and imprisoning the relatively less-dangerous is extremely expensive. We should not lock them up for longer than is necessary, and once imprisoned our goal should be to make them productive members of society and reintegrate them into society as quickly and as safely as possible. Spending the vast amount of our finite time and resources on these offenders only serves to make our communities less safe as there is less time and money to pursue the worst offenders.

The principles contained in H.R. 759 and S.467 have proven successful in a number of states across the country and should be implemented as soon as possible. The reforms found in these measures are no longer the political third-rails they once were. These bills would free up the time and resources of the DOJ and would better prepare inmates to become contributing members of society.

As a former law enforcement official, I know first-hand that our current system is far too costly, does not focus limited resources on the most crucial areas of enforcement, and does not prepare inmates, especially low-level offenders, to return to life outside of prison. These problems can be addressed by the legislation currently before the House and Senate. I urge members of the Oversight Committee to act quickly, before the problem becomes an emergency that must be addressed by drastic, emergency measures instead of deliberate, careful measures designed to protect the public.

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Chairman CHAFFETZ. Thank you all for your testimonies. We'll now transition to the point where we ask some questions. And we're going to first recognize the gentleman from Michigan, Mr. Walberg, for 5 minutes.

Mr. WALBERG. Thank you, Mr. Chairman. And thank you as well for these hearings.

As former vice chair of the corrections committee in Michigan's legislature, and during a time when I saw Michigan go from, if I recollect, 17 prisons to 36 prisons, rapid expansion, with no resultant success in dealing with crime in the State of Michigan, and efforts, on my part at the time, to speak to the need for alternatives to incarceration. And, in fact, being a parent of a junior higher son, who was brutally beaten along with his friend, by three teenagers on a bike path, fortunately my son didn't lose his eye. But going to the courtroom, and my wife and I offering to the judge an alternative to incarceration, namely, working on our farm scraping and painting a barn alongside of their victim, my son, and myself, in July in Michigan, and subsequently experiencing the reality of what it means to commit a crime and see the victim as human, and to experience my wife's good home cooking alongside, I believe would have had a better impact upon those three young men.

Then ultimately the judge rejecting that and sentencing them to incarceration in a juvenile facility. And if memory serves me correct as well, two of those three offenders went on to offend again.

Now, I don't know whether our alternative would have been—it would have had a better impact, I bet it would have, but I'll never know, because it wasn't allowed.

So I appreciate your testimony. We have to go to what works, but also what's reasonable and what we should understand that makes common sense.

I'd love to ask more questions along that line, but I do want to go to Mr. Levin and also Mr. Malcolm, since, Mr. Levin, you brought up the issue of the Fair Act earlier this year. Senator Paul and I introduced H.R. 540, the Fair Act, to address many of the abuses that occur within the Federal civil asset forfeiture process, designed to be a good tool, we understand that, but it hasn't worked the way it should. It's become a tool for abuse as well, at least my contention. So I'd like to ask you, Mr. Levin, to expand on what you started at the final point of your testimony.

What do you believe needs to be done at the Federal level to reform this process of civil asset forfeiture, and how does forfeiture reform fit the larger criminal justice reform effort? And, Mr. Malcolm, I'd like to you to respond as well.

Mr. LEVIN. Well, thank you. And thank you for your time about—

Chairman CHAFFETZ. The mic, if you can hit the button.

Mr. LEVIN. Oh. Thank you very much, Congressman Walberg, and thank you for bringing that story about what happened in Michigan to the forefront here, and I really appreciate your commitment to this issue.

The Fair Act is, I think, a great proposal to address some of the abuses with civil asset forfeiture. And just so people understand, there's criminal forfeiture, but civil asset forfeiture is where people's money and property is taken before they've been convicted of

any offense, and in many instances, they're never actually charged. And there have been a few cases recently where Federal authorities, sometimes working with State authorities, just found a guy on a train, an Amtrak train going from Chicago to Los Angeles and took the thousands of dollars he happened to have that he was going to use to make a music video, and there's—he's never been charged with anything, they didn't find any drugs, there was no—and he's still waiting to get the money back many, many months later.

So the Fair Act would abolish equitable sharing, which is a mechanism that States and the Federal Government collaborate. And the way, unfortunately—the good news is a number of States have put certain restrictions on civil asset forfeiture. New Mexico actually got rid of it this year. But by using the equitable sharing doctrine, the States are able to circumvent their own restrictions and get a piece of whatever funds are seized and then the Feds get part of it. So it's created kind of a mechanism for abuse and getting around State law restrictions.

The Fair Act would also raise the burden from preponderance of the evidence to clear and convincing evidence before property can be kept by the Feds, and then it also reforms the structuring law, which has, in some instances, tripped up innocent people who just made a series of deposits from their business for legitimate reason.

It reinvestigates the innocent owner defense. We've seen cases where a hotel owner faced losing their property because there was prostitution, or there was drug activities there, but they didn't know about it. So this would make sure that there actually is a knowledge requirement.

And then also matching the severity of seizure with a crime, which recognizes that just because you're smoking pot on your front porch, you shouldn't lose your home; and making sure people, indigent people who confront civil asset forfeiture can have a lawyer provided if they can't afford an attorney. The only circumstance where they're entitled to that now is if it's their home that's being seized. And finally, the Fair Act also has reporting so that we can know in how many cases there was actually a conviction.

The bottom line is, as you said, Congressman Walberg, this is a well-intentioned policy that was designed to take money and assets from, like, drug cartels before they could hide them and so forth, and so that is a legitimate goal, but it has gone too far and we do need to have reasonable restrictions to ensure that innocent people aren't tripped up.

And so, finally, I think it does relate to many of these other issues in the sense that, first of all, like the growth in regulatory crimes, it's part and parcel of the over-federalism—over-federalization of crime, over-criminalization. And just as we've seen the growth of the Federal Government in so many areas, this is just another area, and it does, I think, also implicate just our constitutional rights and the need to protect those, so—thank you.

Chairman CHAFFETZ. I thank the gentleman. And I would ask the panelists, members only have 5 minutes, so we've got to be—

Mr. LEVIN. Oh, I'm sorry.

Chairman CHAFFETZ. —careful and a little tighter on those. And—

Mr. WALBERG. Mr. Chairman, I may have talked too long myself. Chairman CHAFFETZ. No. Go ahead. Go ahead.

Mr. MALCOLM. I'll be brief, since Mr. Levin answered much of them.

Civil asset forfeiture, of course, did have good intentions to deprive bad guys of their ill-gotten gains in facilitating property, and we have, at Heritage, commented on your proposal and on the Fair Act.

I would also note that one of the things that's unfair about the forfeiture process is a lot of it never takes place in front of a judge, but is handled administratively with rather Byzantine and harshly-enforced rules that often end up hurting property owners. Raising the standards, reforming innocent donor defense, I concur with what Mr. Levin has said.

Perhaps the biggest thing is that, look, law enforcement agencies need to be adequately funded to do the vital work that they do. However, civil asset forfeiture provides too great a profit incentive, a direct profit incentive for them that can end up warping priorities. It also allows them to basically fund their own budgets without the oversight that comes from transparency, that comes from the appropriations process. And so while I fully believe that law enforcement ought to be adequately, indeed generously funded, having that direct incentive through civil asset forfeiture has had a warping perspective.

Mr. WALBERG. Thank you.

Chairman CHAFFETZ. Thank you. Thank the gentleman.

I now recognize the gentleman from Pennsylvania, Mr. Cartwright, for 5 minutes.

Mr. CARTWRIGHT. Thank you, Mr. Chairman. Mr. Chairman, on February 25, 2013, about a month and a half after I was first sworn into this office, Correctional Officer Eric Williams of Nanticoke, Pennsylvania, was working at the U.S. Penitentiary, high risk penitentiary in Canaan, Pennsylvania. He was excited about the job, a 34-year old young man, his mom and dad were proud of him, he was devoted to his friends and his family. That day at Canaan, he was working alone watching 130 angry and dangerous prisoners, when Jesse Kanui attacked him savagely and violently. I won't go into the details, because the Williams family are listening to this. Eric Williams died 2 years after starting at Canaan, and it was because of overcrowding and understaffing.

Prisons across the United States are operating at levels far beyond capacity, putting both guards and inmates in danger. In a 2014 memorandum, the Department of Justice inspector general found, "Prison overcrowding presents the most significant threat to the safety and security of BOP staff and inmates." The same OIG report found that prisons remain significantly overcrowded and face a number of safety and security issues. While there is a downward trend in the Federal prison population, as of June 2014, Federal prisons were operating at a 33 percent overcapacity. This is dangerous. The BOP's long-range capacity plan projects prison overcrowding to be at 38 percent overcapacity by fiscal year 2018, higher than it is today.

Now, Mr. Malcolm, what do we have to do to ensure that the Federal prison population does not creep up to 38 percent overcapacity?

Mr. MALCOLM. Well, I would note, Congressman, that for the first time this past year, there was a small downtick in the Federal inmate population. Of course, overcapacity is not unique to the Federal system; indeed, there are probably greater overcapacity issues in the States.

I believe that some of the proposals that we've talked about today, both front-end reform limiting the amount of time that certain offenders are sentenced to and also spending some money that we currently spend building new prisons and spend money to house people would be better spent providing the kinds of programs that would make it less likely that people would recidivate once they are released, and that way you can help reduce the overcrowding problem that exists and use those prison cells for the people that pose the greatest threat to public safety.

Mr. CARTWRIGHT. All right. Thank you.

And, Mr. Tolman, as a former U.S. attorney, you know, Eric Williams died that night. You believe that one of the solutions to the problem of overcrowding and understaffing is to take a look at over-criminalization by examining the proliferation of Federal criminal laws? Is that correct? Can you explain how it would help?

Mr. TOLMAN. There are two things that would help immediately. One, those 130 that were in that facility that he was supervising, of those, there is a significant portion that are at low risk of recidivism, that are there because of expansion of the Federal criminal code, that could be in prerelease custody—oh, sorry. Could be sentenced to alternative, then released custody such as before home confinement for \$4,000 a year as opposed to \$30,000. That would make an immediate budget impact. And the proliferation of the Federal code has put people in those beds that create the inability of a single individual to observe 130, and that tragedy occurred because of that.

Mr. CARTWRIGHT. I want to follow up with you, Mr. Tolman. I come from northeastern Pennsylvania, the middle district of Pennsylvania where a U.S. District Judge, Richard P. Conaboy, still sits. In '1994 through '1998, he sat as the chair of the U.S. Sentencing Commission. And he often talked to us, the lawyers practicing before him, about the hamstringing nature of the Federal sentencing guidelines and how it took discretion away from Federal judges.

Do you agree that it makes sense to repose wide discretion to the sentencing capabilities of Federal judges?

Mr. TOLMAN. I do agree. Federal judges should have discretion. Not every case is the same. A one-size-fit-all is not going to work when it comes to sentencing people to long prison sentences.

Mr. CARTWRIGHT. Thank you. I yield back.

Chairman CHAFFETZ. The chair now recognizes the gentleman from Wisconsin, Mr. Grothman, for 5 minutes.

Mr. GROTHMAN. I'm very sympathetic to this topic, but I think some of the testimony is a little bit, kind of you're all on the same page. I want you to respond, as some people might think the other thing.

Our homicide rate in this country has dropped, I believe, by over half in the last 30 years. Arguably, one could say that, you know, if the homicide rate had been what it was 30 years ago, another, maybe 8,000 or 9,000 people would be murdered every year, which is not nothing.

Given that the homicide rate has dropped like a stone at the same time the prison population is going up, I would have thought the increase in the prison population ought to get at least a little bit of credit for that.

I'll ask—don't want to pick out of the mix here. John Malcolm, don't you think that the increase in raising the penalties has a little bit to do with all the lives that have been saved as the murder rate drops? Would you give it a little bit credit?

Mr. MALCOLM. Yes, absolutely. I said in both written and oral testimony, Congressman, and in my written testimony, that, for instance, well-respected criminologist like University of Chicago Steven Levitt says that increasing incarceration responsible for probably 25 percent of the reductions in violent crime, University Texas at Austin's William Feldman puts it at 35 percent. Those are not insignificant numbers. However, that still leaves a very, very large percentage that—where the reductions responsible for other factors.

I would also note, although times can change, Mr. Levin noted that according to Pew Charitable Trusts, the 10 States that reduce incarceration levels the most over the past 5 years experienced larger drops in crime, 13 percent, compared to the 10 States that increased incarceration the most which was only an 8 percent reduction in crime. There are anomalies of course. All I'm saying is that while incarceration is indeed necessary and indeed important, it may not be the only—it is certainly not the only and may not even be the best way of reducing violent crime.

Mr. GROTHMAN. Okay. Cause and effect, except they are only on the grounds that one would think if crime goes up here, incarceration should go up, because as crime goes up, you would be putting more people in prison. The next question I have for Mr. Ring, who recently got out of prison. I'm not sure how much it costs to house an individual prisoner in the Federal prison system, but I know in the State of Wisconsin, it is over \$30,000 a year. Do you have any suggestions for waste or that sort of thing or how we could cut the costs there, or maybe by cutting the cost, free up money for more job-training programs in this sort of thing. Were there any observations of waste that you saw?

Mr. RING. There were. And this is something that has really struck me that in the prison system, most people who find waste, fraud, and abuse in every area of government somehow think the Bureau of Prisons is run so efficiently, and it's not. There was a lot of waste and abuse, and there was some outright fraud, some of which I know the inspector general is looking at, and that should occur. Otherwise, I think the way you can cut costs is for the lowest level of non violent offenders—I was at the prison camp, so these were supposedly the best of the best, and people who started at a medium or secure facility moved their way to the camp. But there were people at the camp who were 70 years old, or were dis-

abled in some way. You could have cut costs by letting some of these people get to home confinement or to halfway houses.

