



Written Testimony

Submitted to the
Maryland Commission on Capital Punishment
Benjamin Civiletti, Chairman

October 21, 2008

Dear Chairman Civiletti and Members of the Maryland Commission on Capital Punishment:

My name is David Harris. I am the Managing Director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. The Houston Institute was founded by Professor Charles Ogletree, Jr., also of Harvard Law School, in September 2005. Professor Ogletree now serves as Executive Director of the Institute. I am a graduate of Georgetown University, and hold a doctorate in sociology from Harvard University.

I respectfully submit this brief to the Commission as it considers whether to recommend repeal of capital punishment in Maryland. I applaud the Commission for undergoing this extensive review process. Its willingness to consider the viewpoints, expertise and perspectives of such a wide range of witnesses—from scholars, to advocates, to family members of victims, to law enforcement officers—on an issue of such importance to the state, and to the nation, is testament to the rigor and seriousness with which it is approaching this review.

The Charles Hamilton Houston Institute for Race and Justice is committed to carrying on the legacy of Charles Hamilton Houston, one of the 20th century's most brilliant and influential lawyers, in addressing racial inequalities that continue to block equal treatment and access under the law in this country. 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, he became the chief architect of the strategy employed by Thurgood Marshall, and many of Houston's other protégés, in *Brown v. Board of Education*, the landmark case that legally ended racial segregation in schools and paved the way for the civil rights movement of the 1960's. Not only did Charles Hamilton Houston play a pivotal role in ending Jim Crow segregation in America; he also trained a generation of lawyers who went on to have a profound impact on eradicating enforced segregation and other racial injustices during the second half of the 20th century.

The perspective that we can offer to the Commission is that of an institute deeply committed to wedding the strongest possible research to policy and practice. Since its founding, the Institute has written about and studied racial disparities in the application of the

death penalty, as well as evaluated the effectiveness of the death penalty in statewide efforts to increase public safety, particularly in those communities most deeply affected by high rates of crime and violence. As most of you know, Professor Ogletree has written extensively on this topic, most notably in his widely recognized volume, *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*, co-edited with Amherst College scholar Austin Sarat. The Institute has organized two major conferences focusing on the death penalty, one of which took place in Maryland. Both brought researchers together with practitioners to examine data about the ways in which the death penalty is applied and its effectiveness in meeting its stated goals of deterrence and public safety.

In this brief, I summarize for the Commission some of the major findings from a research study that the Institute undertook this past year that examines the choices we, as a nation, make when we pursue the death penalty, and how the implications of these choices affect public safety. While we take a national perspective on this issue, this brief will focus exclusively on Maryland. Before summarizing our major findings, I want to thank Sean McDonnell and Amia Trigg, both students at Harvard Law School, for their tremendous research on these issues; Lilitiana Ibara, who helped to shape, sharpen and edit our report; as well as my Houston Institute colleagues Johanna Wald and Kelly Garvin, both of whom have helped shape this testimony and the Institute's overall death penalty initiative.

We begin from the premise that the death penalty as an instrument of state law enforcement is duly and properly considered within the realm of public safety. That is, the state pursues the death penalty as one of many policies designed to protect its citizens from crime. The Institute's focus on the broader public safety implications of capital punishment in no way minimizes our concern for the victims of violent crimes or their families. Indeed, Professor Ogletree is himself just such a family member. As he testified in New Jersey:

In 1983, my beloved sister, Barbara Jean Ogletree Scoggins, was stabbed to death, following an unforced entry into her living room in our hometown of Merced, California. Barbara served as a police officer with the Merced County Sheriff's Office. She was highly regarded by colleagues and by the prisoners she escorted to court proceedings. She was also a young mother at the time of her murder. The police in Merced had many suspects. But no one has ever been prosecuted for her murder. Barbara's death ripped our family apart. It caused all of us incredible anxiety and pain. It ignited some soul-searching on my part, since at the time of Barbara's murder, I was

representing clients in criminal cases as a public defender in Washington, DC. It took a great deal of reflection and prayer to accept that my younger sister had been murdered. This brutal fact haunts and pains me to this day. My commitment to finding the person responsible for her death has not diminished. I have offered a reward for information leading to an arrest. Despite my long-felt desire to bring closure to Barbara's death, my views about the death penalty have not changed. I am opposed to the death penalty. I would not even seek to have my own sister's murderer sentenced to death. While Barbara's killer should be punished, taking that person's life would not be a solution that Barbara, my family or I could endorse.

