



Testimony: Jena 6 and the Role of Federal Intervention in Hate
Crimes and Race-Related Violence in Public Schools

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Dear Chairman John Conyers and Members of the House of Representatives
Judiciary Committee:

My name is Charles Ogletree. I am the Jesse Climenko Professor of Law at Harvard Law School. I am also founder and Executive Director of the Charles Hamilton Houston Institute for Race and Justice, also at Harvard Law School.

Charles Hamilton Houston was a native of Washington, D.C., a graduate of the M Street High School, now known as Dunbar High School and valedictorian at Amherst College before he began his career at Harvard Law School in 1919. Later, as vice-dean of Howard Law School, Houston was instrumental in developing the strategy employed by Thurgood Marshall, and many of Houston's other protégés, in *Brown v. Board of Education*. Charles Hamilton Houston played a pivotal role in ending Jim Crow segregation in America. He trained a generation of lawyers who went on to have a profound impact on eradicating enforced segregation and other racial injustices. As Executive Director of the Charles Hamilton Houston Institute for Race and Justice, I, with a staff of experts in the areas of education, housing, child development and criminal justice are attempting to carry on Houston's legacy in remedying racial inequalities in opportunity and related injustices in connected systems of education and criminal justice.

The House Judiciary Committee's decision to conduct hearings to examine recent incidents Jena, Louisiana, marks an important moment in history. As you know, Jena,

before 2006, was a quiet community of 3,000 people. In less than a year, the community became a lightning rod for accusations about racism and injustice. Jena became a stage on which our most stubborn social problems play out. These are long-standing challenges that are so complex and difficult to deal with rationally that we often take the more comfortable route and avoid engaging them. I applaud the Committee's fortitude in confronting our contemporary version of racial inequalities and unresolved race-related tensions that do not look so different from the sort Charles Hamilton Houston, his colleagues and students took on decades before.

My areas of expertise are civil rights and criminal justice. I have been teaching at Harvard Law School for the last 32 years. For eight years, I was a lawyer at the Public Defender Service here in Washington, DC. During the course of my practice and teaching, I have had the chance to not only represent clients, but to observe race and class disparities in education and criminal justice from a wide range of perspectives. As I look at what happened in Jena, Louisiana last year, and the implications of those incidents for shaping public policy, I see ample room for Congress to thoroughly investigate, better understand and then address the racial disparities and disparate treatment that are hallmarks of our educational and criminal justice systems in every corner of the United States. Both systems seem to me to require intervention on a variety of levels. Prior testimony at this hearing, along with material already in the Congressional record highlights some salient issues. I will point out a few of the most urgent and significant matters I think require attention. Then I will offer suggestions to help us move forward.

First, no public school in the United States should have a policy, either written or implicit, that reserves sections of the grounds for students of a certain race. It is unlikely that a modern-day school official would write a restriction of that nature down on paper. It is unlikely that any school board would be so ignorant as to pass such an ordinance. Such “official” regulations certainly did not exist in Jena. However, the mere fact that black students felt compelled to inquire of the school principal whether or not they were allowed on an particular area of public property is a clear signal that a more explicit discussion about race and access is required. No child of any race should be forced to encounter a school climate that is so hostile that a he or she might think that her skin color or, say, her native language or country of origin might limit where she could sit, stand, play or learn.

Second, and related to this “hostile environment” the incidents in Jena send out another alarm. We have failed at basic lessons of history if an American can blithely characterize hanging nooses on a tree as an innocent prank or practical joke, as some officials and parents in Jena have done. This is not an act that should be minimized, laughed off or chocked up to childhood shenanigans.

The history of lynching in the United States, most notably in the south, is not ancient. It has an especially intense emotional meaning to African Americans. With more than 3,000 people lynched from the late 1800’s through the early 1900’s -- children often attended such events as if they were carnivals¹ -- a noose today is a powerful symbol of American white supremacy and pure barbarism. Given the context, the noose, particularly

¹ Brundage, W. Fitzhugh. Lynching in the New South. University of Illinois Press. 1993.

to an African-American who knows his history, is nothing less than an expression of hatred. It is, too, a warning of impending violence and likely death.² Speaking as an African-American, I can say that the image of a noose is as frightening as it is enraging.