But I agree with what everyone has said, that money has to be put back into the prison to sort of treat the people who do need help. But there's plenty of waste there and overspending. And I think that has to be addressed. And I'm glad this committee is looking at it.

Mr. GROTHMAN. In general, I hate mandatory minimums. Nevertheless in my district, I assume it is not unique around the country, there's been a shocking increase in heroin deaths. Number of deaths just beyond belief. And despite the huge increase in deaths, the judges, some judges continue to treat it as no big deal. I was thinking, I'm not sure how many of these are Federal crimes, of introducing a bill making sale of heroin a mandatory minimum. I was wondering if you have any alternative as to how to deal with the explosion of heroin overdoses we are seeing in this country.

Mr. MALCOLM. Who do you want to answer that question?

Mr. GROTHMAN. Well, it was kind of one of those game shows you see on TV, whoever bangs the buzzer first.

Mr. WALBERG. [presiding.] The gentleman's time is almost expired, so answer as quickly as possible here.

Mr. LEVIN. Well, certainly for those who have an addiction, the great news is there is more and more treatments that are very effective, non-narcotic injections that people can take to block the receptors in the brain. Obviously, people that are dealing, especially large amounts of heroin are already subject to lengthy Federal sentences.

I did want to ask, address your issue on the murder rate to say, New York City, the role of policing is incredible, what was done under Giuliani. The murder rate in New York City fell by over 80 percent. It did not fall nearly as much in Chicago and other large cities. So I think that shows you some excellent policing practices such as broken windows policing, data CompStat and having police at the right place at the right time, you can actually prevent a lot of crimes.

Mr. WALBERG. I thank the gentleman. The gentleman's time has expired. I now recognize the gentlelady who represents my hometown in Illinois, Ms. Kelly.

Ms. KELLY. Thank you, Mr. Chair, and thank you to the witnesses.

Our criminal justice system has different effects on unique populations as you have raised. The sentencing project published a report this year examining the ways people of color are disproportionately affected by the criminal justice system. Mr. Chairman, I would like to enter this report into the record.

Mr. WALBERG. Without objection.

Ms. KELLY. That report explains, "Once arrested, people of color are also likely to be charged more harshly than Whites. Once charged, they are more likely to be convicted, and once convicted they are more likely to face stiff sentences, all after accounting for relevant legal differences such as crime severity and criminal history."

Ms. Ryan, can you describe some of the racial disparities you've seen in the juvenile justice system?



Ms. RYAN. Thank you, Congresswoman. There are disparities at every step in the process, so young people of color are more likely to be arrested, more likely to be formerly processed instead of getting diversion, more likely to be prosecuted, much more likely to be incarcerated, and much more likely to be transferred to adult criminal court. And this is well-documented, the Federal Juvenile Justice and Delinquency Prevention Act has required all States to collect data on this, so we see this in almost every single State.

Ms. KELLY. Also, if my son was here, he would say much more likely to just be stopped in general.

Ms. RYAN. Absolutely.

Ms. KELLY. According to testimony, the American Civil Liberties Union submitted to the Inter-American Commission on Human Rights in 2014, sentences imposed on Black males in the U.S. Federal system are 20 percent longer than those imposed on White males convicted of similar crimes. That testimony also highlighted that nationwide, about 77 percent of juvenile offenders serving life without parole sentences are Black and Latino.

Ms. Ryan, how are these disparities reflective of those we see in systems overall?

Ms. RYAN. These disparities are very reflective of what we see. I visit facilities all the time, and you see young people of color in these facilities. And what we see in terms of the disparities of kids being in adult criminal court, that's where the highest level of disparities are. At the point at which kids are transferred to adult court or prosecuted in adult criminal court, and certainly they are subjected to life without parole and other sanctions that adults face in those circumstances.

Ms. KELLY. Mr. Levin, I see you shaking your head. Did you want to add anything?

Mr. LEVIN. Oh, no, I certainly would agree that this the data certainly shows that there are disparities. I think one of the ways we often think about it is, particularly in the area of drugs, and this goes back to what I was saying about policing, I think it is very important to have the police in the neighborhoods where the most crime is. But we need a different type of policing. And so one of the challenges is, of course, if a youth or other person has drugs on them, they are more likely to get caught if they are in an area where there is more police. Yet, we need the police in those areas that have high violent crime, which are, in many cases, areas that have large minority populations. So the challenge then is to change the type of policing that we are doing.

We have people like David Kennedy with the National Network for Safe Communities, we are doing call-ins, Operation Ceasefire in Cincinnati, High Point North Carolina, these have had great impact by working with ministers, grandmothers, bringing the community together, getting people out of gangs, giving them positive opportunities.

Once someone is, for example in New York City now, if they do find marijuana on someone, they are typically given—they go to a desk—they get a cita—they are brought to a police office, it is a desk appearance. They don't go to jail. So there are better ways to deal with it, and that can help reduce some of the disparities han-

dling things in a reasonable manner, particularly when they are very low-level offenses.

Ms. KELLY. Mr. Ring, your organization, Families Against Mandatory Minimums, has called for policymakers to further reduce the disparities in sentencing between crack and powder cocaine; it also calls for existing reductions to be made retroactive. Why might it be important to further reduce the disparity in sentencing and have that disparity reduction apply retroactively to people who were incarcerated prior to the change?

Mr. RING. Quite simply, Congress, when it passed the First Sentencing Act and made the change in the crack law to lower the disparity between crack and powder cocaine, it admitted a goof. You had Members who were around then saying we didn't know what we were doing, we just pulled numbers out of the air, and we passed this disparity. Mind you, the Reagan administration asked for 20-to-1 disparity, and it was the Congress that moved it to 100-to-1. So there was sort of a pox on everybody's House there. So Congress passed the law, made the change, but it didn't make it retroactive.

So now you have people serving decades for—decades-long sentences that Congress admits were a mistake. So until you make it retroactive—I know the President is trying to do some of this piecemeal through commutations, but Congress really should act and get all of those people fairer sentences, because it is the height of injustice for them to serve those when they know anybody sentenced today is going to get a much lower sentence.

Ms. KELLY. My time is up. My colleague is running a tight ship.

Mr. WALBERG. I thank the gentlelady. And I recognize now the gentleman from North Carolina, Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman.

Ms. RYAN, you were indicating that people of color, I guess, are incarcerated at a much higher rate, that's what your study shows.

Ms. RYAN. There have been studies that have been done in all of the States, showing that young people of color at every stage in the process, so arrest, formally processing in the system instead of being diverted out of the system, detention, conviction, incarceration and transferred to adult court.

Mr. MEADOWS. So in your analysis, where would you say the problem is? Is it at the law enforcement side, the prosecuting side or judicial side? I mean, obviously, you're saying that the problem is everywhere, so are you indicating that it's all law enforcement prosecutors and the judges that are being biased this way?

Ms. RYAN. Well, what we're seeing, the study showed that there is bias in the system by all of these stakeholders. And so law enforcement tend to over-police and process young people of color formerly, whereas White youth are not processed in the same way. They have a different justice system. Simply put, we have two justice systems: We have one for White people who have means and one for young people of color who do not.

Mr. MEADOWS. So your contention then is that from the judicial side of things is that judges are making disproportionate sentencing based on their purview. Would that be your contention?

Ms. RYAN. Yes.

Mr. MEADOWS. All right. So Mr. Tolman, let me come to you then, because what Ms. Ryan is saying is that judges have great latitude, and according to what you just shared with Mr. Cartwright is that you think that judges should have greater latitude. Would that not exacerbate the problem that Ms. Ryan has just—

Mr. TOLMAN. I appreciate the question. Congressman, I would answer it a little bit differently than Ms. Ryan would. Judges—I don't believe that judges, in this day and age, are largely driven by a bias in their sentencing, but instead, you see as a result of minorities achieving higher sentences most often come as a result of they are arrested more often, their records look worse. When they get before a judge, they have usually gone through several proceedings that they may not otherwise have gone through, and then judges feel that they are tied. And in the Federal—

Mr. MEADOWS. But they are not tied. You were just saying that they should have discretion. I guess what I'm saying is, I'm here, I love my law enforcement officers, I love my U.S. attorneys, and I'm perplexed because what some of them say is that we need to prosecute more, and we need to arrest more, and that they arrest people and they get out of jail free and they go another way. So I'm very perplexed, Mr. Tolman, because if we're going to give our judges more discretion, would that not give the probability of sentencing that was not uniform or fair?

Mr. TOLMAN. I don't believe so.

Mr. MEADOWS. Okay. So I assumed you would go that way. So let me take you to a U.S. attorney situation in my district where they were charged with felonies, they pleaded them down to misdemeanors where they went before a magistrate judge, and then ended up—I've got a constituent who is going to jail for 23 months for hunting with a spotlight of which nothing was shot, and a hunting license that had expired for 24 hours. He's going to jail for 23 months. That was the discretion of a Federal judge. So how can we say that more latitude with our judges would promote fairer sentences?

Mr. TOLMAN. First of all, I don't think judges feel they have discretion now. The sentencing guidelines, while not mandatory, are certainly still pervasively controlling what the judges do. In those instances where an individual has an offense, there are very distinct recommendations that come as a result of the sentencing guidelines.

Mr. MEADOWS. Well, those were maximum—in this particular case, a maximum of 6 months, but they stacked misdemeanors so that he went to jail for a longer period than what you would think a normal misdemeanor would have. Do you think that's fair?

Mr. TOLMAN. I don't know the case.

Mr. MEADOWS. Well, do you—

Mr. TOLMAN. At first blush, I do not believe that that would be a fair sentence.

Mr. MEADOWS. I agree.

Mr. TOLMAN. It is the point that we are trying to emphasize that the Federal system is filled with more of those than there are of Al Capones. And because of that, they are taking bed space that is required for those that are more serious.

Now the mandatory minimums have added to that the emphasize on guideline ranges that are out of sync with what should be the punishment are creating that. And so, I guess I agree with you and say that it will take a lot more time with true discretion and statutes that don't promote over-punishment before judges start to sentence more properly tied to what the seriousness of the offense is.

Mr. MEADOWS. I thank the chairman. I yield back.

Chairman CHAFFETZ. [Presiding.] I thank the gentleman. I now recognize the gentlewoman from Michigan, Ms. Lawrence, for 5 minutes.

Mrs. LAWRENCE. Thank you. This is a discussion that's near and dear to my heart. I am a representative, I represent Detroit, and also have some of the most wealthiest communities, not only in Michigan, but in the country.

I just want to give some statistics. It is estimated that 2.7 million children under the age of 18 have a parent in prison or jail. That means 1 in 28 children in the United States has a mother, or father, or both in a lock-up. Recent statistics shows that the United States holds 25 percent of the world's prison population, while we're only 5 percent of the world's population or people.

Most inmates are parents of children 18 years of age—of children under 18 years of age. Two-thirds of incarcerated parents, two-thirds, are nonviolent offenders, often locked up for minor drug-related charges. They make up the majority of the parents who are in prison, and they and their children are the ones the criminal justice reform would most affect. The lack of parental contact engagement during imprisonment hurts those children, it has been proven psychologically and socially.

So I have two questions, first to Ms. Ryan. What is the impact, according to the studies that you've looked at, to the educational social development of children growing up with a parent in prison?

Ms. RYAN. I can't speak to all the studies, but a vast majority of them have shown that those young people are further behind in school than their classmates, and that there is an increased likelihood that those young people who have a parent in prison could end up in the criminal justice system as a result.

Mrs. LAWRENCE. My ranking member yesterday, in his opening comments, referred to three generations serving time in prison. It's a statistic that I think our criminal justice system owns some responsibility.

Mr. Ring, you personally experienced this as a parent. I would like to hear your comments. And what could be done—if you could speak in a positive way, what do you think we can do to help the relationship between children and their parents during incarceration, and what are we doing right and what should we stop doing?

Mr. RING. Well, there's a couple of things, it's the hardest part of being in prison currently for everyone. I am thankful that I had a shorter sentence relative to most. I saw people in the visiting room after months past where you could see the relationships were falling apart, the kids weren't running to the parents anymore. And it's really hard when you leave that visiting room to go back on to the compound, and your kids are losing their relationship with you, so it is very hard.

I think the prisons aren't as cognizant of that as they should be. They pay lip service to it, but there are things like the 500-mile rule, which is you're supposed to be placed in a facility that's within 500 miles, but that's as the cock crows rule. It doesn't mean driving miles. So we have people from Rhode Island who are at Cumberland, Maryland. They almost never got to see their kids. Other things, like when I got there, I was devastated to not have my daughters with me, I asked if we could sort of put together a fatherhood caucus, because they had AA and NA. I said, could we get a fatherhood support group so that the older guys could tell the newer guys how to stay in touch, how to space out your phone minutes, that sort of thing. We only had one therapist, and so she didn't even respond to that inquiry..

So I think there are things that can be done. And I think as part of the programming, that should be part of it, because in some cases you have strong relationships that wither, other cases you don't have strong relationships, but it is a great time to reinforce the people who are there. This should be your responsibility when you go out.

Mrs. LAWRENCE. I agree with you. There is a responsibility in our criminal justice system to recognize the impact on those who are not incarcerated, the families. If we truly want to break the chain and reduce the amount of people that we imprison, along with all the other reforms, this must be a critical part of it. And I yield back my time. Thank you.

Chairman CHAFFETZ. I now recognize the gentleman from Oklahoma, Mr. Russell, for 5 minutes.

Mr. RUSSELL. Well, I appreciate not only all of the fantastic information as put forth here, but the scope of the problem and the fact that in a bipartisan nature we recognize that this is a national problem, regardless of politics or party.

