

# Bill as Introduced

HB 455-FN - AS INTRODUCED

2019 SESSION

19-0185  
04/05

HOUSE BILL

***455-FN***

AN ACT

relative to the penalty for capital murder.

SPONSORS:

Rep. Cushing, Rock. 21; Rep. Danielson, Hills. 7; Rep. McGuire, Merr. 29; Rep. O'Connor, Rock. 6; Rep. Pantelakos, Rock. 25; Rep. Harriott-Gathright, Hills. 36; Rep. Welch, Rock. 13; Rep. Wallner, Merr. 10; Rep. Berch, Ches. 1; Sen. Giuda, Dist 2; Sen. Fuller Clark, Dist 21; Sen. Reagan, Dist 17

COMMITTEE:

Criminal Justice and Public Safety

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ANALYSIS

This bill changes the penalty for capital murder to life imprisonment without the possibility for parole.

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Explanation:

Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Nineteen*

AN ACT relative to the penalty for capital murder.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1       1 Homicide; Capital Murder. Amend RSA 630:1, III to read as follows:

2             III. A person convicted of a capital murder [~~may be punished by death~~] ***shall be sentenced***  
3 ***to imprisonment for life without the possibility for parole.***

4       2 Applicability. Section 1 of this act shall apply to persons convicted of capital murder on or  
5 after the effective date of this act.

6       3 Effective Date. This act shall take effect upon its passage.

HB 455-FN- FISCAL NOTE  
AS INTRODUCED

AN ACT relative to the penalty for capital murder.

FISCAL IMPACT:  State  County  Local  None

STATE:	Estimated Increase / (Decrease)			
	FY 2020	FY 2021	FY 2022	FY 2023
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	Indeterminable Decrease	Indeterminable Decrease	Indeterminable Decrease	Indeterminable Decrease
<i>Funding Source:</i>	<input checked="" type="checkbox"/> General	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

**METHODOLOGY:**

This bill changes the penalty for capital murder to life imprisonment without the possibility of parole.

The Judicial Branch indicates this bill would reduce the penalty for capital murder from the death penalty to a mandatory sentence of life in prison without the possibility of parole. The Branch states this bill could result in savings to the Branch because there would be no penalty phase trial as currently required in a death penalty case. In addition, life in prison cases are less hard-fought, usually resulting in shorter trials, than in cases where the death penalty is a possible outcome. New Hampshire has seen two death penalty cases prosecuted in the 2000's, but historically there are so few cases any possible savings would be indeterminable and sporadic. There are no murder cases currently pending trial.

The Judicial Council indicates there have been two capital cases handled by the indigent defense delivery system in the last 20 years. One case was handled by the Public Defender without the need for an additional appropriation because the defended pleaded guilty early in the case in order to avoid the death penalty. The second case has lasted nine years and the State has spent over \$2.9 million in defense costs to date. The Council indicates if the death penalty is repealed, it would not face the extraordinary expenditures necessary to provide representation to an indigent defendant in a capital case.

The Department of Justice states, as a general matter, capital murder cases in which the death penalty is sought are more expensive to investigate and prosecute than non-death penalty cases.

The Department has prosecuted two death penalty cases; State of N.H. vs Brooks and State of NH vs Addison. The cost of the Brooks case was \$1.3 million and, to date, the cost to prosecute the Addison case has been \$2.5 million. The Addison case will continue for several more years resulting in additional costs. The Department indicates the cost to prosecute a first or second degree murder, which would be the equivalent of a non-death penalty capital murder case, is wide ranging. The costs range from \$400,000 to \$550,000. The cost for homicide cases that have been resolved by plea agreement ranged from \$16,500 to \$175,000. The Department indicates that expenditures would decrease as a result the bill, but it is not possible to estimate the amount.

The Department of Corrections is not able to determine the fiscal impact of the bill because it has no information that could be used to predict the number of individuals that would be subject to this legislation. The average annual cost of incarcerating an individual in the general population was \$40,615 for the fiscal year ending June 30, 2018 and the average marginal cost of an additional prisoner in the general population was \$4,620. The average cost to supervise an individual by the Department's Division of Field Services for FY 2018 was \$557.

**AGENCIES CONTACTED:**

Judicial Branch, Judicial Council, Departments of Justice and Corrections

CHAPTER 42  
HB 455-FN - FINAL VERSION

2019 SESSION

19-0185  
04/05

HOUSE BILL            **455-FN**

AN ACT                relative to the penalty for capital murder.

SPONSORS:            Rep. Cushing, Rock. 21; Rep. Danielson, Hills. 7; Rep. McGuire, Merr. 29; Rep. O'Connor, Rock. 6; Rep. Pantelakos, Rock. 25; Rep. Harriott-Gathright, Hills. 36; Rep. Welch, Rock. 13; Rep. Wallner, Merr. 10; Rep. Berch, Ches. 1; Sen. Giuda, Dist 2; Sen. Fuller Clark, Dist 21; Sen. Reagan, Dist 17

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STATE OF NEW HAMPSHIRE

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1 42:1 Homicide; Capital Murder. Amend RSA 630:1, III to read as follows:

2 III. A person convicted of a capital murder [~~may be punished by death~~] ***shall be sentenced***  
3 ***to imprisonment for life without the possibility for parole.***

4 42:2 Applicability. Section 1 of this act shall apply to persons convicted of capital murder on or  
5 after the effective date of this act.

6 42:3 Effective Date. This act shall take effect upon its passage.  
7

Approved: Enacted in accordance with Article II, Part 44, of the N.H. Constitution without signature  
of the Governor, May 30, 2019  
Effective Date: May 30, 2019

# Committee Minutes



**SENATE CALENDAR NOTICE**  
**Judiciary**

Sen Martha Hennessey, Chair  
Sen Shannon Chandley, Vice Chair  
Sen Melanie Levesque, Member  
Sen Sharon Carson, Member  
Sen Harold French, Member

Date: March 21, 2019

**HEARINGS**

Tuesday	03/26/2019	
(Day)	(Date)	
Judiciary	SH 100	9:00 a.m.
(Name of Committee)	(Place)	(Time)

9:00 a.m.      **HB 455-FN**      relative to the penalty for capital murder.

**EXECUTIVE SESSION MAY FOLLOW**

**Sponsors:**

**HB 455-FN**

Rep. Cushing  
Rep. Pantelakos  
Rep. Le  
Sen. Reagan

Rep. Danielson  
Rep. Harriott-Gathright  
Rep. Berch

Rep. McGuire  
Rep. Welch  
Sen. Giuda

Rep. O'Connor  
Rep. Wallner  
Sen. Fuller Clark

Jennifer Horgan 271-2609

Martha S. Hennessey  
Chairman

**Senate Judiciary Committee**  
*Jennifer Horgan 271-2609*

**HB 455-FN**, relative to the penalty for capital murder.

**Hearing Date:** March 26, 2019

**Time Opened:** 9:04 a.m.

**Time Closed:** 11:44 a.m.

**Members of the Committee Present:** Senators Hennessey, Chandley, Levesque, Carson and French

**Members of the Committee Absent :** None

**Bill Analysis:** This bill changes the penalty for capital murder to life imprisonment without the possibility for parole.

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**Sponsors:**

Rep. Cushing  
Rep. O'Connor  
Rep. Welch  
Rep. Berch  
Sen. Reagan

Rep. Danielson  
Rep. Pantelakos  
Rep. Wallner  
Sen. Giuda

Rep. McGuire  
Rep. Harriott-Gathright  
Rep. Le  
Sen. Fuller Clark

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**Who supports the bill:** Please See Sign-In Sheet

**Who opposes the bill:** Please See Sign-In Sheet

**Who is neutral on the bill:** Please See Sign-In Sheet

**Summary of testimony presented in support:**

**Representative Cushing**

- It has been 185 years since the legislature was first asked to end the death penalty.
- NH does not love the death penalty and we have been reluctant to use it.
- The last woman to be executed in NH was Ruth Blay in 1768. She was wrongfully executed.
- Urged the Committee to pay attention to the people here that know what the death penalty is like and listen to the voices of law enforcement and survivors of homicide victims.
- The veto message last year regarding repealing the death penalty spoke about wanting to be on the side of victims.
- His father was shot to death in front of his mother and his brother-in-law was murdered in his own home.