Moreover, if the students responsible for hanging the now infamous nooses in Jena are unable to appreciate the significant brutality of such an act, that lack of understanding should be addressed for the good of the collective community. If all that emerges from these unfortunate events are educators' more systematically informing community members and students about the shameful history of lynching that will be a positive step. We might view my suggestion as a community-level matter for local educators to address either by taking honest stock of school racial climate, enacting policies to enhance racial understanding, educating the community about racial history and establishing clear rules that take a strong stance against discrimination and racism and "hostile environments" in any form. This also seems to be an example of where a "restorative justice" approach to school discipline would be both appropriate and productive. In restorative justice approaches, the perpetrators of the crime must make amends to their victims, and undertake activities that help them more fully comprehend the impact of their actions on their community.³

It may be far easier for local officials in politicized school districts to take on these volatile issues and enact enlightened "restorative justice" approaches if national

² See, generally, Ogletree, Charles Jr., and Austin Sarat. From Lynch Mobs to the Killing State: Race and the Death Penalty in America. New York University Press. 2006.

³ See, for example, discussion of restorative models from Great Britain in Wilcox, Aidan and Carolyn Hoyle. The National Evaluation of the Youth Justice Board's Restorative Justice Projects. Centre for Criminological Research. University of Oxford. Youth Justice Board. 2004.

elected leaders encourage them to do so and if, the federal government offered incentives and endorsed examples of “best practice” programs and policies that might improve cross-racial relations and foster a climate of tolerance and a deeper understanding and appreciation between racial groups.

Third, we must also carefully and honestly consider the question of whether or not the black teens prosecuted in Jena were treated fairly, without regard to race or class. It is in that vein that the House Judiciary Committee can play a leading, important role in a variety of ways.

It is important for us to understand that Jena is not an isolated incident. Jena’s most important role is in lending drama and immediacy to a long-standing, worsening problem. National data on racial disparities in our school discipline and juvenile justice systems point to a link between harsh school discipline policies and entrance into the criminal justice system.

The research into racial disparities that show up first in school suspension and expulsion data and then continue unabated in the juvenile justice system is not new. In fact, researchers have been collecting data on disparities for three decades now.⁴ Across

⁴ Osher, D., Woodruff, D., and Sims, A. (2002). *Schools make a difference: The relationship between education services for African American children and youth and their overrepresentation in the juvenile justice system*. In D. Losen (Ed.), Minority issues in special education (pp. 93-116) Cambridge, MA: Harvard University, Civil Rights Project; Skiba, R.J., and Knesting K. (2001). *Zero Tolerance, zero evidence: An analysis of school disciplinary practice*. In R.J. Skiba & G.G. Noam (Eds.), Zero tolerance: Can suspension and expulsion keep schools safe? (17-43). San Francisco: Jossey-Bass. Gottfredson, D.C. (2001). Schools and delinquency. Cambridge University Press; Department of Health and Human Services. (2001).

the nation, black students, black males in particular, get disciplined at rates that greatly exceed their representation in the general school population.⁵

Nationally, black students are 2.6 times more likely to be suspended as white students. As the overall numbers of students being suspended each year increased due to tough zero tolerance policies that became increasingly popular throughout the 1990's, so did racial disparities. In 1973, 6 percent of blacks and 3 percent of whites were suspended at least once. By 2003, those numbers increased to 13.9 percent for blacks and 4.9 percent for whites.⁶ In some states, black suspension rates are as high as 25 percent.⁷ Black students with disabilities are at even higher risk of both suspension and incarceration. Black students with disabilities are more than three times as likely as white students with disabilities to be removed from school and four times as likely as white students with disabilities to be placed in a correctional institution.

Students who are suspended are three times more likely to drop out by 10th grade than students who have never been suspended.⁸ Dropping out triples the likelihood that a

⁵Casella, Ronnie. *Punishing dangerousness through preventive detention: Illustrating the institutional link between school and prison*. In Wald, J and Losen, D (Eds.) New Direction for Youth Development. Jossey-Bass: 2003. Balfanz, Robert and Kurt Spiridakis, Ruth Curran Neild and Nettie Legters. *High-poverty secondary schools and the juvenile justice system: How neither helps the other and how that could change*. In Wald, J. and Losen, D. (Eds). New Direction for Youth Development, Jossey-Bass: 2003.

⁶ US Department of Justice. Office of Juvenile Justice and Delinquency Prevention. 2004 Census of Juveniles. Also, U.S. Department of Education, Office for Civil Rights.

⁷ Ibid.