I want to address an area that I have not heard addressed much. Senator Booker, in his testimony yesterday, mentioned upwards of 97 percent, I believe, of all adjudication of justices done by plea. And I don't know the accuracy of this. I don't have the data, but it brings out a major point. A person receives a charge, and he gets publicity. Consequently, his employer fires him over the publicity. Then they have an inability to make bail because they don't have work, and then they can't obtain the best counsel because they can't afford it. The counsel that they do obtain then, in a deal with the prosecutor, is suggested to make the plea, or roll the dice with the jury on an exponentially higher outcome of sentence. Faced with this duress, what we potentially see, and I would argue actually see, is the locking up of innocent people.

How do we address that? Because we've not seen or heard anything along that line, and I welcome input from anyone on that issue?

Mr. TOLMAN. I'll volunteer very quickly that the promulgation of disproportionate penalties and some mandatory minimums that are so extreme that you have that very, very scenario that you described is driving that. And yet, if you were to make punishment more commensurate, and not punish an individual for going to trial to test the evidence against them, I think you would have a system that is intrinsically more fair, and that's part of the reform that

has to happen on the front end, but for those that are in that system, that are the 97 percent that did it, we better have immediate back-end reform right now, or else they will continue to serve those very long, disproportionate sentences.

Mr. MALCOLM. Congressman, my colleague, Mr. Tolman during his testimony, talked about mens rea reform and the importance for adequate mens rea. I think that's also a part of this. There are a fair number of crimes, particularly regulatory crimes, but also statutory crimes, where in order to convict somebody, you do not have to prove that there was any knowledge or intent to violate the law or even as somebody engaged in something that is intrinsically morally blameworthy, and the fact that Federal prosecutors have the pressure and say, look, I don't have to prove what you knew about the law, intended to violate the law. I just have to prove that you did the act that resulted in the crime, even if it was a mistake or a complete accident. Therefore, you're facing a very heavy penalty, unless you decide to plea bargain. That's also part of the answer to this.

Mr. LEVIN. It is an excellent point that you make and that you ask about and there is data showing people that day-in-jail pretrial, before their trial, end up with longer sentences and are more likely to go to prison. So some States, like Colorado and New Jersey, have adopted bail reform measures to ensure people who are low risk can get out pretrial, even if they can't afford a bail bond through pretrial supervision and a personal bond. It is kind of like being on probation, so they are held accountable to make sure they appear, but just because they don't have resources doesn't mean they are not able to get out.

And then also, strengthening, of course, indigent counsel and showing that there is quality representation. We have a pilot program in Texas going on kind of like school choice where clients can choose their counsel from a list of qualified attorneys.

Mr. RING. I would just say as somebody who was prosecuted, the leader of this conspiracy that I was a part of what was sentenced to 4 years, 4-1/2 years, and I came later and I had been cooperating for a couple of years. When the government came to me they basically said if you cooperate and implicate these people, you'll see what you will get, which is no time. If you don't, the range I was looking at was 19 to 25 years of prison. And I had real law and order, salt of the Earth people, friends who believed in my innocence as I did, which is why I went to trial, so you just gotta take the deal, you have to take it for your kids. I said, you don't think I'm guilty. They said it doesn't matter, you can't do that. You see that a lot.

And I don't know how anyone who thinks that there aren't innocent people in jail don't believe that people take those deals. You see the statistics. When the Innocence Project exonerates people with DNA in these rape cases, half of those people pled guilty. So you know it happens, and it's a problem, and it's a problem because there's not enough discretion for judges to counterbalance. I was lucky that my offense did not carry a mandatory minimum. That would be tougher. At least I knew I can have a judge who was going to hear the evidence. It's more proof to why you need to have more balance in the system.

Mr. RUSSELL. Thank you, Mr. Chairman. I yield back my time.  
 Chairman CHAFFETZ. Thank you. I now recognize the gentleman from Virginia, Mr. Connolly.

Mr. CONNOLLY. I want to thank you, Mr. Chairman, and especially you, Mr. Cummings, for these remarkable hearings. Yesterday and today, profoundly thought provoking, something that hasn't had the kind of scrutiny it needs. The American system of justice from soup to nuts is, in many places, broken. And the word "justice" is in all lower cases. You just mentioned one, Mr. Ring, and I know my friend from Oklahoma brought it up yesterday with our two governors, plea bargaining was supposed to be an efficiency. It has now become a tool that incarcerates people who are innocent, not all, innocent and guilt are irrelevant sometimes to the process. That isn't justice, that's a perversion of justice. You're quite right, people then have to weigh the gamble, take the lesser of two evils, even though I'm innocent, because the risk of going to trial and losing is too great. The fact that prosecutors who may believe you're innocent, nonetheless pursue that is a perversion of justice and shame on them.

Sometimes prosecutors get into the habit—I know, Mr. Tolman, you might recognize this—where what's important is a scalp on the wall, irrespective again of innocence or guilt. I'm gambling I can win this one, that's all that matters, that's the evidence. Not about whether—what about the innocence of the person in front of me? Not everybody, of course not, but it happens all too often, and there are so many other things.

But I want to ask you about two in particular. One has to do your story, Ms. Ryan, solitary confinement for a youth, it seems to me that that would be ought to be a practice normally that is very infrequent, and only with manifest behavior that is otherwise completely uncontrollable, danger to himself, herself or others, and for limited periods of time. You described a tragic story of a young man who ultimately committed suicide, presumably not unrelated to his very unjust incarceration in terms of what he was being charged with, and it was a failure of the criminal justice system to get around to him because he had to languish in Rikers. How often out of solitary confinement be a tool in the prison setting for young people?

Ms. RYAN. That's a great question. In Kalief Browder's case, he was charged with a crime, so he was pending trial, and he was being abused by guards. They placed him in solitary confinement, so this is pending trial. We know that it is used often in the adult system for children in the form of protecting these children, and it is profoundly harmful to those young people to their development. It is also used unfortunately in the judicial justice system, and there are all kinds of euphemisms for solitary confinement.

I had an argument with a Department of Corrections head here in the District one time because he called it a time out, and I called it 5 days in the hole is solitary confinement. Unfortunately, we don't know how often it is used, and that's something that Congress could fix by requiring States to provide data.

Mr. CONNOLLY. The fact that we would subject a young person to solitary confinement for his or her protection, of course, tells us a lot about the personal environment that we would need to do

that, understanding that there are consequences that flow from doing that, the isolation and so forth.

I'm running out of time, so I want to ask one more question of you, Mr. Tolman. Washington Post just did an interesting series on power parole boards, not trained, often political appointees, capricious decisionmaking, God only knows whether—there was nothing systematic and analytical about how we look at your case and arrive at a just decision. Your experience, and if you'd comment on that in the remaining 27 seconds.

Mr. TOLMAN. Thank you. There is no parole in the Federal system, but there is a need for that role if it was administered fairly, which is why the bill that has been introduced, H.R. 759, would actually take that out of the discretionary. What it would do is it would say we are going to assess the risk of recidivism and reassess the inmate as they go and let them earn time into home confinement. So you take the parole board out of that and some of those problems that came from it.

Mr. CONNOLLY. Thank you.

Chairman CHAFFETZ. I would note to the gentleman from Virginia, Mr. Connolly, that please have a look at the—Cedric Richmond has a piece of legislation that I cosponsored, we introduced it, that deals with solitary confinement requires a study in reporting so we have these types of statistics, because you just worry, there are horror stories out there and we never hear about them, and this piece of legislation is part of a package that we are encouraging.

Mr. CONNOLLY. I thank the chair, I most certainly will. I also want to say one hopeful thing about this process you and the ranking member have gotten underway here, but in terms of the broader conversation, too, that's hopeful to me is actually on the right, on the left, Republicans and Democrats, we're all actually beginning to reexamine what we thought was taken care of from top to bottom. And I think that's a really healthy sign, so hopefully we will continue to look at issues like solitary confinement, but also, the broader issues that challenge American justice. Again, I thank you, Mr. Chaffetz, and you, Mr. Cummings, for leading us down this path.

Chairman CHAFFETZ. Thank you. I now recognize the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman. I likewise want to give a sincere thank you, Mr. Chairman to you and to our witnesses for this tremendously important hearing. I typically don't do this, but I do want to take just a moment and just share a little of a personal experience with all of this, because it really hits home just from the last couple of months with me. I'm from Georgia, and, of course, Georgia has been known in the past as being extremely tough on crime, and frankly, that toughness over the years has not worked, it has cost the State tons of money, and our jails have been filled to the brim. And under the leadership of our current Governor, Governor Deal, he has taken this issue on personally, actually campaigned on this issue as well.

And as a result, Georgia has been, as you know, has been mentioned here in the last couple of days, on the forefront of imple-



menting some critical, momentous, front-end and back-end reforms to our criminal justice system and we are seeing incredible results.

One of the programs, or at least part of it involve some of these non violent offenders, particularly who have drug problems, to be able to participate in court-supervised rehabilitation programs that involve a great deal of accountability. It is an 18 to 2-year—18-month to 2-year program. There's, as I mention, a lot of accountability, these people get jobs, they do do community service, they have regular drug tests, they are involved in evidence, program evidence-based treatment programs, that involve both the faith-based community as well as others. And there's consequences if any of this stuff lapses. The consequences are not just designed for arbitrary punishment, but they are designed to get people back on their feet so that they can live a drug-free life.

And just last May, I had the distinct privilege of speaking at one of the graduation ceremonies. I have heard of this program in Georgia for several years, but I had the first hands-on experience speaking at one of these graduation ceremonies. And I tell you, I was moved to the core. In fact, there was not a dry eye in the place as one of these individuals after the other after the other gave testimony of what their life was and what it has become, and what these programs have meant. And then family members and friends also testified as well. At the end of this program, these people had literally 2 years under their belt drug free, as they've been in the workforce, all these kind of things. It was incredibly moving.

One of the statistics that came up, I believe it was yesterday with the recidivism issue, as I think most of our prisons see people, once they are released, back in prison within 2 years. I mentioned results in Georgia, we are seeing through many of these drug court-type things across the Nation. For that matter, the recidivism rate is 25 percent; in Georgia, it is even less; in Barrow County, where I spoke a couple of months ago, it is significantly lower than even 25 percent.

So I guess all of this is just—I'm so grateful that we're having this hearing, and again, just send sincere thanks to each of you for being on the front line of what you're trying to do, and for, chairman, your leadership in bringing this forward.

Mr. Levin, let me just ask you, I am sure you have dealt with this, I apologize for coming in late myself, but what alternatives to prison do you see? I'm sure you're looking at Georgia and Texas, some of these other places, but to reduce recidivism, get these people's lives straightened out?

Mr. LEVIN. You hit the nail on the head, Congressman, drug courts, the Hawaii Hope Court, which is a similar model but it is more targeted just towards weekend jail for those who fail a drug test. And then, even actually some of those who can't acquit to that and ultimately go into the drug court where they get more significant treatment.

Mental health courts, veterans courts. And other alternatives, including electronic monitoring, various mental health treatment programs, both inpatient and outpatient, for people with that problem. So house arrest has been mentioned. So there is a whole host of alternatives. And I think one of the things we ought to look at is enabling the Federal system through perhaps, you know, the Fed-

eral system could compensate the State, but to be able to place individuals whether in a halfway house or one of the other programs that is actually run by a State or non profit, rather than—it is very hard from the Federal Government, particularly in places where there may not be that many Federal offenders, to try and reinvent the wheel of everything States are doing, so why not have a way for the Federal Government to partner with States and nonprofits and use some of the same programs.

Mr. HICE. Excellent. I'm out of time, but again, I hope this committee continues to look a cost effective ways of turning lives around as opposed to just punishment, and I thank you.

Chairman CHAFFETZ. Thank you. Georgia has done some very significant things. We have tried very hard to get the Governor of Georgia to come join us, but through scheduling on both ends, that we were unable to do it. But Georgia has really helped lead the way and they should be thanked for that.

I now recognize the gentlewoman from Illinois, Ms. Duckworth, for 5 minutes.

Ms. DUCKWORTH. Thank you, Mr. Chairman. I'm so glad that we're having this much-needed debate in our country, and especially in this committee, on need for reforming our criminal justice system. I really want to go back to the discussion on drug offenses and mandatory minimum sentencing.

Mr. Chairman, I have in front of me a statement offered to this committee, to this hearing from Human Rights Watch that echoes many of these concerns. I would like this entered into the record.

Chairman CHAFFETZ. Without objection, so ordered.

Ms. DUCKWORTH. Thank you. Regarding prosecution and mandatory minimums, Human Rights Watch explains that, "mandatory drug sentencing laws has given prosecutors too much power. They are able to strong-arm drug defendants by offering them a choice, significantly shorter prison terms if they plead guilty, and excessively severe sentences if they go to trial." Coerced pleas and disproportionately harsh sentences should not be part of the Federal criminal justice system. And my colleague from Oklahoma began this discussion on that already. I would like to further this sort of power relationship.

Mr. Ring, you said that prosecutors in your case initially asked for a 20- to 27-year sentence, that seemed incredibly excessive for a non violent offense. I have to wonder, you came into the system as someone highly—fairly highly educated, a lot of experience, not easily intimidated, I would think, and I just wonder what your experience was in term of facing that potential mandatory minimum, and then thinking about the folks you saw when you were in prison. And if you think about someone whose entire life experience begins with stop and frisk, and unnecessary police stops, and a law enforcement system, while we have great law enforcement officers, but a system that is skewed, especially toward minorities, what that does to the power relationship between the prosecutor and the defendant?

Mr. RING. Thank you. Let me just say I try to always make clear that my case is definitely unique. I'm a congressional staffer, I'm a lawyer, I worked for sentencing reform. I knew a lot of these issues, and so it was certainly a different situation. The reason I

usually raise it, it's just because I want to show how much power the prosecutors have without mandatory minimum. Because they were able to threaten that sentence because the guidelines are still so high too, and the guidelines are usually driven by the mandatories. So when you lifted the drug mandatory minimum, the white collar folks on the commission said we have to lift these up, too, to make them have parity. So the guidelines are high too.