His words are relevant because, rather than diminishing its commitment to victims, our research strongly suggests that reorienting the discussion of the death penalty toward the broader public safety context will provide the state with additional resources that can be used to support crime victims and their families, reduce incidences of violent crime, and address other public safety deficits faced by communities across the state. Indeed, this argument has already been put forth very compellingly by several expert witnesses who have testified before the Commission, including, most recently, James P. Abbott, Police Chief of West Orange, New Jersey.

Earlier this summer, the Commission heard testimony concerning racial patterns in capital punishment prosecutions in Maryland, patterns which closely resemble those found in other states. In addition to the data presented by Professor David Baldus on national trends, we know from the study conducted by Professor Ray Paternoster several years ago that those convicted of killing residents of Baltimore County were about 23 times more likely to be sentenced to death than those whose victims lived in Baltimore City, nearly 14 times more likely than if the victims lived in Montgomery County, and eight times more likely than if the victims lived in Prince George's County.¹ Paternoster's study also noted that "Harford County's state attorney's office has a rate of seeking the death penalty that is nearly 11 times higher than Baltimore City and four times higher than Montgomery County."²

Given the testimony already provided to the Commission, we need not dwell on the issue of race except to underscore a basic point that casts the death penalty in an entirely

¹ Paternoster, Raymond and Robert Brame. "An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction." Available online at: <http://www.newsdesk.umd.edu/pdf/finalrep.pdf>

² Ibid.

different light: a few jurisdictions spend millions of dollars pursuing capital prosecutions in cases involving white victims, while communities of concentrated disadvantage that disproportionately suffer from high rates of crime and violence suffer from a profound scarcity of resources that could support a myriad of programs and efforts aimed at deterring crime. By making explicit the disparities between costs allocated to pursue highly selective capital prosecutions that almost always involve white victims, to those resources invested in entire communities of color that face the greatest public safety needs, our research poses a central question: Are we as a society consciously choosing to distribute our resources in this way, or, would we choose differently if given more complete information about how resources could be allocated more effectively to create safer communities and help victims when crimes do occur?

As the report authored by John Roman makes clear, maintaining the death penalty has cost Maryland approximately \$186 million since 1978, or \$37.2 million per execution.³ While there have been some questions raised concerning this exact figure, there can be little doubt that the pursuit of the death penalty entails a serious commitment of resources that should be subjected to thorough and public consideration in a public safety framework. Indeed, according to the testimony of former U.S. Senator from Maryland Joseph Tydings, Maryland would need to double or even triple its current expenditures to ensure that every defendant facing the death penalty received adequate counsel.⁴

These expenditures have produced no discernible effect on the state's murder rates. In 2006, Maryland remained second only to Louisiana in per capita homicides. Baltimore City and Prince George's County—with 64.3 percent and 66 percent African American population respectively—accounted for over 75 percent of all Maryland murders in the past two decades, despite constituting less than 1/3 of the state's population.⁵ It appears these jurisdictions rarely pursue capital punishment despite their high rates of death eligible crimes, in part because they cannot afford the costs of capital prosecution given other public safety needs.⁶

³ John Roman et al, "The Cost of the Death Penalty in Maryland," Research Paper for the Urban Institute, 27, March 2008.

⁴ *Baltimore Examiner*, "Maryland Death Penalty Commission Holds Last Hearing," September 22, 2008.

⁵ Scott Sherfelt, "Baltimore, Prince George's Reign as State's Murder Capitals," *Capital News Service*, April 24, 2007.

⁶ *Baltimore Sun*, "Death Penalty Has Cost: Circumstances, Resources Guide Baltimore's Policy," Sep. 3, 2007.

Even so, in Maryland, as across the country, an increasingly large number of homicide investigations languish. Nationally, in 1976, 79 percent of all homicides were resolved by law enforcement.⁷ In 2005, only 62 percent of homicides were solved.⁸ Interestingly, this reduction correlates closely with the end of a ten-year national moratorium on the death penalty in 1977 and with its expanded use by most states in the ensuing decades. As similar studies in other states have already concluded, Maryland's death penalty diverts "significant resources— financial and personnel—that could be used elsewhere. More often than not, money is taken from other law enforcement and public safety needs."⁹

For the \$186 million spent by the state since 1978 to pursue the death penalty, Maryland communities could have paid the full salaries of an additional 92 homicide detectives for the past 29 years.¹⁰ Assigning additional detectives to a particular homicide increases the likelihood that the crime will be solved and the perpetrator brought to justice.¹¹ A study at the University of Maryland found that assigning teams of three or four detectives to a case has a dramatic impact on homicide clearance rates¹².