- Has had the unspeakable happen to him and has concluded that ritual killing by the state does nothing to honor the lives of those we have lost.
- The death penalty cannot do the one thing that people want and that is to bring back the lost loved one; it just fills another coffin.
- The death penalty replicates the behavior that brought the pain to begin with.
- NH can live without the death penalty.

**Representative Harriott-Gathright (provided written testimony)**

- Comes before the Committee with a heavy but peaceful heart.
- African Americans, other people of color, and the economically deprived have been disproportionately sentenced to death at an alarming rate.
- The death penalty ruins additional families.
- Data shows that the death penalty is in a historic decline.
- The death penalty hurts both families and does not allow for retribution or allow for the perpetrator to see the damage they have done to the victim's family.
- Death row inmates are+ afforded multiple appeals, forcing the family to relive the trauma each time they are in court.
- In 1980 her brother-in-law was murdered, and the perpetrator is still out there. Hopes that individual has engaged in some kind of redemption for what they have done.
- If that person was found, would want them behind bars, so that they can really understand what they did and have the opportunity for redemption.

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**The Honorable John Lewis**

- Was a superior court judge from 2001-2013.
- Presided over many felony level cases.
- One particularly horrific case involved the defendant killing his pregnant fiancé by knifing her several times in the stomach.
- In that case the perpetrator was convicted and sentenced to life in prison, which removed the defendant from society and consigned him to prison without any chance of getting out.
- Is it not appropriate that when persons act so egregiously that they in turn have deemed to have forfeited their lives and don't we do it right in NH?
- Has struggled with these questions.
- There are many people in the state who believe in an eye for an eye.
- Has had sentencing hearings where people wanted revenge and ones where people did not
- .Is Jewish from a German heritage. His family had to flee Nazi Germany.
- Today, the state and country are developing a rule of law that places great value on human life for even those that commit reprehensible acts.
- We want the government to have powers, but we also place restraints on them, particularly surrounding life, liberty, and property.
- We do not want our government to be involved in systematic killings.
- Understands that when people commit horrific crimes there have to be consequences.
- The penalty of life in prison is a heavy penalty.
- The rule of law is not always perfect. Mistakes are made, and juries make judgments of credibility.

**Bishop Rob Hirschfeld (Episcopal Churches of NH) (provided written testimony)**

- Feels the death penalty is morally repugnant because it makes us all complicit in a murder.
- It is an obscene waste of public resources that could be used elsewhere for things like education, the opioid crisis, and mental health care.
- Has heard legislators say that Jesus' own execution at the hands of the state serves as justification for the death penalty because of all the good that has come out of it.
- Such reasoning is a toxic perversion of the gospel message.
- Violence and hatred are not overcome by more acts of violence but by the power of mercy.
- Urges the Committee to continue to strive to put our money towards more moral purposes.

**Richard Van Wickler (provided written testimony)**

- Has been in law enforcement for 32 years, and for the last 26 years has been the Superintendent of the Cheshire County Department of Corrections.
- Advocates for the death penalty cite retribution, deterrence and incapacitation as reasons to support it.
- This issue needs to be examined through the eyes of objectivity and in the absence of emotion.
- His career has demanded that he be an expert in the subject matter of corrections.
- Repealing the death penalty is the right thing to do.
- Years ago, a member of the legislature pointed out that as a corrections professional he is a member of the protected class for which the death penalty exists.
- The legislature asked if repealing the death penalty would make him concerned for the safety of his staff. He responded that there has never been an offender anywhere who has harmed his captor because he was being treated humanely in accordance with basic human rights. Furthermore, his professional life should have no more retribution value than others.
- The issue of whether or not the death penalty is an appropriate form of justice depends on a person's personal frame of reference.
- The moral and monetary loss to society that the death penalty delivers is significantly greater than the benefit to society.
- Knows what incarceration is like and life in prison is not fun. A prisoner's life is miserable.
- Everybody in this room has a different idea of what happens after death except that we are all going to get there. We don't know what it is like.
- Wants to be certain that we are delivering punishment and not setting someone free too early without the ability to revoke that punishment.
- The death penalty is state sanctioned homicide
- NH can live without the death penalty.
- Senator French said he often hears that to some people being in prison is like being in summer camp.

- Would challenge anyone to go to any jail and stay for any length of time and say it is fun. If an offender has no life or career, they will say it is a vacation because they don't want to admit the reality, which is that they hate it. Will not make it any more comfortable than required for inmates. Their punishment is a lack of liberty and a life of discomfort. We got rid of corporal punishment because we claim to be a humane society. The death penalty is the only crime where we perpetrate the crime on the offender that the offender committed. We don't steal from people who steal, we only kill people who kill.
- Senator Levesque asked if the inmates take advantage of an opportunity for retribution.
  - Most offenders are manipulative and will seize any opportunity they can to get out early. There have been over 200 studies that show there is no deterrent effect generally or specially to the death penalty. The concept of deterrence comes from non-criminals thinking because they would not kill someone because they might get killed for doing it. Criminals' thinking is different.
  - Senator Levesque asked if they take the time to reflect on what they have done and focus on betterment.
    - Yes, he has seen people reflect.

**Margaret Hawthorne** (provided written testimony)

- Nine years ago, became a part of the same group as Laura Briggs as murder victim's family members.
- Grieving families can disagree about this.
- Finds the heinousness argument to be offensive.
- For each victim's family member their loss is the worst.
- The legal system divides homicide into categories: first-degree, second-degree, manslaughter, etc.
- The legal system does not divide based on heinousness.
- Lost her daughter but would not want her murderer executed.
- When her daughter was murdered people offered to pull the switch or supply the bullet. These were comments made by lawmakers.
- This is state sanctioned killing.
- When the state executes a prisoner every person in the state is responsible and has blood on their hands.

**Hannah Cox** (Conservatives Concerned About the Death Penalty) (provided written testimony)

- Changed her stance on the death penalty years ago after realizing the high costs, the lack of deterrent effect, the arbitrariness and bias in the system, and the real risk of executing an innocent person.
- NH is one of nine states with republican sponsored bills to repeal the death penalty in this year alone.
- The death penalty is in rapid decline.
- Last year was the fourth year in a row that the US carried out less than 30 executions. They all came from eight states; half of them from Texas alone.
- New death sentences are down 60% since 2000.

- Of the 30 states that still have the death penalty, more than a third of them have not carried out an execution in a decade or more, including NH.
- A recent Gallop poll found that less than half of Americans believe the death penalty is carried out fairly.
- The location a crime is committed is the biggest determinate about whether or not a person will receive a death sentence, not what they did.
- To date the majority of death sentence convictions have come from only 2% of all US counties, and all executions since the reinstatement of the death penalty have come from less than 16% of all US counties.
- Usage is highly concentrated.
- Last year, in areas of high use voters removed district attorneys who frequently sought the death penalty in favor of reform-minded prosecutors.
- Considering the expense of capital cases and the burden they place on the clearance rates for other crimes, it makes sense that voters would turn against those who frequently waste their tax-payer dollars on these proceedings.
- In 2018, two republican US Senate candidates (one in Michigan and one in Montana) came out in opposition to the death penalty, while still in the primary phase and won even after being attacked by their opponents for that stance.
- It has been said that support of the death penalty runs a mile wide and an inch deep. Meaning that support can be very high until people consider the expense, the arbitrary nature of it, and the fact that it is largely applied to the poorest amongst us.
- The system is marked with racial bias, wrongful convictions, poor representation, corruption, and trauma.
- It is not a deterrent and it wastes resources that could be used to make communities safer.
- NH is paying a high price for having this law on the books.
- Consider the opportunity costs that are spent on a few death penalty cases rather than on solving other crimes or funding programs that deter crimes.
- Those on the left and right are turning against the death penalty.