The people I saw in prison look nothing like me. I mean, I hope it is clear, and I don't think everyone knows, there is no Club Fed. I was definitely a minority in the prison, most people are brown and Black. And that's another problem in terms of getting programming to such a disparate group of people. But these folks faced mandatory minimums, they didn't know anything. They knew nothing about sentencing laws. It is such a—the divorce between what members or politicians think is going to deter a criminal as if they are listening—if you pass a 5-year mandatory minimum, the next year, they are going to, oh, I'm not going to do that anymore because they just stiffened the penalties. There is no idea.

Most of these guys made stupid mistakes without any idea of what the punishment was. They just didn't think they were going to get caught. So you can make the severity off the charts. You can do a life sentence for jaywalking. It is not going to stop it. So it is a problem. These people don't know, there is a lot of bad lawyering. Some of these people had really terrible representation. And so the people who can't afford it—and I don't know anybody who can afford to go to trial today—it is a huge problem, and so I think that's why you see so many lower level people who have no resources just cave to the system.

Ms. DUCKWORTH. Thank you. Mr. Tolman, with your experience as a defense attorney, have you seen defendants discouraged from exercising their right to a trial? I want you to speak to this power relationship, because it seems like the way this is set up, it just gives excessive power to the prosecutors and that you have a defendant from a community where they see all their buddies or their friends who get stopped and frisked and minor drug offenses end up in jail for long periods of time, I would think that that power relationship is just excessive.

Mr. TOLMAN. It is extreme power, we could—as Federal prosecutor, I could control what the sentence would ultimately be because of our ability to wield the particular statutes we wanted because of the guideline ranges, because of enhancements we could apply, and we control the ability to also go down from those guideline ranges. It influenced me as a defense attorney so that my practice currently, I tell many of my clients, we need to be successful prior to you being charged, or we need to be cooperating in a way, or we need to show the government that we are going to be very different than just an individual that they prosecute and goes to trial. I cannot, in good conscience, advise any of my clients at this point to go to trial, because their resources and the evidence and the penalties present incredible obstacles to exercising your constitutional rights.

Ms. DUCKWORTH. Thank you. I'm out of time, Mr. Chairman.

Chairman CHAFFETZ. Thank you. I now recognize the gentleman from California, Mr. Lieu, for 5 minutes.

Mr. LIEU. Thank you, Chairman Chaffetz and Ranking Member Cummings, for these hearings on criminal justice reform. My first question is to the entire panel. Do any of you believe that it is wise to spend even \$1 of precious taxpayer resources to arrest, prosecute and lock people up for marijuana crimes, especially when multiple States have legalized marijuana? Okay, I take that as a no. Thank you.

I would like to focus on recidivism.

Mr. LEVIN. Yeah, obviously, there are people that—if you're dealing in huge amounts of marijuana as part of a cartel or something, but I think it has certainly been encouraging to see, even in States, we can debate whether it should be legalized or not, but certainly, even in States that haven't legalized, they are diverting people. In Houston now, they are bringing them to the police station, they can do 8 hours of drug education or community service, so bringing small marijuana offenders to jail is, I think, a wasteful use of human resources.

Mr. MALCOLM. If I could also quickly jump in. I think that very, very few small marijuana possessors are prosecuted Federally. I do think that there are Federal laws that are way overreaching, perhaps in this area too, but I'm not a big fan of unequal enforcement to Federal laws. If you're going to have them, I believe that they should be equally enforced.

Mr. LIEU. I'd like to talk about recidivism. Mr. Tolman, you had testified that within 3 years of release, nearly 67.8 percent of prisoners are rearrested, and then within 5 years, 76.6 percent are rearrested. I dealt with this when I was in California State legislature, we had a massive prison overcrowding problem. When you looked at the facts, it wasn't that California had longer prison sentences, we are about the middle in most States. But you get a massive recidivism rate, and we are locking people up for nonviolent offenses in prison.

So I'd like to turn to Mr. Ring, and I listened and read your testimony, and it is a stunning indictment for the lack of rehabilitation program for the Bureau of Prisons. And I think you testified that you saw little to no real rehabilitation in prison, that most inmates get classes, will sign their names to the attendance list during the week so the administration thought they went, and that the most glaring deficiency was the lack of any kind of cognitive therapy or anger management counseling.

Then your conclusion seems to be sort of odd, because you go from that and you conclude that, I think the only way Congress can improve public safety while reducing cost is to reform sentencing laws, especially mandatory minimum sentences. I fully support you, but I would have thought you would have said the important thing to do is reduce recidivism, and that means increasing rehabilitation programs, making sure that people don't recidivate. Because if you don't do that, what will happen is, and you reduce sentencing laws, instead of having a person serve two longer sentences, they'll serve four shorter ones. I don't think you do very much to reduce prison overcrowding and reduce incarceration. I'm just very curious how you go from the first part of your testimony to that conclusion, rather than saying we should focus on recidivism reduction.

Mr. RING. Okay, that's a fair question. I never—I'd always hear the term "warehouse," that prisoners were warehoused in Federal prisons or in prison, and I didn't know what that meant until I got there. You are just sitting there and there is nothing happening, so you are just looking at the clock and you are waiting to go home. There is no programming or anything like that so you find ways to make yourself busy.

As I said, if you had any skills, they atrophy, and you don't gain any new ones. So to me, being there itself is a complete waste, and letting people get back into their lives before they lose touch. People say what's an app? They are going to come out and have no idea what the world is like when they get out. So to me, the thing that you can do immediately is right-size some of these sentences. But it would be a mistake to think I don't think you have to do both. You absolutely, while they are there, however long they are going to be there, have programming. And one thing I think the problem is that if we just said let's increase programming across the board in Federal and State prison, that's a lot of money. We are going to have to own up to the fact that they are going to take a lot of resources to have the kind of programming that you want, and I think you have got to couple that by getting some savings from sentencing reform.

Mr. LIEU. Thank you. When I was in California State legislature and touching your point about having programs that deal with anger management and behavior therapy, I got an increase in funding to arts and corrections programs. And arts and corrections programs have been shown to reduce recidivism. It actually, in fact, teaches anger management and behavior therapy in a different sort of way. Nonprofit actors came, run by Tim Robbins and others who were doing it for free for quite a while and then scaled them up. It seems like we should do this in our Federal prisons, in addition to getting rid of mandatory sentences. It is my belief that we need to really reduce the recidivism rate if we actually really want to reduce the overall prison population.

With that, I yield back.

Chairman CHAFFETZ. I think the gentleman. I now recognize the gentlewoman from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you. I want to thank you and the ranking member for focusing on what is a really a rising bipartisan issue in Congress, I'm pleased to say. Mr. Lieu asked a question I was obligated to ask. I take it none of you would say it makes much sense and do not find prosecutors thinking it makes much sense to prosecute people for lower amounts of—for possession of lower amounts of marijuana. Is that the case?

Mr. MALCOLM. I gave the answer that I gave before. I think that it makes a very compelling argument, that there shouldn't be a violation of Federal law. But as a general matter, I believe the Federal laws, if they exist, should be enforced evenly and that—

Ms. NORTON. Well, so let me take you to the next answer, the harm that is done is not that there is any prosecutor in his right mind has so little crime that he goes after low level marijuana possession. The harm that is done is the arrest record. And what we find is throughout the United States, overwhelmingly the only, vir-

tually the only residents, here in the District of Columbia, 90 percent, of those who get arrest records for possession of small amounts of marijuana are people of color.

For a young man, especially of color, this is a bar for the rest of his life. Leave aside that it's marijuana, leave aside that it's not a conviction. What would you do, up front, about arrest records for low level offenders like this who are possessing for their own habit. By the way, this is a college town, half of those, the marijuana rate, smoking rate is the same for people of color and White people. We've got five or six universities in here. I don't remember seeing anybody get arrested.

Mr. LEVIN. I think citation certainly is a way to give someone—in Florida, they are doing juvenile and adult civil citation, so giving someone a citation certainly can address it rather than arrest them. And then the other issue—

Ms. NORTON. That citation, I take it, wouldn't be on his record, so the employer would say, well, you got a drug arrest, that's enough for me.

Mr. LEVIN. Provided probably that they complete whatever, they show up in court, they do whatever they are supposed to address the citation. The other thing is enabling people to get records sealed, if they do have a record, and we passed legislation in Texas to allow nondisclosure, so that way you can say on an employment application you haven't been convicted because you obtained an order of nondisclosure.

Ms. NORTON. Thank you. Senator Booker was here, and testified about the REDEEM Act. Very important juvenile expungement automatic. People, as it were, earned their way out of jail, simply by paying their time. Then they faced the problem of additional earnings. Have you thought about a way to earn your way to expungement or sealing of your record. For all we're doing, black boxes and the rest, when you see choices between people who have no record and people who do—whatever the merits of the people who have something of a record, that is a black mark. Is there a way, have you thought about a way for a person to actually earn expungement of that record?

Mr. LEVIN. Sure, and I wanted to distinguish in Texas, expunction is reserved generally if you are innocent, if you are acquitted, or the case is dismissed. But nondisclosure is a bit different, because the records aren't destroyed but law enforcement can still see them, prosecutors, certain licensing agencies, things like doctors, things that are very sensitive. But if you have a nondisclosure, which you can get, even if you are guilty, that means you have your records sealed after a certain number of years of living crime free, you can say, when you apply for jobs, that you haven't been convicted. Likewise, when you apply to rent an apartment. And we have also, by the way, passed legislation in Texas to say employers and landlords can't be sued for hiring and renting to ex offenders.

Ms. NORTON. Doesn't something of that kind serve as a kind of incentive not to commit more crimes? Has it been shown in any way? Is there any evidence that could then be used in other States?

Mr. LEVIN. Absolutely. Minnesota and Indiana passed good ceiling laws in the last couple of years. And I will also tell you the evi-

dence shows if someone has been living crime free for 5 or 6 years in the community, they are no more likely to commit an offense than someone who never had a criminal record. So there is no value to these old records being publicly accessible.

Ms. NORTON. I can't say enough about incentives for people not to recidivate. Thank you very much, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentlewoman.

We will now recognize the gentleman from Missouri, Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman. And let me thank the witnesses for appearing today. The work that you do in the area of criminal justice reform is of vital importance. I'm eager to learn from your expertise.

On Friday, it was announced that President Obama as part of his plan to reform the criminal justice system, will be the first sitting President in history to visit a Federal prison, which will take place tomorrow. This unprecedented action prompted me to wonder whether those of us in Congress should consider doing the same?

And as a bit of background in my days in the Missouri State legislature, I was the chairman of our prison committee, so I've visited numerous State prisons, I have not visited a Federal prison. I would like to throw that question out to anyone on the panel on what you think the redeeming benefit would be of a Member of Congress going to visit Federal prison, let's start with Ms. Ryan.

Ms. RYAN. I think that would be great, because I think that you would be highlighting some of these issues in a very personal way. I would encourage you to go to the BOP facility in Lewisburg, Pennsylvania. That is one of the most abusive and heinous places in the Bureau of Prisons. Young people who are incarcerated there in their late teens and early 20s are subjected to very harsh and punitive actions by guards and placed in solitary confinement. So if you're going to pick one place, I hope you'll start there.

Mr. CLAY. How about the family members that go to visit? How are they treated?

Ms. RYAN. I'm not as familiar with how the family members are treated, but the stories that we get through letters and calls usually come from the family members. They often will share information, but what they tell us is that if they show up and they're wearing the wrong thing or they've got—they came at, you know, a couple minutes late, they're not allowed in, and that's really difficult.

And I think the point that Kevin made about families being very, very far from where inmates are held is also another huge issue.

Mr. LEVIN. Can I add?

Mr. CLAY. Yes.

Mr. LEVIN. I just got from back from touring prisons in Germany, and one of the interesting things we saw is probation officers come into the prison a month or two in advance to help that inmate start looking for a job and identify housing even before they start supervising them after they're released, which they actually do supervise them. And I'll also tell you our chair of the Senate Criminal Justice Committee in Texas, John Whitmire, he not only visits prisons, but he shows up unannounced.

Mr. CLAY. Mr. Ring.

Mr. RING. Please go and please show up unannounced. If you say you're coming, the whole dog-and-pony show will get put on for

you. When we're on the inside, all of a sudden we get new shower curtains that the mold is gone, and everybody's working real hard and looking busy, and it's really—it's Potemkin Village. There's no reason to go if you're going to go that way, but I urge you to go.

Mr. CLAY. What—

Mr. TOLMAN. Let me—if I might—

Mr. CLAY. Yeah. Go ahead.

Mr. TOLMAN. If I might add, when I was congressional staffer, I accompanied Senators to Guantanamo Bay, in which they were going to reveal to us their methods of interrogation. It was far different than we would later learn occurred in those interrogations. And so I echo the unannounced visits, but I would say, more importantly, require reporting. Get into the actual data that shows you what is going on and dig through the data that's going on in those prisons.

Mr. CLAY. And what do you think would surprise a Member of Congress most if we made an unannounced visit to a prison? Mr. Ring?

Mr. RING. I would just say the lack of the sort of concern. I think that people are pretty much—and, again, I was in a camp, but we only had a couple guards. I mean, we could walk out the fence if we wanted to. I mean, there was a level of trust because we were considered the least risk, but just how little there is going on in terms of programming, activity, like sort of, I don't know, beneficial activity, anything along those lines, just—I think people say, well, it's good, it's boring. That doesn't sound bad. I'd like to be bored. But it's sort of a mind-wasting boredom. And if there's nothing productive to do with your time, I think people turn even more anti-social than they were when they get there, which is part of the problem.