The need for additional detectives is particularly acute in the city of Baltimore. In a study completed in 2007 by the *Baltimore Examiner*, 43 percent of all homicides committed in Baltimore between 1998 and 2007 remained unresolved.¹³ These additional personnel and resources could be assigned to 'cold-case' units to investigate existing unresolved homicides.¹⁴ Such an investment would almost certainly increase the rate at which suspects in homicide cases were identified and brought to justice, thereby facilitating the state's interest in deterring violent crime.

⁷ Bureau of Justice Statistics, "The percentage of homicides cleared by arrest has been declining," Department of Justice, (available at <http://www.ojp.usdoj.gov/bjs/homicide/cleared.htm>).

⁸ Id.

⁹ Capital Punishment Project, *The High Costs of the Death Penalty*, Report of the American Civil Liberties Union, 3 (2007).

¹⁰ This calculation is based on an estimated \$6.2 million per year cost of capital punishment and assumes a \$70,000 base salary for homicide detectives, which reflects the current prevailing wage before overtime in the City of Baltimore. Figures are not adjusted for inflation.

¹¹ See Charles Wellford & James Cronin, *Clearing Up Homicide Rates*, NATIONAL INSTITUTE OF JUSTICE JOURNAL, 6 (April 2000).

¹² Id.

¹³ *Baltimore Examiner*, "Cold Cases Bring Broken Hearts," May 1, 2007, by Luke Broadwater and Stephen Janis.

¹⁴ The Maryland State Police already have an existing cold case unit, but the unit has a large number of unresolved cases and a limited budget. The unit has shown promise, including the resolution of the 1990 murder of Leonard Steele in 2007, based in part on newly available DNA forensic analysis.

Since murders involving victims of color remain unsolved a disproportionate amount of the time, increasing the resources available to investigate and clear unsolved homicides would likely help mitigate racial imbalances in the administration of justice rather than exacerbate them in the way the death penalty currently does. Additional public safety and investigatory resources could also be channeled to those communities that deal with the greatest burdens and need the most state support. Rather than continuing the racially imbalanced application of the death penalty, Maryland could begin to ameliorate racial inequalities, solve more murders, and deter more crime simply by hiring more detectives. This is just one example of a beneficial policy alternative forgone by the state in favor of large expenditures on the death penalty system. Indeed, in Colorado, a bill has been presented to the legislature to use the funds saved by repealing capital punishment to support cold case units to reinvigorate languishing homicide cases.

Beyond deterrence and retribution, the state's ultimate concern should be to reduce the number of homicides and violent crimes in Maryland as well as increase public safety overall. As previously stated, the death penalty had no demonstrable effect on Maryland's murder rates.¹⁵ Evidence suggests a number of alternative programs could more efficiently reduce crime and lower murder rates for the same cost to the public.

The following descriptions, by no means exhaustive, offer evidence of the types of programs that improve public safety and quality of life, while deterring and preventing crime and violence. It is important to underscore just how much we have learned in recent years about how to design successful social policies. Fortunately, we no longer need to rely on speculation and wishful thinking. Rather, today we know a great deal about human neurobiology, the physical as well as social impact of stress, and the emotional development of children and adolescents. All of this information informs the how and why of proven interventions for young children, beginning at birth, who live in neighborhoods of concentrated disadvantage as well as for adolescents and young adults. We at the Charles Hamilton Houston Institute work closely with researchers and practitioners and are determined to make

¹⁵ See FBI Uniform Crime Report, *supra* note. Maryland's murder rate, 9.7 (per 100,000 residents) in 2006, has held roughly steady for the past 10 years, dropping slightly in 2001 and 2002 but rising again in the years since to exceed pre-2001 levels.

the link between our knowledge and practice more widely known and useful to policy makers. In that respect we would gladly provide the commission or others who might be interested with studies by researchers such as Dr. Jack Shonkoff of the Center on the Developing Child at Harvard University, Dr. Robert Macey of the Center for Trauma Psychology, Dr. Robert Anda of the Centers for Disease Control and Prevention, and Dr. James Heckman of the University of Chicago, as well as programs based on the findings of their research. If there is a common theme or element to this research-practice nexus it is that consistent, ongoing investment in programs that connect people to each other and to opportunity pay off many times over in preventing violence and crime.

Victim Assistance and Witness Cooperation

One of the most common and compelling arguments in support of the death penalty comes from those who believe it serves the interests of victims and their families. In fact, family members of victims argue on both sides of this issue. However, regardless of their positions on capital punishment, there is little question that all family members would benefit from improved and expanded direct assistance. A shift of funding away from capital prosecutions in favor of expanded services for victims' families could go a long way toward balancing the needs of the communities experiencing the greatest losses – communities with the highest rates of violence and lowest arrest rates – since they house far more victim families in need of support than communities where the greatest number of death penalty cases are pursued.