**The Honorable Art Brennan (provided written testimony)**

- Was legal counsel to Governor Judd Gregg, served as a superior court judge from 1992-2007, and in 2007 directed the US Embassy's effort to stop murderous corruption in Iraq.
- Presided over hundreds of trials and has seen the best and the worst in people as a judge and in war torn Cambodia and Iraq.
- The death penalty is not a deterrent and it gives the state a power it should not have.
- Respects the judicial process but we all make mistakes!
- Reflects on his decision making and asks if he mistakenly believed a liar or disbelieved someone that was telling the truth.
- Do we really believe the government should have this power?
- Do we believe that government should be trusted to kill without error?
- Personally, believes the answer is no.
- Heard Senator Ayotte describe the horrific facts of a case, but murder cases are always horrible.

- Does not believe that any particular case should be part of the consideration. Rather, it should be much broader than that.

**Meredith Cook** (Roman Catholic Diocese) (provided written testimony):

- It is one of the most basic beliefs of the catholic faith that every human life is created by God.
- The dignity of life must never be taken away even in the case of someone who has done great evil.
- In State v. Belanger the state recognized that sentencing has two goals: protecting society and rehabilitation of an offender.
- Giving the state the power of the sword to pursue vengeance, is something that should be in our past.
- 13 years ago, her aunt was killed by a drunk driver.
- Recognizes that it is not the same as a murder but having sat through that trial and all it involved understands that the justice system cannot bring back a loved one.
- We cannot bring back a life by taking a life, and we cannot rehabilitate a life by taking a life, and we cannot defend life by taking a life.

**Jane Van Zandt** (provided written testimony)

- Has been an episcopal priest for more than 35 years and a nurse for nearly 50 years.
- Could never participate in a state sanctioned pre-meditated murder.
- Celebrates the Eucharist at the men's prison in Concord and can assure the Committee that spending one's life in prison with the monotony and the fear is a punishment.
- Respects the dignity of every human being without exception.

**Kirk Bloodsworth** (Witness to Innocence)

- Is the first death row inmate exonerated by post-conviction DNA testing.
- Spent 8 years, 10 months and 19 days in prison for a crime he did not commit.
- A little girl, Dawn Venice Hamilton, was found murdered.
- The killer was described as 6'5", curly blonde hair, bushy mustache, tan skin, and skinny.
- At the time he had red hair and he does not tan.
- Was convicted and sent to the Maryland Penitentiary where a guard had been disemboweled by an inmate.
- Could touch either wall of his cell with both hands at the same time, could take three steps from the back to the front of the cell. The cell had a metal rack and a stainless-steel sink and toilet.
- The real killer was found 10 years after through DNA testing.
- Five identification witness positively identified Mr. Bloodsworth as the last person to be seen with Dawn. They were wrong, the police were wrong, and two juries were wrong.
- Currently, there are 163 death row survivors who were exonerated.
- If this can happen to an honorably discharged marine with no criminal history, then it can happen to anyone.

**Phil Runyon** (provided written testimony):

- Has been a member in good standing of the NH Bar for 45 years and was the presiding justice for the 8<sup>th</sup> circuit court for 27 years.
- Presided over thousands of criminal trials.
- Criminal defendants give no thought whatsoever to the consequences of what they do.
- There are two types of offenses: those committed in the heat of the moment and then those that are premeditated.
- Individuals who commit crimes in the heat of the moment are not thinking at all and those who commit premeditated crimes do not think they will be caught. Neither instances involve thinking about the consequences.
- Some argue that some crimes are so heinous that we owe it to the family, but these cases can be appealed for 10, 20, 35 years with multiple hearings and the families are re-traumatized every time.
- The best penalty for these individuals is jail for the rest of their lives thinking about what they did.

**Marian Baker (NH Council of Churches) (provided written testimony)**

- The Council is an ecumenical body consisting of 10 denominations, with approximately 457 congregations.
- Violence begets violence.
- Everyone can be redeemed and changed.
- During the House hearing testified that she had just returned from East Africa for a humanitarian mission. A Kenyan showed her a video of President Trump who was introducing and praising a violent criminal who had become a Christian while in jail.
- Even President Trump agrees that people can be redeemed.
- All ten denominations have made statements against the death penalty.
- It is time to get rid of the death penalty.

**Paul Lutz (provided written testimony)**

- Is a 30-year retired law enforcement officer.
- During his career responded to situations with people who were armed and predisposed to violence, usually including deadly force.
- Fear is something that keeps people from doing careless things and officers use it to stay alive.
- Members of the General Court have said they endorse capital punishment to protect police officers.
- An officer on the brink of going into action is not going to feel safer going to the next step because there is a death penalty.
- Do you think anyone is more predisposed to not murder if there is the death penalty?
- Although there are not many situations where people have thought about the death penalty before committing a crime, there is one notable instance.
- In 1963 two LA police officers were kidnapped by two career criminals. One of the criminals voiced that he thought California had the death penalty for kidnapping of an officer. He was incorrect but his response to that was to execute Officer Ian Campbell. They thought the destruction of the witness



would help them avoid the death penalty. The other officer, Officer Hettinger, was able to escape.

- If voting against this bill makes you feel good that would be the only good thing that would come out of not passing this.

#### **Jonathan Cohen**

- Shared the story of finding out his grandfather had been murdered.
- It was a very surreal moment in time and the loss is very hard to put into words.
- To kill his grandfather's killer will not serve any productive purpose or serve any deterrent effect whatsoever.
- Practices criminal law and has represented murderers.
- It is important to keep in mind that at the same time as Michael Addison's trial there was another case, State v Brooks where John Brooks was convicted of murder for hire and sentenced to life in prison with parole.
- No one is speaking to the deterrent effect of that.
- Criminal defendants do not weigh the pros and cons of their actions.
- This is a moral choice and it is time to repeal the death penalty.
- Senator Levesque asked if State v. Brooks was an officer killing:
  - No, but both were capital cases with different results.
- Senator Carson asked if the aggravating factors could have been the reason why there were different sentences in those capital cases.
  - Aggravating factors can be considered as long as the prosecutor notices them and the court holds a hearing. Depending on the quality of the counsel and a whole slew of factors, different sentences may be imposed. For example, different jurors with different bias could affect the outcomes of similar cases. The law is not a machine that stamps out the same result for every similar thing. That is why life without parole is more just because the bias could be based on something like how someone looks.
- Senator Carson pointed out these aggravating factors do not include race and they set the bar so high.
  - The law always comes down to people and a jury makes a determination about whether or not someone is going to be a danger while incarcerated or is redeemable. Everyone has an implicit bias and that could affect their determination about whether someone should be put to death or not.

#### **Bess Klassen-Landis (provided written testimony)**

- Her mother, Helen was murdered at age 41 in a home invasion. She was stripped, beaten, raped, strangled, and shot.
- In 1996 her case had been reopened but it has never been solved.
- Hate never helps one heal or find inner peace.
- The death penalty is a physical manifestation of hatred and it is unnecessary to keep society safe.
- Every step in the death penalty process is reported in the news and what once was a personal horrifying story begins to be reiterated as old news, but it still wounds the families.
- If there had been a conviction in her mother's case and the death penalty was used that would be the worst way to honor her mother.
- The death penalty only creates more families of murder victims.

**Blake Allison** (provided written testimony)

- His late wife was murdered in the September 11<sup>th</sup> attacks.
- Despite the horror of that event, has never considered 'eye for an eye' retribution.
- Does not waiver in his conviction that taking a person's life in the name of another is wrong.
- Governor Sununu argued that the death penalty was necessary to stand with the victims, but not all of us believe that the death penalty is right.
- On the 10<sup>th</sup> anniversary of the September 11<sup>th</sup> attacks attended an annual gathering with many families of victims.
- Wondered what recovery support these families received and questioned if they would be better served by a system of justice that provided help in recovery, rather than putting violence upon violence?

**Anne Lyczak**

- Is a victim of attempted murder and a widow of a murder victim from the 1994 shooting in Portsmouth.
- There is nothing the death penalty could do to change what happened.
- The death penalty can provide no benefit to the victims.
- The affects of a murder stays with the family and nothing can change that.
- This is a question of morality.
- The death penalty is premeditated murder and we need to build a society that does not stand for murder.