Mr. CLAY. So there's no real effort toward rehabilitation, then, in our Federal system?

Mr. RING. That was my experience, and I think it's a product not only of—part of it is a product of budget. I mean, I don't think—I don't know if they know the programs. I don't see a lot of evaluation of the effectiveness of the programs they are running. As Mr. Tolman said, get reporting on this stuff. If we're going to fund more programs, see what works and doesn't work, and be willing to go a different direction.

Mr. CLAY. I think my time is up.

Chairman CHAFFETZ. I thank the gentleman.

People on my Facebook page think I should probably—think I should be there a little more often for a longer period of time, yeah. So, yeah, maybe we should just announce that we're coming and we don't need to actually show up, and get some new curtains, so—that was a good line of questioning.

All right. We'll go to the gentlewoman from New Mexico, Ms. Lujan Grisham, for 5 minutes.

Ms. LUJAN GRISHAM. Thank you, Mr. Chairman, for this important hearing. And I want to thank the panel. And I really want to, again, as we're focusing on recidivism so that we are looking at what populations ought to be incarcerated and for what reasons, and what we do about that in this country as we look at broad-based criminal justice reform, I hope this is a stepping off place to



do that. I think it's really important to recognize that our criminal justice system is a place where, in my opinion, we are warehousing a mental health population. Given today in this country, we've got almost 8-1/2 million Americans who have both a mental health-diagnosed disorder and a substance abuse issue; these co-occurring issues we know unfortunately go hand in hand, given the lack of resources for this population.

And we also know that as a result of that substance abuse issue, that we are not only holding and then treating those behavior health issues, the fact that we don't deal with them on the front end, we're dealing with them in jails, we don't deal with them on the back end either, so once you serve your time and you're out, we aren't doing anything to resolve those drug addiction and the issues associated with having a mental illness. And until this country does something about behavioral health issues, I fear that we can make lots of adjustments to the criminal justice system, but we are still going to have it as a de facto environment for institutional care for this population.

Given that, and given that we know that the resources we could make lots of discussions—we should have lots of discussions, but in New Mexico, we pay higher than the national average, I think it's \$30,000 a year for an inmate, we pay \$34,000, and yet we pay \$7,300 annually on public education for a student. So I think about my State where we're having so many issues, if we were reversing those investments. And when I was a Bernalillo County commissioner, we would have loved to reinvest those resources, because we just don't have them in the criminal justice system.

You started to explore in looking at incentives in the conversation earlier in the hearing. What else are States doing to try to address the behavioral health issues? For example, New Mexico is just now working on Medicaid enrollment while you are serving time, so as you come out, we've got an insurance program to make sure that you're getting access. That's not, in and of itself, garnering productive access, but it's a step in the right direction. Are there other measures that we can look at that would be best practices to begin to deal with, on the front end and the back end, behavioral health issues for this population?

Mr. MALCOLM. Congresswoman, it's a very important point. I mean, ever since we had the deinstitutionalization movement in the '1960s and '1970s, a lot of people who used to be treated involuntarily are now in the streets, in our communities, and there are inadequate amounts of money that are spent on outpatient, you know, behavioral and mental health services for those people, and a number of them, of course, end up committing crimes, and that poses a real problem for the safety and security of those who are in prisons, since dealing with people who have mental and behavioral issues is a very different type of problem than the—your standard inmate that doesn't have these problems.

States can address these with things like mental health courts, veterans courts, since our returning veterans suffer from emotional disorders that are unique to the experiences that they have had, that try to get them the help on the front end.

Ms. LUJAN GRISHAM. And I don't mean to interrupt you. You're on the right track, I totally agree, but these are also States, par-

ticularly with the mental health courts that have a behavioral health system, including mandated outpatient treatment programs which New York launched early and other States have struggled to get the sort of civil rights aspect of that correct, but if you have also best practices that marry those behavior—whole services with those systems, I'd be really interested in the States that are doing the best at that, since 80 percent of this population gets back in the criminal justice system, and clear that they're not getting what they need once they've been released.

Mr. MALCOLM. Well, you know, my colleague, Mr. Levin, could better address what each State is doing. I would say that States are not uniform and that there are—you know, different States have different environments, and perhaps should adapt the solutions that work best for them. So for instance, there's been a reference made to the Hawaii Hope Program, which is tied to methamphetamine, while other similar programs in the Dakotas, for instance, the 24/7 Program, address alcohol problems, which are the large problems in those States. Each State has to adapt their programs to their conditions, and they should study those results rigorously and share them with other States, who may be able to replicate those results.

Ms. LUJAN GRISHAM. Thank you. My time has expired, but Mr. Chairman, perhaps we could get a list of those and think about whether there's a Federal, so you can create some uniformity and really create the right kind of environment for reform.

Chairman CHAFFETZ. I thank the gentlewoman.

I now recognize the gentleman from California, Mr. DeSaulnier, for 5 minutes.

Mr. DESAULNIER. Thank you, Mr. Chairman. I first want to thank you and the ranking member. I frequently say that as a freshman, we have a lot of surreal moments. This is one of those surreal moments in this committee that I, having served a lot of time in politics in California and been in the State legislature and having chaired the Budget Subcommittee when we were told by the Federal courts that we needed to remove 45,000 of our inmates in the California Department of Corrections, and I was given the assignment only because no one else in the legislature was dumb enough to do it.

So I remember, during that period, visiting State prisons and I remember standing outside of San Quentin, which was next to my congressional district, and the warden is now retired that was there then, but he was a tough old ranger, had been the warden at San Quentin twice, and a long time at Pelican Bay, and we were standing outside on the San Francisco Bay and he said, You know, if you told most of your constituents that what we're doing is making them less safe by doing what we do when we incarcerate these individuals, it would change the political dynamic quite a bit. And he said this in the tone of somebody who had spent 35 years at the Department of Corrections starting as a line officer.

So my question, maybe Mr. Levin first and Mr. Malcolm, is, we spent a lot of time in those hearings with Washington State, who had the Institute for Public Policy, which was an MOU between their legislature and the administration, and Cleveland State University, and they started on evidence-based practices 20 years ago

in Washington State about, we're going to depoliticize a lot of this. The legislature's still going to make the decisions, so they're not off the hook, but we're going to give them enough evidence-based research that gives the public the confidence that these are the right investments to make so that you're not driven by being afraid of being Willie Horton'd in a primary or general election.

So how do we do that at the Federal level, or maybe we're right on the cusp of doing that, that we rely enough on evidence-based research that we do what's the best investment from a policy standpoint to make sure that the public is, in fact, safe at the lowest possible cost? Mr. Levin?

Mr. LEVIN. Well, that's a great question. And we've used the work of the Washington State Institute for Public Policy, their cost-benefit analysis and matrix of programs that reduce recidivism, and you can kind of look at the other step in that is to match the right program with the right offender with a risk-and-needs assessment.

And obviously at the Federal level, you have things like the General Accounting Office that provide objective information. Maybe there's a way to expand their role in evaluating. I think having an independent outside the Federal Bureau of Prisons to evaluate whether programs are effective or not in reducing recidivism, which programs we may need more of. And you have to do it in an objective manner, because you have to look at who's going into the program, what is their risk level. You don't want to just have an incentive to put the lowest risk people in a program to show results. You actually want programs to really intervene with those who would otherwise be at the highest risk of recidivism.

And I just—your anecdote about the San Quentin warden really rang a bell with me, and as well as the things that you said, Kevin, because, you know, I was talking to some people with the Prison Entrepreneurship Program, where they go in with executives and help inmates develop business plans. But they said, when some of these inmates come out, they first go to—their first meal in a restaurant, they just stare at the menu, because they can't figure out what to order, because they haven't had to make any choices this whole time they were in prison. And as I was in Germany, I saw, for example, they had communal kitchens. They would pick out ingredients and make some of their own meals. That's just one can example of many where they did take on more responsibility. And they have in statute there that the prison should be as much as possible like general society so these people are prepared to live when they return.

Mr. MALCOLM. I would say, Congressman, that States and the Federal Government should obviously do everything they can to avoid what happened in California, being forced to release large numbers of prisoners through the Plata decision. And, look, with respect to avoiding Willie Hortons, there are a lot of very brave governors in red States, blue States, and purple States that have touched the third rail of running the risk of being soft on crime. Governor Deal was referred to, but you could also refer to former Governor Perry and Governor Haley and, you know, the Governors who appeared here yesterday to testify before you. And they are, you know, taking a methodical approach.

I would say that bringing in best practices, that whatever it is you do, it has to be measured, it has to be constantly reevaluated, and it must be statistically valid and scientifically sound, or else you are just putting a Band-Aid and making it seem as if you are doing something that will ultimately not result in reductions of recidivism and will not enhance public safety.

Mr. DESAULNIER. And I will just say we have a very visible case right now, an unfortunate murder on the waterfront in San Francisco, and it's become so politicized. It would be nice to be able to have an organization, and this involves—because it involves immigration and Federal authorities, that could go in and do a forensic, sort of like the chemical industry does, just do a forensic root cause of what—why did this happen and what do we do to fix it? And I'm unaware of something in this field that would be able to do, for instance, in the case of Catherine Steinle, who was a 32-year-old, unfortunately murdered by someone who was here illegally, and now it's—it's cut off this storm of politics unfortunately around this great tragedy as opposed to what did the—what did the immigration folks do that they should have done correctly, what did the Federal Bureau of Prisons do that they should have done correctly, and what do sanctuary cities have to do with this, and a less dispassionate, more forensic evidence-based research so we could fix it, because you have to wonder how many of those situations—how many people have been deported five times, got back in the country, and there but for the grace of God we would have had another tragedy like that.

With that, I would yield back.

Chairman CHAFFETZ. Thank the gentleman.

Mr. Cummings and I have a few more questions, and then we'll be at the halfway point. We're getting near the end here.

I now recognize Mr. Cummings, the ranking member, for 5 minutes.

Mr. CUMMINGS. Thank you very much.

Your testimony has been extremely helpful. I think one of the things that I'm most concerned about, and I just want to get your opinions on this. I've often said that there are transformative moments in our lives when you know that all the stars are aligned, you see the problem clearly, and you know that if you don't correct it at that moment, it only gets worse. What do you all see? I mean, you see the Congress and the Senate seem to be coming together, and you see—I mean, would you agree with me that if we can't get it done now, it's going to be kind of hard to get it done? Mr. Tolman?

Mr. TOLMAN. I wholeheartedly agree. I'm worried about that, because there are a lot of dynamics and politics does get in the way, but you're correct. I believe that we're now seeing the problem. We're looking back and we're seeing a culture of punishment that we had hoped would root out criminal trends, but instead, what that culture of punishment has resulted in is problems that are far more difficult to take care of, and now is the time, or else we will be, similar to California, having missed our legislative opportunities to fix it.

Mr. CUMMINGS. Anybody else?

Mr. LEVIN. Well, I mean, I think you're absolutely right. We've seen kind of—you know, you described, and we've described all these different States where legislators have come together. Some of these States have passed reforms unanimously, in other States it's been a few votes short of unanimous, and so it is fairly rare. And obviously, we've seen so many bills in Congress with kind of unlikely cosponsors. So I believe that people who say that nothing can get done in Washington, I think we have a great chance to prove them wrong this year.

Mr. CUMMINGS. Ms. Ryan, you know, you talked about Lewisburg. I remember visiting Lewisburg to see an inmate years ago, many years ago. It's interesting that that prison could earn such a reputation, but apparently a lot has changed. You know, it seems to me if I were running an institution and it had—and I know—and I'm sure the Bureau of Prisons is looking in on this now, I hope so anyway, you know, and I had a prison like that that has that kind of rep, I mean, what does it take to reverse that other than, I mean, the spot visits or—and what are the questions that one asks? I mean, what can we do to correct that kind of situation? We are—we are elected by the people to make—and this committee is to make sure that government operates properly. And it would be, I think, legislative malpractice if we did not do what was appropriate, assuming that we know what to do. And so, what advice would you give us?

Ms. RYAN. I think there's a number of things that you can do. And I think it's great that this is an oversight committee, because that's really what's needed for the Federal Bureau of Prisons, is much more vociferous oversight. And the point of having surprise inspections is really true. I think if they know you're coming, they're going to put on a show.

And the other piece that you have to be concerned about is retaliation against anyone who's incarcerated there. So you can't just talk to a couple people here and there and you can't do it in the presence of guards. You have to talk to everybody, you have to stay for a couple days. And doing that takes a lot of time and energy. I would encourage you to establish an independent oversight board of the Bureau of Prisons that has this kind of function. And that I would encourage you to have directly-affected family members as members of that board, because you will learn a lot more from the families who have loved ones in these institutions. And then I think, ultimately, we have to stop investing in things that don't work. I mean, all of this talk about investment in what works is great, but we continue to invest in things that don't work, like trying kids in adult court, putting people in institutions where they're subjected to inhumane confinement. We know solitary confinement is harsh and punitive. We should stop doing that. So those would be the things I would start with.

Mr. LEVIN. Can I also just add, one thing that came up earlier, with regard to people pleading to things that they didn't actually do, I think the open vial policy, which we've adopted in Texas, it's also in the Safe Act, is very important. That allows the defense to see exculpatory evidence, to have transparency. And obviously, there's things that need to be redacted dealing with victims and homeland security, but in general, there ought to be—and the rea-

son this came about in Texas, it's called the Michael Morton Act, because this man served 26 years in prison, he didn't kill his wife, he never committed any crime, and he helped then pass this legislation.

Mr. CUMMINGS. You know, Mr. Ring, I can't help but think about what you said about family. As a father of two beautiful daughters myself, I know it has to be difficult. And you admit that you had it easier than most people. People in my neighborhood, they go to hard time, they have hard time. You know, it's painful.