To its great credit, Maryland has been at the national forefront in providing support for victims of crime through its Victim Assistance Grant Program and Criminal Injuries Compensation Fund. However, there is no question that the need continues to outstrip available services. For example, the 2007 Maryland State-Wide Assistance Report published online indicates there were over 46,000 residents served by the grant program that year. The majority of these were victims of domestic violence and various forms of abuse (30,611 or 65 per cent). According to the report, there were also 1,499 survivors of homicide victims served, but only 2,490 robbery victims and 3,678 assault victims. Acknowledging the need for additional assistance to victims of assault and robbery in no way minimizes the severity of

domestic abuse, but an expansion of resources would eliminate the need for a trade off between the two. The report itself also identifies the “need for specialized services tailored to meet the needs of un-served and underserved victim populations, particularly those victims with limited English proficiency.”¹⁶

The services reported for 2007 were underwritten by \$7 million from the federal government. However, according to a report in the *Baltimore Sun*, federal funds for Maryland were cut to “about 6 million” for 2008.¹⁷ Given the continued and severe budget cuts that Maryland is certain to experience in the coming years, it could certainly dedicate funds saved by halting death penalty prosecutions to providing increased and consistent funding for victim assistance programs.

Community Policing

It is not only victim assistance services that suffer from funding shortfalls. In a lean budget year, many Maryland communities have either had to sacrifice public safety programs or raise taxes. In Prince George’s County, officials proposed raising the county income tax by 3.2 percent so that the county could continue to hire police officers.¹⁸ The strains on local budgets were exacerbated by the fact that Maryland communities received no federal funding for law enforcement initiatives in the President’s budget for fiscal year 2009.¹⁹ In fiscal year 2007 Maryland received \$2 million in federal grants for law enforcement through the Community Oriented Policing Service (COPS) and Justice Assistance Grants (JAG) programs.²⁰ Without funding from COPS or JAG many Maryland communities must eliminate or scale back demonstrably successful programs.

Among those programs in jeopardy are Community Policing initiatives, like the pilot program that contributed to a 21 percent decline in Prince George’s County’s homicide rate

¹⁶ U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crimes, “Victims of Crime Act Victim Assistance Grant Program: 2007 Maryland State Wide Assistance Report,” available at <http://www.ojp.usdoj.gov/ovc/fund/sbsmap/ovcpf07md1.htm>

¹⁷ *Baltimore Sun*, January 14, 2008. “Federal Aid Cut for Victims’ Services in Maryland.

¹⁸ *Gazette.Net*. “Bare bones budget gives boost to safety,” March 20, 2008.

¹⁹ Joint Economic Committee, “Bush’s Budget Again Ignores Maryland’s Middle Class Families,” (Feb. 4, 2008) (available at <http://jec.senate.gov/Budget%202008%20State%20by%20State/MD.pdf>).

²⁰ *Id.*

between 2005 and 2006.²¹ The success of community-based policing is predicated on adequately training officers and positioning them inside communities for prolonged periods in order to build trust. Because of this, community-based policing initiatives require sustained resources. Disruption in these programs caused by budget shortfalls or a loss in federal funding can quickly erase gains. If Maryland ended capital sentencing today, the projected \$6.2 million in savings next year (\$186,000,000/30 years) would replace the shortfall resulting from lost federal funding three times over. Proven community-based policing efforts like those in Prince George's County and other parts of the state, which have a demonstrable effect on homicide rates, could be substantially expanded without tax increases.

Community policing programs must be a crucial component of any strategy that addresses one of the most critical public safety crises we face today, namely the need for greater witness cooperation. Most public discussion of "witness intimidation" focuses on the rise of gangs among youth of color. However, the dearth of witnesses willing to testify in court reflects a much larger, deeper, and more enduring distrust of the police that exists in communities of color and in communities of concentrated disadvantage. To be sure there are instances in which witnesses are intimidated and harassed by criminal elements. In those instances there is clearly a need for funds to support those who are threatened as well as supplement police and prosecutorial efforts to convict the intimidators. But, for every witness who is intimidated, there are many others who simply choose not to cooperate. The Houston Institute is currently working with prosecutors from a number of cities, including Baltimore, to document the various factors that inhibit witness cooperation. Preliminary interviews indicate a fundamental and widespread distrust of the police and the justice system; a distrust that dampens cooperation in many of the communities hardest hit by crime. We believe sustained, consistent funding for community policing carries the promise not only to reduce crime but to increase witness cooperation by strengthening police/community relationships.