**The Honorable Gregory Smith** (provided written testimony)

- Served as Attorney General and for seven years prior to that served in the criminal division.
- Has been involved in one way or another in approximately 250 homicide cases and has been to 100-125 undisturbed homicide scenes.
- People argue that the death penalty is necessary for certain murder cases, but all homicide cases are terrible.
- The death penalty is agonistic and does not serve the purposes of criminal justice to reform and protect society any better than life without parole.
- We have a system that arbitrarily picks out some people and imposes the death penalty.
- We can say all we want about standards, but it is a system administered by people and it is subject to error.
- There are over 150 people who went through all of the protections we award an American citizen, they were still placed on death row and spent years there, but then were found to be innocent.
- In at least 10% of the cases since 1973, the system made a mistake.
- The reason we apply a disparate penalty is because of a sequence of decisions by police officers, prosecutors, jurors, and judges who are subject to implicit bias. They may believe they are doing the right thing, but the outcome of applying this system is appalling.
- This burden falls disproportionately on people of certain racial and ethnic groups and people who are in the lower socio-economic level of our society.

- NH has had about 1,000-1,500 murder cases since the last execution was carried out 80 years ago.
- Knows personally of some cases that have involved capital level circumstances and other cases that involved officer killings, but those defendants did not get the death penalty.
- There is a highly arbitrary and selective nature to how this works.
- We are unable to fairly and justly apply the death penalty.

**Barbara Keshen** (NH Coalition to Abolish the Death Penalty) (provided written testimony)

- People say is that this a narrow statute reserved for the worst of the worst.
- Has served as a prosecutor and a defense attorney in murder cases.
- Murder is a great equalizer of pain and it does not matter if the victim is an officer or a drug dealer it is equally painful to the family.
- It is painful to say to a family that their loved one's death was not deemed heinous enough.
- People also say that in NH we do not make mistakes and the mistakes other states have made would not happen here.
- Was proud to serve in the Attorney General's office and in the public defender's office.
- Even if it is true that we never make mistakes, we don't just live in NH, we live in the United States.
- In other states, counsel was ill prepared and sometimes a real estate lawyer would act as defense counsel instead of criminal lawyers.
- If we continue to have this on our books, we become complicit in what goes on outside of our state's borders.
- It is time for this to end in the country, and NH must stand up and acknowledge that.
- Provided an article by Stephen Bright that chronicles some of the horrific representations people have experienced.

**Rabbi Robin Nashi** (provided written testimony)

- The Hebrew Bible lists at least 21 offenses punishable by death, but there is no application of the death penalty in the bible.
- The ancient Rabbis ruled that in order to apply the death penalty the prosecution would have to prove that a witness saw an individual about to commit a crime for which the punishment is death, the witness would have to warn the person not to act, the person committed the crime nonetheless, and a minimum of two witnesses say the person committed the crime.
- They set the bar so high that it was essentially impossible to apply it.
- Jews like other religions are divided in to denominations, but they are united in their opposition to the death penalty.
- Only God is infallible and human beings make mistakes.
- There is no evidence that the death penalty acts as a deterrent.
- All people have the ability for repentance.
- The modern state of Israel has used the death penalty once. Not on Yigal Amir who assassinated Prime Minister Yizchak Rabin or on terrorists. The only

application of the death penalty was to kill Adolph Eichmann after the Nazi Trials.

- Do not sully the memories of six million Jews murdered in the Holocaust by equating killing in our state with the behavior of the Nazis.
- The eye for the eye argument is about monetary compensation in the Jewish faith.
- In 40 nations where Christianity is the official religion or where the governments give or gave special recognition to Christian religions they have suspended the use of the death penalty.
- Even Russia has suspended the imposition of the death penalty since 1996,

#### **Grace Mattern**

- Has spent 40 years in the victims' services field.
- Victims have different points of view on this, but the majority of them do not support the death penalty and research backs that up.
- What victims most seek is healing and moving on with their lives.
- In 2012, a researcher from the University of Texas and a researcher from the University of Minnesota conducted a study.
- They interviewed 20 families from Minnesota whose family member was a victim of homicide and the perpetrator was given life without parole.
- They also interviewed 20 families in Texas whose family member was a victim of homicide and the perpetrator was given the death penalty.
- The research determined that over time the families in Minnesota reported better physical and psychological health and more satisfaction with the criminal justice system.
- The researchers attributed that to the lack of control that the Texas families felt about what happened with the cases because of how long death penalty cases are tied up in appeals.
- When perpetrators went off to life without parole after the sentencing no one would hear about them again and the families were able to go on with their lives.
- In 2007 Scott Balm looked at media interviews with family or friends of murder victims conducted around the time the murderer was executed.
- Victims' families reported feeling some kind of peace or relief in only 17% of the more than 150 cases where public statements were made. Only 2.5% felt a sense of closure and 20% explicitly said the execution did not bring them closure.
- The justification of standing with victims through this does not actually work.
- Researcher Marilyn Armour stated that rather than listening to the families of victims, society often uses these people and their pain to score political points in the death penalty debate.

#### **Emily Burr (NH Council of Churches)**

- The first principle of the unitarian faith is the belief of an inherent worth in every person.
- In 1967 Martin Luther King Jr. said he does not believe God approves the death penalty for any crimes, rape and murder included.
- Supports justice, equity, and compassion in human relations.

- Cannot support a process that is riddled with injustice, inequity, and lacks compassion, and therefore, cannot support the use of the death penalty in any circumstances.
- The seventh principle speaks to the respect for the interdependent web of existence of which we are all a part of.
- In her heart she knows the death penalty is wrong.
- Wants the laws in her country to reflect the unitarian universalist values.
- The legislature is charged with supporting the ideals of their constituents.

**Arnie Alpert (American Friend Service) (provided written testimony)**

- In 1985 the American Friend Service Committee first voiced opposition to the death penalty.
- Their moral objection to killing is reason enough to support the repeal of the death penalty.
- His grandfather, Charlie Alpert, was a Jewish immigrant from Poland and a well-regarded man in Springfield, MA. In 1966 he surprised a burglar in his store and the burglar beat Charlie over the head until he died.
- Remembers the tremendous amount of love and support his grandmother received from the community.
- Remembers that when the trial took place it was very painful for his grandmother to relive what happened and then the relief the family felt when the killer was convicted and sent to prison.
- Does not remember his family spending a lot of time or attention on the killer, but instead focused on one another.
- Ultimately, what we are discussing is what we as a society and a state do in the aftermath of a murder.
- In thinking about the just way to respond in that situation, personally comes back to the idea that it is wrong to take another life.
- There is no reason to take the life of someone even if they have taken the life of another.
- Repealing the death penalty will be a step in breaking the cycle of violence.

**Richard O'Leary (provided written testimony)**

- Spent 33 years as a Manchester police officer and was the deputy chief for part of that time.
- The criminal justice system is not perfect and innocent people can and have been killed.
- The Innocence Project has freed over 165 inmates on death row from across the country.
- How do you bring back the life of someone who was executed and then found to be innocent?
- How do we decide which category of victims warrant the death penalty?
- His children are a police officer, a nurse, two of them are teachers, an IT man, and a chef. All of these occupations have been involved in a mass shooting throughout the country. All of their lives are equally important.
- Should we as a society designate some lives as more important than others?
- The death penalty does not deter people from committing murder.

- Most people involved in dangerous activity are drug addicts and crack heads who do not consider the consequences of their actions ahead of time.
- The death penalty turns murderers into celebrities, which in some ways is painful to the victim's family.
- Today, Michael Addison is well known for killing the great officer Michael Briggs. Michael Addison gets constant notoriety because he is on death row.
- In the early '70s another Manchester officer, Ralph Miller, was murdered.
- Officer Miller's killer, Cleo Roy, was sentenced to 50 years behind bars.
- Cleo Roy lost his notoriety many years ago because he was a nobody in prison and he did not get notoriety for killing Officer Miller.
- Had the honor of working with both Officer Miller and Officer Briggs.
- Victims' families do not want a reminder every few years when appeals are brought forward. They need closure regarding what happened to their loved ones.
- Strongly supports death in prison where a person who commits a crime has to live the rest of their lives in a cell without their liberty.
- Life without parole also allows rehabilitation and for corrections when the criminal justice system makes a mistake.
- The cost of executing a person is phenomenal.
- How much money could be saved with this repeal that could be used to help officers on the street, treat addicts, increased training for drug and alcohol counselors and more?
- Senator French asked why he believes the NH Police Association claim that deterrence is the reason for supporting the death penalty.
  - 90% of crimes have penalties associated with them as a form of deterrence. Our jails are full, so does not buy deterrence argument. Officers are a group of people with the same mindset. When he first came on to the force, everyone was supporting it, but now with all the studies done and 165 people exonerated, would rather 10 people on death row be set free if only one was proved innocent than have them all put to death. It is a longstanding police fraternity. There is a good percentage of people on death row who are innocent. Only God is infallible. Years ago, did support the death penalty, but now likes to think they are smarter than that.