⁸ Goertz, M.E., Pollack, J.M & Rock, D.A. (196). Who drops out of high school and why?: Findings from a national study. *Teachers College Record*, 87, 357-73.

person will be incarcerated later in life.⁹ Nationwide, in 1997, about 68 percent of state prison inmates had not completed high school.¹⁰

Juvenile justice data mirror these disparities. In 2003, African American youth were detained at a rate four and a half times higher than their white counterparts. According to these figures, minority youth represented 61 percent of all youth detained in 2003, despite accounting for only about one-third of the nation's youth population.¹¹ Four out of five new juvenile detainees between 1983 and 1997 were youths of color. According to one study black youths with no prior criminal records were six times more likely, and Latino youths three times more likely, to be incarcerated than white youths for the same offenses.¹²

One of the first steps in discerning the causes for these disparities and the cures is obtaining reliable, consistent data on the problem. For example, depending upon what data source one looks too, Jena High School, in the year 2002, recorded anywhere from 65 out of school suspensions¹³ to 0 out of school suspensions, as reported to the Louisiana State Department of Education.¹⁴

⁹ Coalition for Juvenile Justice. *Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention*. 2001 Annual Report.

¹⁰ U.S. Bureau of Justice Statistics.

¹¹ Hayward Burns Institute. San Francisco, California.

¹² Poe-Yamagata, Eileen, Michael A. Jones. National Council on Crime and Delinquency *And Justice for Some*. Building Blocks for Youths, Youth Law Center, Washington, D.C. 2000.

<http://www.buildingblocksforyouth.org/justiceforsome/>

¹³ U.S. Department of Education, Office for Civil Rights.

¹⁴ Louisiana Department of Education. District Composite Report. 2005-2006 LaSalle Parish. March 2007.

According to the OCR data, at Jena High School in the 2001-2002 school year, 10 out of 45 black females and 10 out of 50 black males were suspended out of school at least once. But just 10 out of 205 white females and 35 out of 225 white males were suspended out of school at least once. This translates into an out of school suspension rate of 4.8 percent for white females and 22 percent for black females, at least according to this data. In other words, black females were more than 4 times more likely to be suspended than their white counterparts. The rates for white versus black males in Jena were 15.5 percent and 20 percent respectively, according to the U.S. Department of Education.¹⁵

Simply because the numbers of students here are so small, it is crucial that we not jump to conclusions about the source of the apparent disparities. But what is clear, is that consistently reliable data broken down by race are vital as we move forward. Most immediately, the question we must ask is: Why do the two sets of data differ so remarkably? Without clear, reliable information about disparities, it is simply impossible to locate potential problems or make sound decisions about potential solutions.

Under the Gun-Free Schools Act, districts are currently required only to report the most serious offenses that triggered suspensions or expulsions.¹⁶ At the least, school districts should be required by the federal government to report suspensions from school, broken down by race, *no matter* the alleged offense since research demonstrates a clear

¹⁵ U.S. Department of Education. Office for Civil Rights.

¹⁶ Gray-Adams Westat, Karen. Report on the Implementation of the Gun-Free Schools Act In the States and Outlying Areas. School Year 2003-04. U.S. Department of Education. Office of Safe and Drug-Free Schools. April 2007.

link between suspension and lower achievement and between suspension and dropping out of school and between dropping out of school and incarceration.

Meanwhile, in Louisiana we do know that African American youth are vastly overrepresented in juvenile detention facilities. In 2001, in that state, African American youth represented 41 percent of the overall youth population, but 68 percent of youth in detention.¹⁷

Experts in criminal justice and sociology offer a range of causes for the disparities and it is undoubtedly difficult to untangle the complex, interconnected sources of the problem. Plausible explanations include inherent and often wholly unconscious racial bias on the part of school officials and actors within the criminal justice system. One research study conducted by Professor Russ Skiba of Indiana found that black students are punished more severely than white students for lesser offenses, such as “disrespect,” “excessive noise,” “threat,” or “loitering” than their white peers.¹⁸ In addition, Skiba’s study on perspectives on school discipline of principals in the state of Indiana found that a principal’s attitudes toward school discipline in general, and the effectiveness of the use of suspensions specifically, played a far greater role in the numbers of students suspended in a school than the actual behaviors of the students.¹⁹

¹⁷ The Hayword Burns Institute. San Francisco, California. <http://www.burnsinstitute.org/dmc/la/>

¹⁸ Skiba, Russell, Robert S. Michael, Abra Carroll Nardo and Reece Peterson. *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*. Indiana Education Policy Center. 2000.