I was sitting here and I was thinking about marijuana. I've got people in my neighborhood serving 2, 3, 4 years for marijuana, then they turn on the television and they're buying it in Colorado. What kind of justice system is that? You know, and going back to, I think you said it, folks aren't—you know, they're not looking at the penalties and all that, but they do know one thing, when they turn on the television, they see people sitting in a bar with dollar bills buying marijuana, and they've got cousins sitting in jail. They don't understand that.

And I'm just wondering, how do—how do we deal with the family thing? I mean—because we heard a lot of testimony about people who have—adults who have children, there's millions of them, that are finding it very difficult. So what—I mean, what do you have to say about that? And what's your organization doing to deal with that? I mean, you know, I've often said that, Mr. Ring, out of our pain quite often comes our passion to do our purpose: pain, passion, purpose. And, you know, I'm sure that you saw a lot—you felt a lot of pain. You just got a sample of the pain that a lot of other people are going through. And I'm not trying to minimize it, don't get me wrong, but can you give me some—help me with that?

Mr. RING. Yeah. I was always cognizant of how good I had it. I had a shorter sentence. You learn not to talk about your sentence if you had a shorter one. I lived with bunkmates who had 15 years, 10 years. I remember one time a guy saying to me—you know, it was getting short and he started—he started losing his mind a little bit because he was getting nervous, and we had a talk one time. Actually, I was going through a bad time and he was counseling me, and he said, you don't know my life. He said, you're just dying to get back to your neighborhood and to your kids and your house and your job.

They're all waiting for you. He goes, I'm going to go back to my neighborhood, and all my old friends are going to want to get me back in the game, because they drug runners, and he was deathly afraid of that. He was one of those people you meet that was so institutionalized, I do think there was a big chunk of him that thought he was better off there, because he had been there for 8 years, his wife was taking care of the kids, they were there without him. He almost knew that that status quo worked, and he could live in prison. He was so scared about going out. That's a terrible situation if we come to that point where he thinks he's better off in jail.

In terms—there's no policy, I think, that fixes that. I think you can do a better job of keeping people closer together and programs that work on parenting, and—but I think it's a cultural thing. I think we're very vengeful people. I think that even people who

have, you know, minor convictions, when they go for a job application, people look at you funny. I know a lot of people who—you know, again, it wasn't my experience, but didn't get jobs. If it's down to you and somebody else, you're tossed out.

So I think it's bigger, broader, cultural. I think in the same way you've seen other movements, normalized different sort of things in our country, what we did with smoking, what we did with gay rights, other things. With prisoners, there has to be a sense that you're coming back, we want you back, and we're going to welcome you in society in a way that makes you productive, because it's in our interest too, but that is not something you can legislate, I don't think.

Mr. CUMMINGS. You know, one of the things I—you know, it's amazing how as you're on earth for a while you do so many things, and one of the things that I—you know, had different jobs, and one of the things—two things I did, was when I first came out of law school, I taught in a prison, in the Maryland Penitentiary for 2 years, as a matter of fact. Just an ad hoc, you know, just a little course on, of all things, criminal justice. And it's interesting that later on, I hired some folk who had gotten out of prison who I had taught.

And I noticed something very interesting, that I think prison does something to people, because I think because they're told when to sit, when to go to the bathroom, whatever, it's some—I mean, maybe not for you, but for people that have been there a long time, they have no concept of, some of them, no time, of responsibility, of a lot of things that—and I don't know that people know that prison does have—it's more than just locking up the body; it also quite often, and you were alluding to that, affects the mind. I know people who have come out after many years, and they don't even want to come out of their house, they don't even want to come out of their house, because they—it's—they become so conditioned.

Would you—I mean, any of you want to comment on that? I had a whole other line of questions, but I'm kind of—but I do—

Mr. TOLMAN. I had a conversation with a Federal judge fairly recently that has sentenced some significant sentences, and he said to me in a moment of candor, you know what prosecutors have forgotten? And I said, no. And he said, how long 2 years actually is. Because the sentences you seek as a prosecutor often—you think of 2 years as a minimal sentence, and perhaps a failure in your case. You think of 8 and 10, and these numbers become almost badges of—of an acceptance in the community that you're in as a prosecutor. And this judge said—you know, who's been on the bench a while, he said, we've forgotten how long 2 years is.

Mr. CUMMINGS. Wow.

Mr. Chairman, just one other thing. I don't know if we got this in the record. The ACLU written testimony, American Civil Liberties Union, House Oversight, dated July 15. I'd like to have that submitted.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CUMMINGS. I yield back.

Chairman CHAFFETZ. This has been a very productive 2 days. We've had three good panels, good quality discussion, we've talked about a whole variety of topics.

If there are additional materials, additional statements that you would like us to review that could inform us, we'd appreciate that, everything from drug rehabilitation, I think the point made about the mental health issues and how we're not assessing those, not dealing with those in so many of these people who have mental health problems are ending up in our system and dealing with law enforcement on a regular basis. Very interested in Texas and what they're doing with the sort of client choice. There could be nothing worse than to know or feel you're innocent, or at least you want a good quality trial, and you get assigned a public defender who's not up to the case and doesn't seem to care about you. You ought to have some choice. I just believe in that type of principle. It's probably true in this instance as well.

I'm intrigued by this oversight of the Bureau of Prisons, because we are only as good as the information we get. And we get spread very thin. The inspector general, in this case, I think, does a good job, but even they are spread thin on this issue.

And one thing that I would like to be addressed, and if you can follow up with me on, and we haven't really talked about this, but there are victims' rights. You know, there are victims on a lot of these crimes. Not everybody in prison is innocent. There are a lot of people that have been harmed. And I think we—to complete the circle to totally tackle this in a thoughtful way, I think we also need to address victims' rights.

And if you have additional thoughts or perspectives on that, we haven't really heard that in the last 3 days, but that too, in the completeness—the fullness of the discussion and trying to get this right, we but get very few opportunities to address these things. Hopefully I would encourage, I've been a participant, I've worked hand in glove across the aisle and in a bicameral way to get legislation passed, and then it won't be addressed for a long time, and so we have but one chance, and I want to get it right. Whether it's a series of bills or a bill, I do hope we come together and that we can push this. And I think you've seen a broad bipartisan support; not just one or two people, very broad bipartisan support. We need to keep that momentum going.

So we thank you all today for your expertise, what you've given to your country, your patriotism, and we thank you. This committee stands adjourned.

[Whereupon, at 12:31 p.m., the committee was adjourned.]



## **APPENDIX**

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MATERIAL SUBMITTED FOR THE HEARING RECORD

February 2015

The Sentencing Project: "***Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System***" can be found here:

[http://sentencingproject.org/doc/publications/rd\\_Black\\_Lives\\_Matter.pdf](http://sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf)



Written statement of Human Rights Watch

to

The United States House of Representatives  
Committee on Oversight and Government Reform

**“Criminal Justice Reform”**

July 14, 2015

Chairman Chaffetz, Ranking member Cummings, members of the Committee, thank you for the opportunity to submit a statement to the Committee on the topic of criminal justice reform.

Human Rights Watch is an independent, international organization that works in more than 90 countries around the world as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all. We scrupulously investigate abuses, expose the facts widely, and press those with power to respect rights and secure justice. Within the United States, we have long worked on domestic human rights concerns, including in the area of criminal justice.

The attention that this Committee and others are paying to the issue of criminal justice reform is a highly positive development, and one that is long overdue. We offer the comments below in the hopes of informing reform efforts, to ensure that they address the key underlying causes of many of the problems—excessive sentencing, mass incarceration—that this Committee and others are examining.

In particular, we wish to emphasize the importance of restraining prosecutorial power in federal drug cases in criminal justice reform. Prosecutorial discretion is important to securing justice. But mandatory drug sentencing laws have given prosecutors too much power—they are able to strong-arm drug defendants by offering them a choice: significantly shorter prison terms if they plead guilty and excessively severe sentences if they go to trial. Coerced pleas and disproportionately harsh sentences should not be part of federal criminal justice.

In December of 2013, Human Rights Watch released [“An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty,”](https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead-guilty) a report that details how prosecutors extract guilty pleas from federal drug defendants by charging or threatening to charge them with offenses carrying harsh mandatory sentences and by seeking or threatening to charge them with additional mandatory sentencing enhancements.<sup>1</sup> Prosecutors acknowledge that their plea bargaining offers are made with an eye to securing pleas and without regard to whether the resulting sentences would be fair or proportional to the defendant’s alleged criminal conduct.

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<sup>1</sup> Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, December 2013, <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead-guilty>

When Congress enacted the current mandatory sentencing scheme, it did not intend to provide prosecutors a bludgeon to coerce defendants into pleading. Yet that has been the effect. Today 97 percent of federal drug defendants plead guilty, an increase of 40 percent from the early 1980s, before mandatory drug sentences were enacted.<sup>2</sup> Prosecutors make good on their threats for those few defendants who have the temerity to insist on their right to trial. If they go to trial, and are convicted, they receive sentences on average three times as long as those who accept a plea bargain.<sup>3</sup>

Prosecutors are able to coerce plea bargains by threatening defendants with: mandatory minimum sentences based on drug quantity; mandatory sentencing enhancements for drug offenders with one or more prior convictions; and mandatory sentences consecutive to the drug sentences when a firearm was involved in the drug offense. Prosecutors and defense counsel know that the mandatory nature of the drug sentences and enhancements will preclude judges from imposing sentences that are better tailored to the defendant's conduct and role in the offense. Armed with mandatory sentences keyed to the charges they file, prosecutors—who represent the executive branch—have, in effect, been able to assume a sentencing function that rightly belongs with the judiciary. Judges cannot countermand prosecutorial decisions that yield disproportionately long or cruelly excessive sentences.

“An Offer You Can't Refuse” contains many examples of unjustifiably long sentences that resulted from prosecutorial decisions. For example, Sandra Avery, a small-time drug dealer, rejected a plea of 10 years for possessing 50 grams of crack cocaine with intent to deliver. The prosecutor triggered a sentencing enhancement based on her prior convictions for simple drug possession, and Avery was sentenced to life without parole.<sup>4</sup>

#### Sentencing cudgels in the prosecutor's toolbox

##### Mandatory minimum sentences based on drug weights

Most federal drug defendants are prosecuted under laws which key five- and ten-year minimum sentences to the weight of the drugs involved in the offense, regardless of the

<sup>2</sup> Out of more than 25,000 convicted federal drug defendants in 2012, only 771 were convicted after trial. USSC, 2012 Sourcebook, “Table 38: Plea and Trial Rates of Drug Offenders in Each Drug Type, Fiscal Year 2012,”

[http://www.usc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table38.pdf](http://www.usc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table38.pdf) (accessed July 13, 2013).

<sup>3</sup> Human Rights Watch, *An Offer You Can't Refuse*, p. 102.

<sup>4</sup> Information on the case of Sandra Avery obtained from documents filed in *United States v. Avery*, United States District Court for the Middle District of Florida, Case No. 8:05-CR-389, which are available on PACER; from Human Rights Watch correspondence with Avery; and from Human Rights Watch telephone interview with James Preston, federal prosecutor, Middle District of Florida, August 6, 2013.

defendant's role or culpability. While Congress apparently intended the five- and ten-year sentences to be minimum sentences for mid- and senior-level figures in the drug business, prosecutors routinely seek them for low-level players as well.

Depending on how prosecutors choose to exercise their charging discretion, someone hired to drive a box of drugs across town, for example, can face the same mandatory sentence as the major trafficker who orchestrated the delivery and was caught with the box. Take, for example, Jamel Dossie, a 20-year-old small-time street-level drug dealer's assistant who earned about \$140 for acting as a go-between in four hand-to-hand sales totaling 88 grams of crack. Prosecutors charged him with an offense carrying a five-year mandatory minimum.<sup>5</sup>

At least half of convicted federal drug defendants were sentenced under federal laws mandating five- or ten-year mandatory minimum sentences.<sup>6</sup> But those who plead guilty have sentences that are on average 11 years shorter than those convicted after trial. In some cases—there is no data indicating how many—as part of a plea agreement prosecutors drop charges from one containing a ten-year mandatory minimum to one with a five-year mandatory minimum. Prosecutors also offer defendants sentencing relief if they agree to provide substantial assistance to the government in prosecuting other cases. Plea agreements may also contain an assurance that even though mandatory minimum charges are retained, the prosecutors will support a lower guideline sentence. Our interviews with judges, defense attorneys, and prosecutors made clear that offering defendants who face mandatory minimum sentences some sort of sentencing concession is a common practice in plea bargains. But, as one former US Attorney told us, “If you reject the plea, we’ll throw everything at you. We won’t think about what is a ‘just’ sentence.”<sup>7</sup>

#### Mandatory sentences for prior drug convictions

When prosecutors file an information with the court to secure a prior drug felony sentencing enhancement based on a drug defendant's prior record (also referred to as an “851” because of the statutory provision<sup>8</sup> that authorizes it), they greatly increase the mandatory sentence the defendant would face. Prosecutors have complete discretion

<sup>5</sup> *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).

<sup>6</sup> United States Sentencing Commission, 2014 Sourcebook of Federal Sentencing Statistics, [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table\\_43.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table_43.pdf) (accessed July 13, 2015), Table 43: Drug Offenders Receiving Mandatory Minimums in Each Drug Type.

<sup>7</sup> Human Rights Watch telephone interview with former US attorney (name withheld), Utah, April 25, 2013.

<sup>8</sup> 21 USC 851.

whether to file an information, but if they do and the defendant had qualifying prior convictions, judges have no choice but to impose the higher sentence upon conviction.<sup>9</sup> If the prosecutor chooses to file an information notifying the court of a single prior conviction, the defendant's sentence will be doubled, e.g., from ten years to 20. But if a prosecutor chooses to notify the court of two prior convictions, for a defendant facing a 10-year mandatory minimum based on the quantity of drugs in his case, the prosecutor will have required the judge to impose a mandatory sentence of life without parole.