### **John Tobin**

- His sister Kathy was murdered in a robbery attempt and it was devastating beyond words to his family.
- A man was arrested, they were told he confessed, and he was executed.
- His sister was 29 when she was murdered, and it is a sorrow that never leaves.
- That man's execution did not bring his family peace of mind or closure about her death. It really just brought more sorrow, confusion and more death.
- Can only speak for himself.
- If he had to do it over again thinks he would have spoken up against the death penalty. Regrets not speaking up against it at the time.
- Does not think putting him to death got them anywhere.

- The implementation of the death penalty has resulted in questions. Wonders if that man's confession was coerced.

**Summary of testimony presented in opposition:**

**The Honorable Kelly Ayotte (provided written testimony)**

- This bill is opposed by the police chiefs, the NH Police Association and the troopers.
- Laura Briggs, the widow of Officer Michael Briggs, is opposed to this.
- Mrs. Briggs is a wonderful person who has suffered and gone through so much as the result of having her husband murdered.
- The bill states that it applies going forward, but there is no doubt that if the legislature repeals the death penalty that Michael Addison's sentence will be commuted from a death sentence to life without parole.
- A first-year law student could make the argument to commute Michael Addison's sentence if the death penalty is repealed.
- Shared the story of Officer Briggs. Michael Addison had been involved in a crime spree in Manchester and Officer Briggs confronted him in an alley to peacefully arrest him. Michael Addison shot Officer Briggs in the head in order to avoid being caught.
- At the time that Michael Addison shot Officer Briggs, he had already committed crimes that would result in life in prison.
- The death penalty was imposed in that case because if it were not, essentially, he would have not gotten any added penalty for having murdered Officer Briggs.
- It is important to recognize that when someone is facing a life sentence and they are confronted by a police officer, they have a choice to make. Do they kill the officer in order to try to get away or do they submit to the arrest?
- Does not want Michael Addison's sentence to be commuted.
- Does not want the next career criminal who is already facing a lengthy sentence and chooses to shoot a police officer, not get a further penalty for doing so.
- NH is very limited in the imposition of the death penalty.
- The jury had to find three times that Michael Addison was guilty beyond a reasonable doubt in order to put him to death. First, that he committed capital murder beyond a reasonable doubt; second that there were no aggravated factors as set forth in the statute; and third that the death penalty should be imposed beyond a reasonable doubt.
- If one juror decides one factor is mitigating, then the death penalty cannot be imposed.
- In these cases, the jury is instructed that they are not obligated to impose the death penalty.
- Michael Addison is the only person in NH on death row.
- Recognizes that people will testify that innocent people have been put to death but would urge the Committee to look at NH's record and the history of the statute.
- Michael Addison deserves punishment for murdering Michael Briggs.

- The legislature expanded the death penalty in 2009 on a bipartisan basis due to Kimberly Cates being murdered in her home and her daughter being maimed for life.
- Governor Lynch said at the time that he believes some crimes are so heinous that the death penalty is warranted. He went on to say that as a state we have used our death penalty statute judiciously and cautiously as is appropriate.
- Agrees with Governor Lynch.
- Do not repeal the death penalty and do not let Michael Addison off death row.
- Senator French asked what crimes Michael Addison committed that would have reached level of life in prison prior to shooting Officer Briggs.
  - Two armed robberies, a drive by shooting, and he was already a felon. There were separate trials for those underlying crimes because they offered that as evidence in the capital murder trial as to why the death penalty was appropriate.
- Senator Levesque asked what sentence the perpetrators in the Kimberly Cates case received.
  - They received life without parole because at the time the statute did not cover murder in a home invasion. In 2009 the legislature expanded the death penalty to include murder during a home invasion.

**Laura Briggs and Bob Blaisdell (NH Police Association & NH Troopers Association)**

- Would like to see the evil person that killed her husband serve the consequence of that.
- The death penalty is about protecting society from evil, it is not about an eye for an eye.
- There are many evil people in NH that are not interested in redemption and take pleasure in hearing that they have hurt people.
- The person who killed her husband has no interest in redemption.
- Her husband, Mike, had helped save that person's life when that person had been shot.
- Other states have passed similar legislation and the people on death row got their sentences commuted.
- That would mean that her husband's killer would not serve time for killing him.
- Some people can thrive in prison and they figure out how to work the system and do not work towards retribution.
- Mike was a genuinely good person and a good dad.
- Knows that Mike was for the death penalty and was upset in 1997 when a fellow officer was killed; and the State was not able to seek the death penalty.
- Her son is working in law enforcement now and would want someone to get fair justice if something were to happen to him.
- This bill either means that Mike's murderer is going to continue to breath in a cell or meet the justice he deserves.
- If this bill passes Mike's murderer's sentence will be reduced.
- The proponents of the bill say the bill is prospective, but it does not make sense that this guy should die but not the next one.
- Justice should be served, and it should not be discounted.



- Urges the Committee to think long and hard about what this vote really does mean.
- Often hears about unintended consequences, but we know the sentence will be commuted because it has happened in other states.
- Understands that this all comes from the heart and what you believe.
- Senator Carson pointed out that with the bill being prospective it is drawing a line in the sand with other people being treated differently and that other states have been sued because they are dealing with equal protection under the law. Asked if this will result in NH being sued.
  - Mr. Blaisdell answered that he is not an attorney, but his opinion is that he can see a mess coming our way.
- Senator Carson asked if he is aware of what happened in Connecticut.
  - Mr. Blaisdell responded that his understanding is that when CT repealed the death penalty there were 11 inmates on death row. Two of them had raped and murdered a mother and daughter; set their house on fire, and tied the father up in the basement. The father survived. Those perpetrators were sentenced to death. Once CT repealed the death penalty their sentences were reduced to life in prison. People in prison can continue to kill.
- Senator French asked when saying 'this is what it is all about' is that referring to whether Michael Addison will die or not.
  - Mr. Blaisdell answered, yes. Is saying that the murderer of Michael Briggs, based on what has happened in other states, will have his sentence reduced.

**John Yurcak (NH Police Association) (provided written testimony)**

- All negative consequences deter somewhat; the only question is how much.
- 24 recent studies show that anywhere between 1-28 homicides are prevented per execution.
- In terms of proportionality, certain crimes deserve certain punishments.
- The death penalty provides the accused additional due process and provides protection to society.
- Life in prison is not pleasant, but how many people on death row ask to be executed.
- 99%+ of people on death row fight tooth and nail to stay alive.
- A life without parole has been stated to provide enough protections, but people in prison have killed other inmates and innocent civilians.
- If you remove the death penalty there is no further punishment for someone already serving life without parole who then takes another life.
- There is not a single state in the country that has passed the proscriptive repeal and has then gone on to execute anyone.
- Thinks repealing the death penalty would be a disservice to the juries of the Addison case and to the memory of Michael Briggs.

**Mark Chase (provided written testimony)**

- Had deferred his time to Senator Ayotte.
- The NH Chiefs of Police are opposed to repealing the death penalty.