Drug Treatment

In addition to community policing, violent crime rates can be reduced through drug and alcohol treatment. Drug and alcohol use is a major contributing factor to a large number of

²¹ Candace Rondeaux, "Homicide Rate Soars in Year's First Quarter," *Washington Post* (April 25, 2007).

murders and other crimes in Maryland. In 2000, there were 523 drug-related deaths in Maryland. The link between drug abuse and crime is well established in Maryland. The U.S. Attorney for the District of Maryland reported in 1998 that an estimated 75,000 repeat drug offenders who abused heroin, cocaine, or marijuana were responsible for a substantial number of crimes in the state, especially violent crimes. Approximately 70 percent of the roughly 80,000 people arrested each year in Baltimore City, which has some the highest rates of heroin and cocaine use in the country, test positive for recent drug use.²² The Baltimore Police Department estimates that between 40 percent and 60 percent of the homicides in Baltimore are drug-related.²³

State and local governments already invest in combating drug addiction in Maryland, with positive effects. For example, Baltimore City spends about \$26 million to provide free drug treatment to around 23,000 people with drug addictions annually (1130.43 per person).²⁴ Still, treatment is only available to one in four Marylanders who need it.²⁵ If the money Maryland has spent on capital punishment since 1978 had been applied to drug treatment, Maryland would have been able to treat more than 164,602 additional people with addictions (186,000,000/1130.43). Such a substantial additional investment in treatment would likely have helped diminish demand for drugs and subsequently dramatically reduced drug-related violence in the state. Based on this evidence, legislators might consider shifting resources from capital prosecution to drug treatment in order to reduce homicides and other violent crimes.

Gang Activity and Crime Prevention

Another major factor in violent crime is gang involvement. According to law enforcement tallies, Maryland has more than 200 gangs, with well over 1,000 active gang members.²⁶ These include gangs affiliated with national groups with a reputation for extreme violence, including the Bloods, Crips, and MS-13.²⁷ Gang activity has historically been centered

²² Open Society Institute, "Tackling Drug Addiction," (available at http://www.soros.org/initiatives/baltimore/focus_areas/drug_addiction).

²³ See National Drug Intelligence Center, *supra* note.

²⁴ Baltimore Substance Abuse Systems, "Services Overview," (available at <http://www.bsasinc.org/services/>).

²⁵ See Rodricks, *supra* note.

²⁶ Governor's Office of Crime Control and Prevention, *Gangs in Maryland*, (2008) (available at <http://gangs.umd.edu/wfrmGangsinmd.aspx>).

²⁷ *Id.*

in impoverished areas of larger cities, which are most often populated by people of color. Increasingly, however, “violent street gangs now affect public safety, community image, and quality of life in communities of all sizes in urban, suburban, and rural areas.”²⁸ Gang members in Maryland are most often young African-American or Latino men or adolescents, who are especially vulnerable to gang recruitment due to the prevalence of gang activity in their communities.²⁹ Gang activity is often closely linked to drug distribution, and gang drug distribution results in a high degree of firearm assault and homicide in Maryland and surrounding states.³⁰

Though exact statistics on gang-related homicides in Maryland are spotty because many jurisdictions do not keep track of how many cases involve gang violence, anecdotal evidence suggests gang-related homicides account for a substantial number of murders in Maryland each year. For example, MS-13, a historically Salvadoran gang identified by the Mid-Atlantic Regional Gang Investigators Network as the “largest and most dangerous threat” in the area,³¹ is reputed to have a “high propensity for violence,” relying on “[m]urder, assaults, and rape...to punish its own members and to counter perceived threats from rivals.”³² Since 2005, federal prosecutors have indicted 25 alleged members of the MS-13 gang, 22 in Maryland and three who allegedly coordinated killings from jails in El Salvador, for their roles in at least eight murders in Prince George’s and Montgomery counties.³³

Given that gang-violence is likely a major cause of murder in Maryland, the state could conceivably reduce murder rates by directing resources toward preventing gang involvement and countering gang activity. Research has demonstrated that the most effective and cost-efficient way to reduce gang-activity and violence is to provide education-related and community-based programs to direct vulnerable youth away from gangs.³⁴

²⁸ National Alliance of Gang Investigators Associations, *National Gang Threat Assessment* (2005) (available at http://www.nagia.org/PDFs/2005_national_gang_threat_assessment.pdf).

²⁹ *Id.* at 20-23.

³⁰ *Id.* at 24-25.

³¹ *Id.* at 21.

³² See Governor’s Office of Crime Control and Prevention, *supra* note 26.