Congress apparently intended the prior felony enhancements to ensure truly hardened, professional traffickers with long records received sufficient punishment. But the statute only requires that the prior convictions were punishable by one year or more—the defendant may never have actually served any time. And it does not require the prior offenses to be serious. In one case, prosecutors sought to enhance a defendant's sentence because he had a state conviction for simple possession of marijuana.<sup>10</sup> Moreover, the prior convictions could have happened decades ago: in another recent case, prosecutors sought to enhance a cocaine dealer's sentence based on a marijuana selling conviction that was more than 25 years old.<sup>11</sup>

In 2013, Human Rights Watch attended the sentencing hearing of a federal drug defendant in a multi-defendant cocaine trafficking conspiracy who had refused to plead guilty despite various sentencing inducements offered by the prosecutor. Shortly before trial, the government upped his minimum sentence from 10 years to life by filing a prior felony information with the court based on the defendant's two prior marijuana convictions. The government offered to withdraw the prior felony information if the defendant would plead. Not surprisingly, he did. As the judge noted, the defendant “buckled under [the] pressure and agreed to forgo a trial.”<sup>12</sup>

#### Mandatory sentences for weapon involvement

A third mandatory sentencing provision, referred to as 924(c), permits prosecutors to obtain additional consecutive sentences for a drug defendant if a weapon was involved in the drug offense. The first 924(c) conviction carries a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime; second and

<sup>9</sup> The only way for a defendant to avoid a sentence enhancement is to establish that the prior convictions are not valid or eligible to trigger the enhancement.

<sup>10</sup> Information on the case of Bill Oscar Lee obtained from court documents filed in *United States v. Lee*, United States District Court for the Northern District of Alabama, Case No. 5:10-CR-00313, which are available on PACER.

<sup>11</sup> *United States v. Berry*, 701 F.3d 374 (11th Cir. 2012).

<sup>12</sup> *United States v. Kupa*, No. 13-CR-345, 2013 U.S. Dist. LEXIS 146922, 56 (E.D.N.Y. 2013).

subsequent convictions each carry 25-year consecutive sentences—resulting in grotesquely long sentences for drug defendants when prosecutors “stack” the charges. For example, Marnail Washington, a 22-year-old with no criminal history, was sentenced to 40 years for conviction of possession with intent to distribute crack cocaine and two 924(c) counts.<sup>13</sup> The judge who was required to impose this “shockingly harsh” mandatory sentence said it was “the worst and most unconscionable” he had given in 23 years on the federal bench.<sup>14</sup> Again, prosecutors have complete discretion whether or not to pursue 924(c) charges, but judges have no choice but to impose the mandatory increase if they do.

### Recommendations

1. *Pass the SAFE Justice Act.* Introduced this month, H.R. 2944 (the SAFE Justice Act) would help to rein in the ability of federal prosecutors to threaten disproportionately long and unfair sentences. It would modify mandatory minimum sentences so that they exclude people whose role in a drug trafficking offense is low-level or minimal, and give judges more discretion through “safety valves” to impose sentences on drug offenders shorter than those required by mandatory minimums. Further, the SAFE Justice Act would narrow sentencing enhancements and require the acts that trigger them to be serious and recent before being used to double mandatory minimums. The Act would also reform 924(c) provisions on weapons involvement that would end the practice of “stacking” sentence enhancements.
2. *Codify 2013 Department of Justice charging directives and collect data on practices.* As of mid-2013, a directive issued by then-Attorney General Eric Holder instructed federal prosecutors to avoid charging offenses carrying mandatory minimums for certain low-level nonviolent offenders and also to avoid seeking mandatory sentencing enhancements based on prior convictions when the severe sentences are not warranted. There is little data to show whether these directives are being followed in practice. The Department of Justice should collect and disseminate data on charging practices that can help inform whether prosecutors are adjusting

<sup>13</sup> *United States v. Washington*, 301 F. Supp. 2d 1306 (M.D. Ala. 2004). Washington pled guilty to possessing different guns in connection with two different quantities of drugs in separate locations and on separate occasions six days apart, and was convicted of two stacked counts of violating § 924(c). The sentence therefore consisted of five years of imprisonment on the first § 924(c) count and 25 years of imprisonment on the second count, with those 30 years running consecutive to the underlying 10-year sentence.

<sup>14</sup> *Ibid.* at 1309.



their charging practices. But directives from the Attorney General are not binding and do not carry the force of law. Congress should codify these directives so that they are incorporated into the laws prosecutors are obliged to follow.



**Written Testimony of the American Civil Liberties Union to the  
House Oversight and Government Reform Committee**

*Hearing on Criminal Justice Reform  
Tuesday, July 14, and Wednesday, July 15, 2015*

**Submitted by the  
ACLU Washington Legislative Office  
ACLU Criminal Law Reform Project**

**For further information, please contact Ruthie Epstein, Legislative Policy Analyst,  
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The American Civil Liberties Union (ACLU) values the opportunity to provide testimony to the House Oversight and Government Reform Committee for its hearing on Criminal Justice Reform. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU fights in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

Today's hearing is an important one. Our nation's jails and prisons hold almost 2.3 million people on any given day,<sup>1</sup> at an annual cost to taxpayers of more than \$80 billion.<sup>2</sup> The criminal justice system disproportionately impacts African-Americans and Latinos, perpetuating a harmful legacy of racism that stretches back to our nation's founding. It has criminalized entire communities, often lacks fundamental due process protections for low-income people and people of color, in some cases hands down unreasonably long sentences, and makes it all but impossible for a formerly incarcerated person to rebuild his or her life after doing time – all the while wasting trillions of taxpayer dollars on efforts that have no clear connection to increasing public safety. It is time for change. Given this hearing's broad scope, we offer recommendations to Congress in five areas: sentencing, early release, re-entry and collateral consequences, police practices, and indigent defense.

#### **I. Sentencing**

The federal prison population has increased from approximately 25,000 in FY 1980 to slightly more than 208,000 today.<sup>3</sup> The budget of the federal Bureau of Prisons (BOP) has also doubled over the past decade, reaching \$7.2 billion in the President's FY 2016 budget request, approximately 25 percent of the overall budget of the Department of Justice (DOJ). Indeed, in 2014, the BOP's budget grew at

almost twice the rate of the budget of the rest of the DOJ.<sup>4</sup> Federal prisons are now at 125 percent of their capacity, with even higher overcrowding in medium- and high-security facilities. This overcrowding undermines staff and inmate safety, as well as prisoner rehabilitation.

Harsh sentencing, including mandatory minimums, has contributed to an unsustainable increase in the BOP population without any clear connection to an increase in crime control.<sup>5</sup> Data from the Urban Institute show that the number of federal drug offenders has doubled since 1994, and they now comprise half of the federal prison population. Last year, drug offenders were the largest group of federal offenders sentenced. Of the more than 22,000 sentenced in FY 2013, 60 percent faced mandatory minimum prison sentences of 5, 10, 20 years, or life without parole in federal prison. One in four of those offenders did not receive the mandatory minimum because they met the unnecessarily strict criteria of the drug “safety valve” at 18 U.S.C. § 3553(f), but far too many low-level, nonviolent drug offenders continue to receive mandatory minimum sentences that Congress intended for major and serious drug dealers and kingpins. Furthermore, mandatory minimum sentences defeat the purpose of sentencing by reducing judicial discretion and instead handing it to prosecutors, who then use the threat of lengthy sentences to frustrate defendants seeking to assert their constitutional rights.

Mandatory minimum drug sentencing reform is essential to reducing the Justice Department’s prison costs and creating a fairer criminal justice system. In order to address the central reason for the explosion in the federal prison population, the ACLU strongly supports the Smarter Sentencing Act (SSA) of 2015 (H.R. 920/S. 502) and the SAFE Justice Reinvestment Act of 2015 (H.R. 2944). A 2013 Urban Institute report estimated that reducing mandatory minimum sentences for certain drug offenders by half or more, as the SSA proposes, would have a monumental effect on the prison system. According to the Congressional Budget Office, passage of the SSA would save \$3 billion over 10 years.<sup>6</sup> DOJ found that the SSA would save \$24 billion over 20 years, including money taxpayers

would not have to spend to build new prisons and hire thousands of additional correctional officers. These savings could be used to increase rehabilitative programming in and out of prisons and bolster services for victims.

Current mandatory minimum drug sentences are too long, too expensive, and not contributing to enhanced public safety. While the SSA would change mandatory minimum sentences for drug traffickers, it is incorrect to conclude that all drug sellers and traffickers are therefore major and serious dealers and kingpins and violent criminals. The person most likely to receive a mandatory minimum sentence is a street-level dealer, not a high-level supplier or importer: 68 percent of street-level drug sellers convicted in FY 2010 received no relief from the mandatory minimum sentence, through either the safety valve or substantial assistance. These dealers are the assembly-line employees of the drug trade, easily and immediately replaced once they are arrested. The U.S. Sentencing Commission and other experts have found little incapacitative or deterrent value in giving these offenders lengthy mandatory minimum prison terms.

## **II. Early Release**

Reducing prisoners' actual time in institutional custody can also help to reduce the number of people in the federal prison system, and at the same time incentivize good behavior and educational and rehabilitative efforts for the prisoners themselves. Under the Sentencing Reform Act of 1984, Congress authorized BOP to request that a federal judge reduce an inmate's sentence for "extraordinary and compelling" circumstances, also known as "compassionate release." The request can be based on either medical or non-medical conditions that the judge could not reasonably have foreseen at the time of sentencing. In 2013, BOP expanded the medical criteria that can be considered for inmates seeking compassionate release. In addition, the Attorney General announced revised criteria for other

categories of inmates seeking reduced sentences, including older prisoners and certain inmates who are the only possible caregiver for their dependents.

Building on existing policy, Congress should clarify the statutory language allowing an inmate to earn good time credit of up to 54 days per year.<sup>7</sup> This change would save approximately \$400 million over ten years, according to BOP.<sup>8</sup> Congress should also implement a proposal supported by BOP that would create a new good time credit earned for successful participation in recidivism-reduction programs.<sup>9</sup>

### **III. Re-entry and Collateral Consequences**

More than 65 million adults in the United States have criminal records. These records carry collateral consequences that persist long after a person has completed his or her sentence, erecting numerous barriers for individuals who wish to rebuild their lives as productive members of society, and, perversely, contributing to recidivism at extremely high cost to taxpayers. These barriers limit their access to housing, temporary support via the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF), higher education, and employment – barriers that increase the likelihood that even the most well-intentioned returning citizens could recidivate and re-enter the prison system.

Public housing agencies and landlords providing federally subsidized housing have wide discretion to consider criminal records in tenant admission and termination decisions. Federal law permits them to deny housing to people with drug-related or other criminal histories, drug users, and alcohol users, whether or not those individuals truly present a threat to the safety of their neighbors. Federal law also requires a so-called “no-fault eviction” of any family with a household member who has been found to have engaged in “drug-related criminal activity on or off” the premises, a provision that would leave a grandmother homeless if her grandson is convicted of drug possession 20 miles

from their apartment. Congress should limit the discretion of public housing agencies and owners of federally assisted housing to deny housing to individuals with drug-related or other criminal histories, drug users, and alcohol users, except for those individuals who truly present a threat to public safety,<sup>10</sup> as well as repeal the “no-fault eviction” provision at 42 U.S.C. 1437d(1)(6).

Anyone with a state or federal felony drug conviction can also face a lifetime ban on receipt of SNAP or TANF cash assistance. These benefits provide crucial support for individuals on the brink of poverty, which is too often the case for people who have just left prison. Since 1996, the bans have affected hundreds of thousands of low-income individuals and their families. Congress should repeal the drug felon ban on SNAP and TANF cash assistance.<sup>11</sup>

Higher education, practically a requisite for economic solvency today, also remains elusive for people in prison and formerly incarcerated individuals. In particular, the Violent Crime Control and Law Enforcement Act of 1994 eliminated access to federal Pell Grants for people in state or federal prison. Before 1995, there were 350 college degree programs in prisons; a decade later, there were only 12. This sharp decline marks a profoundly wasted opportunity. A 2013 RAND Corporation study found that on average, “inmates who participated in correctional education programs had 43 percent lower odds of recidivating than inmates who did not.”<sup>12</sup> Congress should restore access to Pell Grants for individuals in federal and state prison, as proposed in the Restoring Education and Learning (REAL) Act of 2015 (H.R. 2521)<sup>13</sup>, and revisit statutory restrictions on access to federal financial aid for individuals with drug trafficking or possession records.

Finding a job can be the most challenging part of rebuilding life on the outside for a person who has spent years or decades in prison. Public and private employers nationwide rely on the Federal Bureau of Investigations’ fingerprint-based criminal records system. Between 2009 and 2013, about 120 million checks were conducted for non-criminal justice purposes, including the screening of

applicants for employment. Yet 50 percent of FBI records are incomplete. As a result, people whose records are inaccurate may be adversely impacted when they seek employment. To improve the reliability of the FBI criminal records system, Congress should support remedies proposed in the Fairness and Accuracy in Employment Background Checks Act of 2013.<sup>14</sup>

The ACLU supports the Record Expungement Designed to Enhance Employment (REDEEM) Act of 2015 (H.R. 1642/S. 675), which proposes some, though not all, of these important statutory fixes.<sup>15</sup>

In addition to the legal barriers, individuals leaving prison must adjust to freedom and an ever-changing society after years or decades on the inside. Effective counseling, meaningful substance abuse treatment, mentoring, education, and job training can provide invaluable assistance to ensure that formerly incarcerated people have the tools they need to rebuild their lives and avoid cycling back into the criminal justice system. To that end, Congress should support the Second Chance Reauthorization Act, robust appropriations for offender reentry programs and research at the U.S. Department of Justice as authorized by the Second Chance Act of 2007, and robust appropriations for the Reintegration of Ex-Offenders (RExO) program managed by the Employment & Training Administration at the U.S. Department of Labor.