## Neutral Information Presented:

### Michael Lewis

- From 2007-2013 was an assistant attorney general and staffed both State v. Addison and State v. John Brooks.
- State v. Brooks was a capital murder conviction that resulted in the punishment of life without parole.
- Consistently hears that NH is a state of limited resources.
- Seeking the death penalty for a homicide requires an extraordinary outlay of resources and it is very divisive.
- In terms of the staffing decisions made on those cases, no senior prosecutors were involved.
- The current deputy attorney general, the most recent deputy attorney general, and the head of the civil bureau were all prosecutors in the criminal bureau during those cases.
- The reason they did not work on those cases was because they had conscientious objections to the penalty that was being sought.
- Has had to sit through testimony today with people saying that those involved in these cases were engaged in state sponsored murder.
- The responsibility of prosecuting the laws of the state is an incredible burden to bare.
- Is the cost of seeking this penalty worth it in relation to the crises the state is facing, such as the opioid crisis, the child protective services crisis, gun violence, and issues regarding mental health?
- Hopes the Committee considers the limited resources our government while making this decision.

jch

Date Hearing Report completed: March 29, 2019

# Speakers

# SPEAKING

## Senate Judiciary Committee

### SIGN-IN SHEET

Date: 03/26/2019 Time: 9:00 a.m.

HB 455-FN AN ACT relative to the penalty for capital murder.

Name/Representing (please print neatly)

	Support	Oppose
✓ Richard Van Wickler	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Laura Briggs Bob Blaisdell	<input type="checkbox"/>	<input checked="" type="checkbox"/>
✓ Margaret Hawthorn	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Hannah Cox / conservatives concerned About the Death Penalty	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Arthur Brennan SELF	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Meredith Cook, Roman Catholic Diocese of Manchester	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Jane W Van Zandt Episcopal Church	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ KIRK BLOODSWORTH witness to INNOCENCE	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ PHIL RUNYON	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ MARK CHASE yielded to)	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3 ✓ Kelly Ayotte ←	<input type="checkbox"/>	<input checked="" type="checkbox"/>
✓ Marion Baker NH Council of Churches	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ JOHN YURCNIK NH POLICE ASSOC.	<input type="checkbox"/>	<input checked="" type="checkbox"/>
4 ✓ Paul Lutz	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4 ✓ John M. Lewis, Retired Superior Ct. Judge	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Jonathan Cohen	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Bess Klassen-Landis	<input checked="" type="checkbox"/>	<input type="checkbox"/>
5 ✓ A Robert Hirschfeld, Bishop of Episcopal Church	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Blaki Allison	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Rep Linda Harriot.

# SPEAKING

## Senate Judiciary Committee

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Date: 03/26/2019 Time: 9:00 a.m.

HB 455-FN AN ACT relative to the penalty for capital murder.

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Name/Representing (please print neatly)

Name/Representing (please print neatly)	Support	Oppose
✓ Mike Lewis	<input type="checkbox"/>	<input type="checkbox"/>
✓ Barbara Mesken	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ ANNE LYZAK	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Rabbi Robin Natshi	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Grace Mattern	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2 ✓ Deborah Harriet Hathright	<input checked="" type="checkbox"/>	<input type="checkbox"/>
1 ✓ Mary Alice Mc	<input checked="" type="checkbox"/>	<input type="checkbox"/>
✓ Emily Student Burr	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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# NOT SPEAKING

## Senate Judiciary Committee

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Date: 03/26/2019 Time: 9:00 a.m.

HB 455-FN AN ACT relative to the penalty for capital murder.

Name/Representing (please print neatly)

	Support	Oppose
Robert Spencer, Concord NH	<input checked="" type="checkbox"/>	<input type="checkbox"/>
NH Police Association	Support	Oppose
Ken Chamberlain JR Manchester Police Retirees Assoc	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Christopher Cunningham NH Police Association Manchester Police Retirees Ass	<input type="checkbox"/>	<input checked="" type="checkbox"/>
DEREK FEATHER Manchester Police Retirees Assoc	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Liz-Anne Platt Concord self	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Maura Willing Concord NH self	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Donna Coriady Dover NH NHCADP	<input checked="" type="checkbox"/>	<input type="checkbox"/>
ANTHONY CORIADY Dover NH NHCADP	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Walter Feldhouse, Manchester NH	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Kevin Woudy Fitzwilliam, NH	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Nancy Brunna Wear NH self	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Doug Hempt self Concord self	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Ruth Heath Canterbury	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Senator Bob Giuda Senate District 2	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Charlie Dennis	<input type="checkbox"/>	<input checked="" type="checkbox"/>
[Signature]	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Raiti O'Brien	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Louise Spencer	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Orin Taylor Concord self	<input checked="" type="checkbox"/>	<input type="checkbox"/>

# NOT SPEAKING

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Date: 03/26/2019 Time: 9:00 a.m.

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Name/Representing (please print neatly)

SCOTT LANGLEY - Amnesty International	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Scandice Stoneleane	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Ann Wright - NHCADP	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Amanda Merrill " board	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Bette Lasky " "	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Katherine Cooper / NHA Assoc. of Criminal Def lawyers	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Rep. Timothy Hinson	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Rep. Nancy Murphy	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Ellen Koltz (self)	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Kerry Cook	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Rep. Chris R	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Sen Reagan	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Dennis Jakubowski	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Cher Falk	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Ed Friedrich	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Lois Friedrich	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Sally Embley Webster LRVNM	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
DAVID CAWLEY	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Mark Barker	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>

# NOT SPEAKING

## Senate Judiciary Committee

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Date: 03/26/2019 Time: 9:00 a.m.

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Name/Representing (please print neatly)

Jeanne Hruska	ACLU-NH	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Heide Hamer	Representative	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Deborah Jankowski		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Lucy Arington		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Began Lamphier		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Donna Brown		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
JOHN BORDENET		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
JULIE RADHAKRISHNAN		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Deb Howard		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
REP. DAVID MEUSE		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
JOE SCHAPIRO	Representative	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Richard Osborne	Representative	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Karin Man	Representative Grafton 6	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Rep. Lion Butler	Rock, 18 Exeter	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
For Rep. Mark Messer	Rye, NH	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
REP BOB GREEN	Hills 37	Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Senator Delonni Levesque		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Debra J. Pignatelli		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>
Maitha Hennessey		Support <input checked="" type="checkbox"/>	Oppose <input type="checkbox"/>



# Testimony



2013

# Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*

Stephen B. Bright

Sia M. Sanneh

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Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 *Yale L.J.* (2013).  
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STEPHEN B. BRIGHT & SIA M. SANNEH

## Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*

**ABSTRACT.** In its 1963 ruling *Gideon v. Wainwright*, the Supreme Court declared the right to a lawyer “fundamental and essential” to fairness in the criminal courts and held that lawyers must be provided for people who could not afford them so that every person “stands equal before the law.” In later decisions, the Court ruled that a poor person facing any loss of liberty must have a lawyer “so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.” This Essay argues that fifty years later, this right has not been realized. The U.S. criminal system is not truly adversarial because prosecutors possess broad, unchecked power and therefore determine results in criminal cases with little or no input from the defense. Governments have failed to adequately fund defense systems, many judges tolerate or welcome inadequate representation, and the Supreme Court has refused to require competent representation, instead adopting a standard of “effective counsel” that hides and perpetuates deficient representation. In this system, poverty, not justice, dictates outcomes.

**AUTHORS.** Stephen B. Bright is Harvey Karp Visiting Lecturer at Law, Yale Law School, and President and Senior Counsel, Southern Center for Human Rights, Atlanta, Georgia. This Essay draws upon his first-hand observations of representation of indigents since 1976. Sia M. Sanneh is Senior Liman Fellow in Residence, Yale Law School. Since 2008, she has represented indigent defendants as an attorney with the Equal Justice Initiative, Montgomery, Alabama. This Essay draws upon her first-hand observations. The authors would like to thank Kathleen E. Mollison for outstanding research assistance.



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**INTRODUCTION**

Every day in thousands of courtrooms across the nation, from top-tier trial courts that handle felony cases to municipal courts that serve as cash cows for their communities, the right to counsel is violated. Judges conduct hearings in which poor people accused of crimes and poor children charged with acts of delinquency appear without lawyers. Many plead guilty without lawyers. Others plead guilty and are sentenced after learning about plea offers from lawyers they met moments before and will never see again. Innocent people plead guilty to get out of jail. Virtually all cases are resolved in this manner in many courts, particularly municipal and misdemeanor courts, which handle an enormous volume of cases. But it is also how many felony cases are resolved.