³³ Reuben Castaneda, “MS-13 Case Adds Salvadoran Inmates,” *Washington Post* (June 6, 2007).

³⁴ The Charles Hamilton Houston Institute for Race and Justice, *No More Children Left Behind Bars*, 3 (March 6, 2008) (available at <http://www.charleshamiltonhouston.org/Publications/Item.aspx?id=100012>)

For example, longitudinal studies of at-risk youth in high-poverty areas have shown that participants in the Child-Parent Centers in Chicago are significantly less likely to have been arrested (16.9 percent vs. 25.1 percent) and more likely to graduate high school (50 percent vs. 25.1 percent) than their peers.³⁵ This program combined early education, health, and family support services, and began working with participants when they were as young as three years old. A 19-year follow-up of participants found that they had higher rates of school completion, attendance at four-year colleges, and full-time work, as well as lower rates of felony arrests and incarceration³⁶ at an estimated annual cost per child of \$4,989.³⁷

Using our calculation of \$6.2 million per year in savings to the state if capital punishment funds were redirected, the state of Maryland could have provided a year's worth of an analogous program to over 37,202 at-risk youth. If results were similar to those in the Chicago study, such a significant early investment in at-risk youth would have resulted in almost 3,000 fewer arrests, and by extension a reduced likelihood of gang participation, violence, and homicide. Moreover, early investments actually tend to save the state money by reducing long-term incarceration rates and economic costs. "Researchers calculated that savings from early education and community programs associated with reductions in remedial services, fewer arrests, and the increase in tax [revenue from participants'] income... would save \$22,897 per child."³⁸

Multi-faceted education and community programs targeted to reach at-risk youth in poor communities would likely reduce rates of gang-involvement, violent crime, and homicides, while potentially saving the state millions of dollars in expenditure and lost revenue. The benefits of such programs are exhaustively documented,³⁹ as are the positive impacts of effective drug treatment programs and community policing strategies, in terms of reductions in crime and murder rates and numerous ancillary benefits.

³⁵ Arthur Reynolds et al., *Long-term Effects of an Early Childhood Intervention on Educational Attainment and Juvenile Arrest*, 285 JAMA 2339-2346 (2001).

³⁶ Arthur Reynolds et al., *Effects of a School-Based, Early Childhood Intervention on Adult Health and Well-being*, 16 ARCH. PEDIAT. ADOL. MED. 730-739 (2007).

³⁷ See The Charles Hamilton Houston Institute for Race and Justice, *supra* note 34 at 11.

³⁸ *Id.*

³⁹ See generally *Id.*

Increasing High School Graduation Rates

We also want to point out to the Commission the relationship between educational attainment and criminal activity. The on-time high school graduation rate in Baltimore Public Schools for the year 2003-2004 was 34.6 percent.⁴⁰ This means that over 65 percent of students who begin ninth grade in the city's public schools do not graduate four years later—a staggering figure which ranks Baltimore as 46th among the 50 largest cities in the percentage of students who graduate on time from high school. A report released by Johns Hopkins University in November 2007 listed five of Baltimore City's 28 high schools as "dropout factories." In contrast, the suburban areas surrounding Baltimore have a graduation rate of 81 percent, making the Baltimore metropolitan suburban-urban gap of 47 percent the largest in the nation.⁴¹

Robert Balfanz, a professor of Education at Johns Hopkins University, is a national expert on the long-term effects of dropping out of high school. He has written that:

The consequences of dropping out of school are catastrophic. Dropouts are more likely than their graduating peers to be unemployed, living in poverty, receiving public assistance, in prison, on death row, unhealthy, divorced, and single parents with children who drop out. Dropping out is not just a personal or economic issue; it also undermines the fabric of society. High school dropouts are almost completely missing from the civic lives of their communities.⁴²

A team of leading economists from Columbia, Princeton and Queens College estimates that increasing high school graduation rates would decrease violent crime by 20 percent and drug and property crimes by more than 10 percent.⁴³ They calculated that each additional high school graduate yielded an average of \$26,500 in lifetime cost savings to the public. (This

⁴⁰ *Cities in Crisis, A Special Analytic Report on High School Graduation*, Christopher Swanson, p.9, April 2008, EPE Research Center, available online at: http://www.americaspromise.org/uploadedFiles/AmericasPromiseAlliance/Dropout_Crisis/SWANSONCitiesInCrisis040108.pdf

⁴¹ *Ibid*, p. 11.

⁴² *Christian Science Monitor*, "A Plan to Fix Dropout Factories," (Robert Balfanz), November 2007.