¹⁹ Skiba, Russell; Edl, Heather. *The Disciplinary Practices Survey: How Do Indiana’s Principals Feel About Discipline*. *Children Left Behind Policy Briefs*. 2004.

Such bias, coupled with harsher “zero tolerance” policies in schools, research strongly suggests, leads to black students, particularly males, being suspended, expelled and eventually incarcerated for behaviors and crimes for which their white peers, on average, don’t receive as harsh, opportunity limiting punishments. Meanwhile, a third, related explanation is that the environments in which significant numbers of African American children live encourage a defensive, confrontational, hyper-aroused, but not necessarily dangerous, posture. The most constructive response, especially for younger children, the research suggests, is increased psychological services, family support and sensitized educators – *not* automatic suspension and/or expulsion, which research shows alienates children from school and often marks a child’s first step toward the criminal justice system.²⁰

Of course, Congress has the responsibility to examine whether the educational system in Jena, in particular, which is obligated to provide equal protection of the laws for all children, has violated the rights of students in terms of suspensions and expulsions. Similarly, the same careful analysis and investigation should be applied to the local system of justice there. It’s not enough to assume that the national problem of bias in the criminal justice system is what is at play in Jena. In fact, we know very little about Jena in a larger context. However, given the numerous anecdotal reports about racial bias and

²⁰ See, for example, Massachusetts Advocates for Children. *Helping Traumatized Children Learn. A Report and Policy Agenda*. 2005. Also, Craig, S. *The Educational Needs of Children Living with Violence*. Phi Delta Kappan. 74 67-71;68. Pynoos, R.S., Steinberg, A.M., and Goenjian, A. (1996). “Traumatic Stress in Childhood and Adolescence: Recent developments and current controversies.” In B.A. van der Kolk, A. McFarlane and L. Weisaeth (Eds.), Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society. (pp. 331-358). New York: Guilford Press; pp. 332, 349-350.

the strong perception of injustice that seems to match the experience of many African-Americans in our nation, it seems that alone warrants an investigation. While the facts about what occurred in Jena are predictably in dispute, clearly there is a widely held belief that race played an enormous role in determining who was punished, to what extent, and for what reasons.

One can never fully enter another human being's mind to assess motive or prejudice. However, repeated patterns of disparate treatment, astonishing disparities, and notably harsh, disparate punishments for children of color, should, at the very least, raise a red flag. Racial prejudice is far more difficult to discern these days, but that does not mean it is not there, infecting what are supposed to be objective decisions about whether a child can attend school, whether or not he should be charged with a crime and whether or not he should go to jail.

The immediate lessons of Jena should be clear. A public educational system should not be allowed to punish anyone in disparate ways where it appears to have racial implications. Procedures should be implemented to prevent that from happening. The federal government should provide resources for states and localities to educate professionals about racial disparities and the bias and prejudice that likely plays a role in disparate treatment. Men and women who are elected or appointed to administer the criminal justice system would also benefit from enhanced understandings. The federal government should collect and make publicly available rates of out of school suspension and expulsion, no matter the offence, broken down by racial group. Further,

extraordinarily high suspension rates – for example where more than 20 percent of any racial group of students are suspended at least once – signal a school in need that is unlikely to be serving students educational interests if significant numbers of students are losing instructional time. Clearly, we should put in place a system for flagging intervention in such schools and in the schools shown to be suspending half or more of black males more than once. Such schools are pushing children out more than encouraging them to stay in and need support in changing their culture and outcomes.

In our modern times, so much bias lives undercover. For that reason alone, we may never know the full extent of what happened in Jena, Louisiana and exactly why. But we do know that a significant segment of that community, consisting of African American adults and children, strongly believe that the system is patently unfair, and the absence of recourse outside the borders of Jena makes them wonder whether anyone will really pay attention and address their valid concerns after the protesters and media representatives leave their small community. Coupled with the long-standing national data pointing to racial disparities and strongly suggesting the role of bias and the long legacy of racism in our nation, it seems that at the least, we must take their concerns very seriously, as a closer, more careful, consistent investigation that might lead to answers and, most important, to healing and improvements, is clearly called for.

Thank you for this opportunity to testify on this most important matter.