Even when representation lasts for more than a few minutes, it is often provided by lawyers struggling with enormous caseloads. These lawyers practice triage as they attempt to represent more people than is humanly—and ethically—possible without the resources to investigate their many clients' cases, retain expert witnesses, and pay other necessary expenses. As a result, they are unable to give their clients informed, professional advice during plea negotiations, which resolve almost all cases in “a system of pleas, not a system of trials.”<sup>1</sup> In the rare case that goes to trial, defense counsel often cannot seriously contest the prosecution's arguments, raise and preserve legal issues for appeal, or provide information about the defendant that is essential for individualized sentencing. For the poor person accused of a crime, there may be no adversarial system. Prosecutors may determine outcomes in cases with little or no input from defense counsel.

There are exceptions. Some jurisdictions have provided the resources, independence, structure, training, and supervision that enable capable, caring, and dedicated lawyers to zealously represent their clients. Some public defenders and assigned counsel do heroic work despite overwhelming caseloads and lack of resources. But in many jurisdictions, perfunctory representation and “meet 'em and plead 'em” processing of human beings through the courts remain the dominant culture. Many courts are plea mills: courts of profit that impose fines without any inquiry into the ability of defendants to pay, thus setting them up for failure and return to jail.

The representation received by most poor people accused of crimes—if they receive any at all—is a far cry from the constitutional requirement of the “the guiding hand of counsel at every step in the proceedings,” which was

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1. *Lafley v. Cooper*, 132 S. Ct. 1376, 1388 (2012). Ninety-four percent of convictions in state courts are the result of guilty pleas. *Id.* In the federal courts, ninety-seven percent of convictions are the result of guilty pleas. *Id.*

established by *Gideon v. Wainwright*<sup>2</sup> and its progeny.<sup>3</sup> *Gideon* held that “fair trials before impartial tribunals in which every defendant stands equal before the law” “cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”<sup>4</sup> The Court also discussed equality before the law in another case decided on the same day as *Gideon*, reiterating its previous statement that “there can be no equal justice” where the kind of justice a person gets “depends on the amount of money he has.”<sup>5</sup>

Nevertheless, most states, counties, and municipalities—responsible for over ninety-five percent of all criminal prosecutions<sup>6</sup>—have refused to provide funding necessary for counsel and equal justice, despite repeated reports of deficient representation and gross miscarriages of justice. There is no public support for such funding, and governments have no incentive to provide competent representation, which could frustrate their efforts to convict, fine, imprison, and execute poor defendants. Many state governments have a long history of disregarding or resisting unpopular United States Supreme Court

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2. 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).
  3. *Gideon* applied to felony cases. The Court later held that children facing commitment to an institution were entitled to counsel as a matter of due process in delinquency proceedings, *In re Gault*, 387 U.S. 1, 34-42 (1967), and that “no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel,” *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). An accused is entitled to counsel “within a reasonable time” after “the initiation of adversary judicial proceedings,” *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008), and at any “critical stage” of a criminal proceeding, such as a preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1, 7-10 (1970), or arraignment, *White v. Maryland*, 373 U.S. 59, 60 (1963). The Court also held that an indigent defendant is entitled to expert assistance when necessary to a fair trial in *Ake v. Oklahoma*, 470 U.S. 68, 77-83 (1985), although its decision was based on due process and not the Sixth Amendment. The American Bar Association, among other organizations, has developed standards for effective representation, *see, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/providing\\_defense\\_services.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf), and the effective delivery of public defense services, *see* Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System*, A.B.A. (Feb. 2002), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lsc\\_laid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_laid_def_tenprinciplesbooklet.authcheckdam.pdf) [hereinafter *Ten Principles*] (summarizing and citing principles from previous reports, studies and guidelines).
  4. *Gideon*, 372 U.S. at 344.
  5. *Douglas v. California*, 372 U.S. 353, 355 (1963) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)) (holding that a poor person had a right to counsel on appeal).
  6. *See* NAT’L CTRL. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (Brian J. Ostrom, Neal B. Kauder & Robert C. LaFountain eds., 2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/ewsc02-npcsp.pdf>.

decisions—whether they require desegregation of the schools or the right to counsel—unless these decisions are enforced. The right to counsel is not enforced. Many judges tolerate or welcome inadequate representation because it allows them to process cases quickly. The Supreme Court has refused to require competent representation, instead adopting a standard of “effective counsel” that hides and perpetuates deficient representation.

The cost of this one-sided system is enormous. Innocent people are convicted and sent to prison while the perpetrators remain at large. Important issues, such as the system’s pervasive racism—from stops by law enforcement officers to disparate sentencing—are ignored. People are sentenced without consideration of their individual characteristics, allowing race, politics, and other improper factors to influence sentences. Over 2.2 million people—a grossly disproportionate number of them African Americans and Latinos<sup>7</sup>—are in prisons and jails<sup>8</sup> at a cost of \$75 billion a year.<sup>9</sup> Nearly an additional five million people are on probation, parole, or supervised release.<sup>10</sup> Over seventy thousand children are held in juvenile facilities.<sup>11</sup> Even those who have completed their sentences may be deported, denied the right to vote, dishonorably discharged from the armed forces, denied public benefits, and

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7. One in 15 African-American men over eighteen and 1 in 36 Latino men over eighteen are imprisoned, while only 1 in 106 white men over eighteen is behind bars. *One in 100: Behind Bars in America 2008*, PEW CENTER ON THE STATES 6 (2008), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf). One in 9 African-American men between the ages of twenty and thirty-four is behind bars. *Id.*
  8. Lauren E. Glaze, *Correctional Populations in the United States, 2010*, BUREAU OF JUST. STAT. 7 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>.
  9. John Schmitt, Kris Warner & Sarika Gupta, *The High Budgetary Cost of Incarceration*, CENTER FOR ECON. & POL’Y RES. 2 (2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.
  10. Glaze, *supra* note 8, at 2-3. When those under supervision in the community are combined with those in prison and jail, one in every thirty-three adults, or 3.1% of the population, is under some form of correctional control. *Id.* at 2. The rates are drastically elevated for African Americans. One in every eleven African Americans was under correctional control at the end of 2007. *One in 31: The Long Reach of American Corrections*, PEW CENTER FOR THE STATES 5 (2009), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2009/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf); *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 179-80 (2010) (discussing the effects of mass incarceration on the African-American community).
  11. CHILDREN’S DEF. FUND, *THE STATE OF AMERICA’S CHILDREN: HANDBOOK 2012*, at 48 (2012). Since 1997, African-American children have been at least three-and-a-half times as likely and Latino children at least one-and-a-half times as likely as white children to be in residential placement. *Id.*

denied business or professional licenses.<sup>12</sup> Reentry into society is extremely difficult,<sup>13</sup> extending the costs to the families and communities of those who have been imprisoned.<sup>14</sup>

There are expressive costs as well. A system in which all of the key actors routinely ignore one of its most fundamental constitutional requirements is not a system based on the rule of law, no matter what it claims to be. When those actors shirk their constitutional obligations and bring the immense power of the state down most heavily on African Americans and Latinos, people cease to have confidence in the courts. The system lacks legitimacy and credibility and is undeserving of respect. For this to change, courts, legislatures, executives, and members of the legal profession will need to respond with a sense of urgency and commitment to justice that has been missing in most places during the last fifty years.