⁴³ Henry Levin, Clive Belfield, Peter Muennig & Cecilia Rouse, *The Costs and Benefits of an Excellent Education for America's Children*, Working Paper, Teachers College, Columbia University (2006). <http://www.cbcse.org/pages/cost-benefit-studies.php>. Crimes and arrests were considered in deriving the impact of education on the commission of specific crimes because crimes greatly exceed arrests. Data on specific crimes were taken from the annual Uniform Crime Report. *Id.* at 41.

estimate accounts for the expense of trials, sentencing and incarceration.) These economists estimate that each Black male who graduates from high school is associated with a savings of more than \$55,000. By the same accounting, each Latino male graduate saves the public \$38,500.

Another research study found that a 1 percent increase in high school graduation rates would save the nation as much as \$1.4 billion each year in crime-related costs.⁴⁴ Thus, one could very legitimately argue, from a purely economic standpoint, that one of the most effective ways to reduce crime in Baltimore would be to implement effective dropout prevention programs that will increase high school graduation rates in the city.

This preliminary list of alternatives is by no means exhaustive, but it demonstrates that the state of Maryland foregoes a multitude of proven policy options when it opts to fund the death penalty. Funds allocated to prosecute death penalty cases are funds no longer available to provide assistance to witnesses, victims and their families; expand the number of law enforcement officers assigned to investigate homicides; expand drug treatment; implement community policing; or fund high school dropout and gang activity prevention programs. Increasingly, the state outlay required to fund death penalty procedures and the resultant drain on state and county budgets has caused policymakers, among them Maryland Governor Martin O'Malley, to reconsider the wisdom of capital punishment. O'Malley noted that if the death penalty were replaced with life without parole, "[we] could pay for 500 additional police officers or provide drug treatment for 10,000 of our addicted neighbors. Unlike the death penalty, these are investments that save lives and prevent violent crime."⁴⁵

Implicit Biases with Explicit Effects

Various experts have presented evidence of racial disparities throughout Maryland's criminal justice system. The very existence of this commission speaks to the seriousness with which Maryland lawmakers treat such disparities. There is clearly a great desire among legislators and other key players to create a more equitable system; the difficulty is that

⁴⁴ Lance Lochner and Enrico Moretti, "The effect of education on crime: Evidence from prison, arrests and self-reports," *American Economic Review* (2004) 94: 155-189, p. 173.

⁴⁵ Martin O'Malley, "Why I oppose the death penalty," *The Washington Post*, A15 (Feb. 21, 2007).

scientific research suggests it will take more than sincere desire. Research into implicit biases indicates that our unconscious prejudices and stereotypes shape our actual behaviors to an incredible degree, often without our knowledge and despite our best intentions.⁴⁶ These biases, which appear in laboratory tests and in real-world actions, are likely also deeply embedded in our criminal justice system.

In the most compelling tests, social scientists have examined unconscious biases by comparing how quickly participants complete tests that either challenge or endorse prevalent biases. The most sophisticated of these tests, the Implicit Association Test, measures the ease with which test participants can match concepts such as “violent” or “peaceful” with photos of people of different races.⁴⁷ The difference in how quickly those matches are made points to underlying biases. Both white and black test takers have been shown to be significantly quicker to match black faces with words representing violent concepts.⁴⁸ The striking aspect of this test is that this bias pattern existed both in those who expressed explicit prejudices when asked and in those who denied them.⁴⁹ In a similar test, participants were asked to quickly determine whether characters in a video game were carrying guns or harmless objects.⁵⁰ Researchers found that all participants were more likely to mistake a harmless object for a gun when it was carried by a black character.⁵¹

The types of racial bias revealed in this testing have been found to affect all aspects of the criminal justice system from how probation officers portray youths of different races,⁵² to jury attitudes,⁵³ to how judges decide sentences for members of different racial groups.⁵⁴ In the

⁴⁶ Lane, Kristin A., Jerry Kang and Mahzarin R. Banaji. Implicit Social Cognition and Law. *Annual Review of Law and Social Science*. Vol. 3, pp. 427-451 (2007).

⁴⁷ Kang, Jerry. Trojan Horses of Race. *Harvard Law Review*. Vol. 118, pp. 1489-1593 (2005).

⁴⁸ Lane, *supra*, note 46.

⁴⁹ Id.

⁵⁰ Correll, Joshua, Bernadette Park, Charles M. Judd and Bernd Wittenbrink. The police officer's dilemma: Using ethnicity to disambiguate potentially threatening individuals. *Journal of Personality and Social Psychology*. Vol 83, pp. 1314-1329 (2002).

⁵¹ Id.