#### **IV. Police Practices**

Recent incidents across the country – from Los Angeles to Cleveland, from Ferguson to New York City, and from North Charleston to Baltimore – offer an opportunity to change the culture of policing. This culture, as it currently exists in some cases, results in a relationship based on mistrust between law enforcement and low-income communities and communities of color.

Concerns range from racial profiling, to excessive use of force, to militarization of state and local law enforcement agencies. Yet we do not have a complete picture of domestic policing – the



stops, searches, arrests, excessive uses of force, and homicides by law enforcement – because we do not have data. As an example, in 2013 the FBI Uniform Crime Report indicates that there were 461 justifiable homicides by law enforcement, the highest in two decades. These numbers fail to represent the complete universe of police killings, however, because they are self-reported homicides.<sup>16</sup> The ACLU's May 2015 report *Picking Up the Pieces – Policing in America, a Minneapolis Case Study* found that African-Americans in Minneapolis are 8.7 times more likely than white people to be arrested for low-level offenses.<sup>17</sup> An earlier ACLU report, *The War on Marijuana in Black and White*, concluded that, on average, African-Americans are almost 4 times more likely than white people to be arrested for marijuana possession, even though the populations use marijuana at similar rates.<sup>18</sup> We also know that in at least 70 police departments, African-Americans are arrested at a rate 10 times greater than those who are not African-American.<sup>19</sup> All of these studies suggest some degree of bias in law enforcement. And certainly, as the situation in Ferguson demonstrates, there is a need for greater police force diversity. The Ferguson Police Department is 94 percent white in a town that is two-thirds black.<sup>20</sup>

In the immediate aftermath of the death of Michael Brown, the nation saw a highly and dangerously militarized response by law enforcement. Media reports indicate that the Ferguson Police Department, in conjunction with other state and local agencies, responded to protests and demonstrations with “armored vehicles, noise-based crowd-control devices, shotguns, M4 rifles like those used by forces in Iraq and Afghanistan, rubber-coated pellets, and tear gas.”<sup>21</sup> The protests and demonstrations that followed a grand jury's decision not to indict the police officer who killed Michael Brown were also met with armored vehicles.<sup>22</sup>

Militarized policing is not limited to situations like those in Ferguson or emergency situations – like riots, barricade and hostage scenarios, and active shooter or sniper situations – that Special

Weapons and Tactics (SWAT) teams were originally created for in the late 1960s.<sup>23</sup> Rather, SWAT teams are now overwhelmingly used to serve search warrants in drug investigations. The ACLU's June 2014 report *War Comes Home: The Excessive Militarization of American Policing* found that 79 percent of the incidents reviewed involved the use of a SWAT team to search a person's home, and more than 60 percent of the cases involved searches for drugs.<sup>24</sup>

We need comprehensive law enforcement reform. The controversies of the past year resulted in a White House Task Force on 21st Century Policing that offered recommendations in March, including to "collect, maintain, and report data to the Federal Government on all officer-involved shootings," to "adopt and enforce policies prohibiting profiling," that "training on use of force should emphasize de-escalation," and that there be "some form of civilian oversight of law enforcement," all consistent with ACLU recommendations.<sup>25</sup>

Congress should support implementation of the Task Force recommendations through current or new federal funding and programs that can incentivize police reforms. Crucial reforms include 1) the collection and reporting of data, that is disaggregated by race and sex, by state and local law enforcement and is regularly provided to a national federal database; 2) the prohibition of profiling and biased policing by state and local law enforcement; 3) the adoption of use of force policies that emphasize de-escalation by state and local law enforcement; 4) the implementation of body-worn cameras with the appropriate privacy protections by law enforcement; and 5) the installation of civilian review boards with meaningful authority in all communities. Additionally, Congress should eliminate federal resources for state and local procurement of military weapons and equipment, including the Department of Defense 1033 program, and prohibit the use of military weapons and associated equipment for immigration and border enforcement by Customs and Border Protection (CBP). Finally, Congress and the federal government should reform all federal policies and programs that encourage

unacceptable police practices at all levels, including civil asset forfeiture and entanglement of police with federal immigration enforcement, and lead by example in ensuring that all federal law enforcement agencies adopt best practices.

#### **V. Indigent Defense**

More than 50 years after *Gideon*, the promise of equal access to justice remains unfulfilled. In deciding *Gideon* in 1963,<sup>26</sup> the Supreme Court held that our Constitution guarantees the right to counsel for anyone accused of a felony offense, even if he or she cannot afford one. Subsequent Supreme Court decisions affirmed this mandate and went further, with the Court extending the right to counsel to those incarcerated for a misdemeanor offense in *Argersinger v. Hamlin*.<sup>27</sup>

Nevertheless, the right to counsel eludes many in our criminal justice system. Approximately 80 percent of criminal defendants cannot afford counsel.<sup>28</sup> Nationwide, public defenders or assigned counsel are ill equipped to meet this demand. They are often forced to juggle hundreds of cases at once, without resources to investigate, conduct legal research, or prepare in even the most basic fashion for hearings and trial. Often, public defenders meet their clients for the first time minutes before critical proceedings. In many courts around the country, cases are adjudicated without the presence of counsel at all. Additionally, public defenders frequently have far fewer resources than prosecutors armed with larger staffs and partnerships with local police departments.

Congress should 1) explore legislation that would create a national clearinghouse to support state and local indigent defense systems and provide training to improve the quality of representation provided to indigent clients<sup>29</sup>; 2) consider legislation that would give the Attorney General the authority to obtain appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct that deprives persons of their rights to assistance of counsel<sup>30</sup>; and 3) examine the impact of sequestration on federal public defender offices. In order for the federal public defender

system to continue serving as a model for indigent representation, funding may need to be restored to pre-sequestration levels.

Nationwide, the bipartisan commitment to criminal justice reform is strong. This Congress has a unique opportunity to transform this commitment into real change. The ACLU urges Congress to adopt our recommendations, which would help to increase fairness and justice at every stage in the system.

<sup>1</sup> This number includes almost 1.6 million individuals held in state and federal prisons, plus approximately 785,000 in county and city jails and 55,000 in U.S. Marshals custody., E. ANN CARSON, PH. D., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>; TODD D. MINTON & DANIELA GOLINELLI, PH.D, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2013 – STATISTICAL TABLES (2014) (Revised Aug. 12, 2014), available at <http://www.bjs.gov/content/pub/pdf/jim13st.pdf>; U.S. MARSHALS SERV., OFFICE OF PUB. AFFAIRS, FACT SHEET: FACTS AND FIGURES 2015, available at <http://www.usmarshals.gov/duties/factsheets/facts.pdf>. Congress funds U.S. Immigration and Customs Enforcement (ICE) to hold an additional 34,000 people in detention facilities daily, though ICE does not publicly release its daily detention population. For more information, see National Immigrant Justice Center, Eliminate the Detention Bed Quota, <http://www.immigrantjustice.org/eliminate-detention-bed-quota#.VO-1yfldU1J> (last visited July. 14, 2015).

<sup>2</sup> U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21<sup>ST</sup> CENTURY 1 (2013), available at <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> (hereinafter SMART ON CRIME).

<sup>3</sup> FEDERAL BUREAU OF PRISONS, STATISTICS: TOTAL FEDERAL INMATES, (2015), available at [http://www.bop.gov/about/statistics/population\\_statistics.jsp](http://www.bop.gov/about/statistics/population_statistics.jsp).

<sup>4</sup> MICHAEL E. HOROWITZ (INSPECTOR GENERAL, BUREAU OF PRISONS), TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DEPARTMENT OF JUSTICE 2014 (2014).

<sup>5</sup> DR. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 4 (2015), available at [https://www.brennancenter.org/sites/default/files/analysis/What\\_Caused\\_The\\_Crime\\_Decline.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf).

<sup>6</sup> [https://www.cbo.gov/sites/default/files/s1410\\_0.pdf](https://www.cbo.gov/sites/default/files/s1410_0.pdf).

<sup>7</sup> 18 U.S.C. § 3624(b).

<sup>8</sup> U.S. Gov't Accountability Office, Bureau of Prisons: Information on Efforts and Potential Options to Save Costs 46 (Sept. 2014) available at <http://www.gao.gov/assets/670/666254.pdf>.

<sup>9</sup> <http://www.colsontaskforce.org/wp-content/uploads/2015/01/SamuelsStatement-1-27-15.pdf>.

<sup>10</sup> The relevant provisions are located at 42 U.S.C. §§ 13661 and 13662. The U.S. Department of Housing and Urban Development has already urged public housing agencies and owners of federally assisted housing to balance legitimate concern for the safety of all residents with the importance of allowing formerly incarcerated individuals to reunite with their families, but it is not clear that this directive has led to measurable change in practice on the ground. See Letter from Shaun Donovan, Sec'y of Housing and Urban Dev., & Sandra B. Henriquez, Assistant Sec'y for Public Housing and Indian Housing, to PHA Executive Director (June 17, 2011), available at [http://csgjusticecenter.org/documents/0000/1130/HUD\\_letter.pdf](http://csgjusticecenter.org/documents/0000/1130/HUD_letter.pdf); Letter from Shaun Donovan, Sec'y of Housing and Urban Dev., & Carol J. Galante, Acting Assistant Sec'y for Housing to Owners and Agents (Mar. 30, 2012), available at [http://csgjusticecenter.org/documents/0000/1344/3.30.12\\_Mfamily\\_properties\\_Reentry\\_memo\\_6\\_2\\_.pdf](http://csgjusticecenter.org/documents/0000/1344/3.30.12_Mfamily_properties_Reentry_memo_6_2_.pdf).

<sup>11</sup> 21 U.S.C. § 862a.

<sup>12</sup> LOIS M. DAVIS, ET AL. RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION, p.xvi (2013), available at [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR200/RR266/RAND\\_RR266.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf).

- <sup>13</sup> H.R. 2521, 114th Cong. (2015).
- <sup>14</sup> H.R. 2865, 113th Cong. (2013). The Accurate Background Check Act of 2013, H.R. 2999, 113<sup>th</sup> Cong. (2013), also presents a good model.
- <sup>15</sup> H.R. 1642, 114th Cong. (2015); S.675, 114th Cong. (2015)
- <sup>16</sup> Kevin Johnson, *Police killings highest in two decades*, USA TODAY (Nov. 11, 2014), <http://www.usatoday.com/story/news/nation/2014/11/11/police-killings-hundreds/18818663/>.
- <sup>17</sup> ACLU, *PICKING UP THE PIECES – POLICING IN AMERICA, A MINNEAPOLIS CASE STUDY* (May 2015), available at <https://www.aclu.org/feature/picking-pieces>.
- <sup>18</sup> ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS*, 4 (June 2013), available at <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.
- <sup>19</sup> Brad Heath, *Racial gap in U.S. arrest rates: 'staggering disparity'*, USA TODAY (Nov. 19, 2014), available at, <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>.
- <sup>20</sup> Taylor Wofford, *After midterms, little changes in troubled Ferguson*, NEWSWEEK (Nov. 11, 2014), available at, <http://www.newsweek.com/after-midterms-little-change-troubled-ferguson-283777>.
- <sup>21</sup> David Nakamura & Niraj Chokshi, *Obama orders review of military equipment supplied to police*, WASH. POST (Aug. 23, 2014), available at, [http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390\\_story.html](http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390_story.html).
- <sup>22</sup> Representative Hank Johnson, Op-Ed., *Why does Ferguson still look like Iraq? Congress can stop the military police*, THE GUARDIAN (Nov. 26, 2014), available at, <http://www.theguardian.com/commentisfree/2014/nov/26/ferguson-congress-military-police-streets>.
- <sup>23</sup> DARYL GATES, CHIEF: MY LIFE IN THE LAPD 131 (Bantam, 1992). For an excellent summary of the creation and evolution of SWAT, see RADLEY BALKO, RISE OF THE WARRIOR COP (PublicAffairs, 2013).
- <sup>24</sup> ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING*, 3 (June 23, 2014), available at <https://www.aclu.org/sites/default/files/assets/jul14-warcomeshome-report-web-rel1.pdf>.
- <sup>25</sup> PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (Mar. 4 2015), available at [http://www.cops.usdoj.gov/pdf/taskforce/interim\\_tf\\_report.pdf](http://www.cops.usdoj.gov/pdf/taskforce/interim_tf_report.pdf). LAURA W. MURPHY, WRITTEN TESTIMONY OF THE AMERICAN CIVIL LIBERTIES UNION SUBMITTED TO THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING LISTENING SESSION ON BUILDING TRUST AND LEGITIMACY (Jan. 13, 2015), available at [https://www.aclu.org/sites/default/files/assets/testimony\\_of\\_aclu\\_laura\\_w\\_murphy\\_final\\_for\\_police\\_tf.pdf](https://www.aclu.org/sites/default/files/assets/testimony_of_aclu_laura_w_murphy_final_for_police_tf.pdf).
- <sup>26</sup> 372 U.S. 335 (1963).
- <sup>27</sup> 407 U.S. 25 (1972).
- <sup>28</sup> Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), available at, [http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?\\_r=0](http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?_r=0).
- <sup>29</sup> Representative Ted Deutch's (D-FL) National Center for the Right to Counsel Act, H.R. 2063, would create such a resource. H.R. 2063, 114th Cong. (2015).
- <sup>30</sup> The Gideon's Promise Act, S. 597, sponsored by Senator Patrick Leahy (D-VT) in the last Congress, would provide the Attorney General with this authority. S. 597, 113th Cong. (2013).