⁵² Bridges, George and Sara Steen. Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes of Mediating Mechanisms. *American Sociological Review*. Vol. 63, pp. 554-570 (1998) (finding that probation officers more frequently attributed blacks' delinquency to negative attitudes and personality traits while they tended to attribute whites' delinquency to social environment).

⁵³ Chiricos, Ted, Kelly Welch and Marc Gertz. The Racial Typification of Crime and Support for Punitive Measures. *Criminology*. Vol. 42 pp. 359-390 (2004) (noting that support for punitive policies toward crime was connected with one's tendency to equate race with the tendency to commit crimes).

latter example, researchers used a sophisticated methodology to determine that Latinos and Blacks were “significantly less likely” to benefit from a withheld adjudication program, after controlling for variables such as individual attributes and indicators of threat.⁵⁵ If experienced judges cannot seem to avoid racial bias in their decisions, it is hard to imagine that death penalty jurors are exempt from such influences.

It is worth noting that the cost of even documenting the bias (let alone eliminating it) would be daunting. As death penalty scholars Michael Radelet and Glenn Pierce note in a recent essay, simply documenting overt bias in the system would require a vastly enlarged data collection system. Such a system would greatly tax “present criminal justice information systems...designed primarily to support administrative functions of the agencies they assist [rather than] to support research activities and, equally important, judicial monitoring activities.” As Radelet and Pierce conclude:

Critically, today’s criminal justice information systems are entirely inadequate to collect, manage, and integrate the range and quality of information on criminal cases necessary to support a reliable criminal justice monitoring system. As a result, the quality of available criminal data will greatly limit the integrity of any death sentencing monitoring system for the foreseeable future...A monitoring system built on a foundation of comprehensive high quality data can be used both to help ensure that race and other inappropriate factors are not involved in death sentencing decisions, and that pure arbitrariness (inequities not attributable to either legal or not-legal factors) does not permeate sentencing.⁵⁶

The lesson from these studies is that almost all of us, no matter our intentions, act upon our unconscious biases. The racial disparities that this commission has studied in Maryland, combined with social science data about implicit biases, demonstrate the vanishing likelihood that racial bias can be easily or quickly located and excised from the criminal justice system. The death penalty is the culmination of dozens of different human decisions throughout that system, any of which is likely to have been affected by bias.

⁵⁴ Beckett, Katherine, Kris Nyrop and Lori Pfingst. *Race, Drugs and Policing: Understanding Disparities in Drug Delivery Arrests*. *Criminology*. Vol. 44. Issue 1. Page 105-117.

⁵⁵ *Id.*

⁵⁶ Radelet, Michael and Glenn Pierce, “The Role of Victim’s Race and Geography on Death Sentencing.” In Ogletree and Sarat (Eds): *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*. New York University Press, 2006.

Conclusions

It is now widely known that the cost of maintaining capital punishment significantly drains state and local law enforcement resources. It is also widely known that these resources are largely used to prosecute cases in which the victim is white. Finally, it is widely known that communities of color and communities of concentrated disadvantage desperately need additional resources for programs, interventions and basic services that would reduce crime and improve quality of life. What is less known is the strong relationship between these three widely known facts.

Maryland expends an extraordinary amount of money pursuing a relatively small number of capital prosecutions while entire communities want for basic services that could vastly improve public safety and quality of life. Indeed, those jurisdictions pursuing the most death penalty cases are the ones with the most resources, while those communities most deprived of resources experience the highest crime rates. It is time to connect these dots and confront the choices we are making when we maintain the status quo. The job of public officials is to invest scarce state and federal resources in programs, services, and practices that will serve the greatest good. This responsibility cannot be reconciled with continued use of the death penalty.

Clearly, capital punishment poses troubling moral, ethical and political issues, which are made even more disturbing when the racial implications of its use are examined. But, in addition to those, there are some very practical considerations in play here. Perhaps an apt analogy can be found in the public debate over global warming. Several years ago, it seems that we reached a tipping point in terms of our scientific knowledge, when the facts on the ground became too overwhelming to ignore. At that point, the issue of global warming ceases to be an ideological or scientific debate. Instead the question became whether we will act to address what we know to be harmful practices. As we begin to address the painful truths about the damage we are inflicting daily on this planet, we must also be prepared to face the damage we do to our social fabric by refusing to heed the mounting evidence from social scientists without a political or ideological bias. By maintaining capital punishment in this state, we deprive our communities and law enforcement agencies of the tools and resources they need to

save lives and reduce violence. If we continue with the status quo, then we must be willing to acknowledge the tradeoffs and accept responsibility for that choice.