#### 1. PROSECUTORS DETERMINE OUTCOMES IN MANY CASES WITH LITTLE OR NO INPUT FROM THE DEFENSE

The United States supposedly has an adversary system of justice, as opposed to the inquisitorial system employed in much of the rest of the world.<sup>15</sup> In the latter, a judge or magistrate is primarily responsible for directing the investigation and sifting through the evidence and establishing

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12. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705-06 (2002)).
  13. *Collateral Costs: Incarceration's Effect on Economic Mobility*, PEW CENTER ON THE STATES 9-18 (2010), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2010/Collateral\\_Costs%281%29.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs%281%29.pdf) (reporting that incarceration reduces former inmates' earnings by forty percent and limits their future economic mobility).
  14. *See id.* at 4-5, 18-21 (reporting that 2.7 million children have a parent behind bars—1 in 9 African-American children, 1 in 28 Latino children, and 1 in 57 white children—and that a parent's incarceration hurts children educationally and financially); *see also* ALEXANDER, *supra* note 10, at 171-75; TODD CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).
  15. The "lawyer-conducted" Anglo-American adversary system is practiced in the United States, England, and other countries founded on English common law, as opposed to the judge-driven "European and European-derived" system found elsewhere. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 1 (2005); *see also* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989) (explaining that the majority of the world uses some version of the inquisitorial system that evolved primarily in continental Europe).

the true facts.<sup>16</sup> America's adversary system relies on the prosecution and defense each to conduct investigations, analyze evidence, select witnesses, argue law, and present "partisan advocacy"<sup>17</sup> to a neutral factfinder. The system is premised on "the principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question."<sup>18</sup> For this system to work, there cannot be significant disparities between the skills and resources of the prosecution and defense. Both must be able to investigate the case and present their evidence and arguments fully and forcefully.

However, for the most part, only very wealthy individuals and corporations can afford to pay for hundreds—often thousands—of hours of representation by experienced trial lawyers and for the cost of investigation, expert witnesses, and other expenses of defending a criminal case within the adversary system. On the other hand, the lawyer assigned to defend a poor person usually has little or no time and few resources to investigate the charges and mount a defense. For those who cannot afford costly representation by experienced attorneys, the system is inquisitorial, but the prosecutor, not a neutral judicial officer, serves as inquisitor.

Prosecutors have vast resources and immense power in conducting their inquests and dictating outcomes in the plea bargaining that resolves the overwhelming majority of cases. Governments maintain well-staffed offices specializing in the prosecution of cases. Prosecutors regularly appear in court, and many judges rely on their recommendations on issues ranging from pretrial release to sentencing. Some judges even rely on prosecutors to write their orders.<sup>19</sup> Prosecutors have access to law enforcement agencies to investigate cases and laboratories to conduct scientific tests and present expert testimony.<sup>20</sup> They can subpoena witnesses to testify before grand juries and

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16. LANGBEIN, *supra* note 15, at 1 ("The striking peculiarity of the Anglo-American trial is that we remit to the lawyer-partisans the responsibility for gathering, selecting, presenting, and probing the evidence. . . . In the European systems, by contrast, evidence is gathered by judges or judge-like investigators, public officers who operate under a duty to seek the truth.").

17. *Herring v. New York*, 422 U.S. 853, 862 (1975).

18. *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)) (internal quotation marks omitted).

19. See, e.g., CLIVE STAFFORD SMITH, *THE INJUSTICE SYSTEM* 206-09 (2012) (describing a Florida judge allowing prosecutors to prepare sentencing orders in capital cases); Stephen B. Bright & Patrick Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 803-11 (1995) (describing numerous instances in which state attorneys wrote orders signed by judges without any changes).

20. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731-36 (1993) (describing the resources available to the prosecution).

produce all documents and records relevant to a case.<sup>21</sup> They have a power that no other litigant has: the ability to reward witnesses for providing information or testimony by granting immunity from prosecution, dismissing or reducing criminal charges, or informing sentencing judges of cooperation.<sup>22</sup> They can place informants in the cells of defendants.<sup>23</sup> On the other hand, in the overwhelming majority of criminal cases against poor defendants, the defense conducts no investigation whatsoever.

In most jurisdictions, prosecutors are not required to reveal much of what they know about the case to defense counsel. “[T]he prosecutor’s institutional role in controlling access to information relevant to a defendant’s guilt, and the prosecutor’s ability to withhold evidence that might prove a defendant’s innocence . . . dramatically distort[] the ability of the adversary system to function fairly and properly.”<sup>24</sup> Most jurisdictions allow prosecutors to withhold almost everything about their case and conduct “trial by ambush.”<sup>25</sup> Some prosecutors make plea offers conditioned upon the defendant’s not filing any motions or seeking discovery.<sup>26</sup> The Supreme Court has held that prosecutors are not required to disclose exculpatory evidence to a grand jury before it decides whether to issue formal charges<sup>27</sup> or to defense counsel before

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21. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 400-01 (1992).

22. *Id.* at 416-17.

23. *See, e.g., Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (holding that an accused’s statements to a jailhouse informant placed in his cell by police are admissible so long as the informant does not ask questions or take coercive steps to elicit information).

24. Gershman, *supra* note 21, at 449; *see also id.* at 449-54 (describing the prosecutor’s control of information); Luban, *supra* note 20, at 1737 (“[C]riminal defendants have virtually no discovery rights against the prosecution in most jurisdictions.”).

25. Norman L. Reimer, *Discovery Reform: The Time for Action Is at Hand*, CHAMPION, Mar. 2012, at 7 (providing illustrative examples and arguing that “[t]rial by ambush practices that leave the defense clueless as to the identity, background and reliability of key witnesses until the eve of trial, or later, must end,” for “[t]hese practices not only ambush individual defendants, they ambush justice”); *see also* Paul C. Giannellia & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493 (2007) (discussing “trial by ambush” in the use of expert witnesses).

26. *See, e.g., R. Michael Cassidy, Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1431 & n.8 (2011) (describing plea agreements with explicit discovery-waiver provisions).

27. *United States v. Williams*, 504 U.S. 36, 45-55 (1992) (holding that a district court may not dismiss an otherwise valid indictment on the ground that the government failed to disclose “substantial exculpatory evidence” to the grand jury).

the entry of a guilty plea.<sup>28</sup> Prosecutors may even demand that a defendant release officials from civil liability in exchange for dismissal of charges.<sup>29</sup>

The exclusive access to information and unbridled discretion in charging and plea bargaining enables prosecutors to dictate the resolution of many cases and often to determine sentences. Prosecutors decide whether to charge, what to charge, whether to charge in state or federal court or both,<sup>30</sup> whether to allow defendants to enter diversion programs, whether to agree to pretrial release as part of a plea bargain, and whether to grant immunity.<sup>31</sup> They can overcharge defendants in order to increase their bargaining power. They may seek the death penalty or other enhanced penalties and mandatory minimum sentences. In jurisdictions with sentencing guidelines, prosecutors influence and often control the length of sentences by what they charge and, in the federal courts, whether they agree to notify the sentencing judge that the defendant has rendered "substantial assistance."<sup>32</sup> In all types of cases, prosecutors may agree to reduce the charges, withdraw their notice to seek enhanced sentences, agree to a specific sentence, or make some other concession in exchange for the defendant's entry of a guilty plea and waiver of a trial by jury and any appeals.<sup>33</sup> Judges are often left with little or no

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28. *United States v. Ruiz*, 536 U.S. 622, 632-33 (2002) (holding that the Constitution does not require the government to disclose material impeachment information prior to entering a plea agreement with a criminal defendant).

29. *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

30. The decision to bring charges in state or federal court may be based upon which jurisdiction has the more severe punishment. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting) (noting that sentences for drug offenses tend to be substantially more severe in the federal system than in the state systems and that, in the case before the Court, the federal sentence might be as long as a mandatory life term, but in state court it could have been as short as twelve years, less work-time credits of half that amount).

31. *See Gershman, supra* note 21, at 405-08 (describing discretionary decisions of prosecutors with regard to charging and resolving cases); *see generally* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (arguing that unchecked prosecutorial discretion leads to unjust results in the criminal system).

32. *See* 18 U.S.C. § 3553(e) (2006); 28 U.S.C. § 994(n) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2011). As one scholar has noted, "Congress created a sentencing system that provides prosecutors tremendous leverage in the plea bargaining process, forced criminal defense attorneys to adopt the role of transactional attorneys rather than zealous advocates, and virtually eliminated the criminal jury as a viable check on government overreaching." Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 373 (2005) (footnotes omitted).

33. *See McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) ("A prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case.").

sentencing discretion,<sup>34</sup> and defense counsel may be relegated to the role of messenger.

These vast prosecutorial powers and the ruthless use of them in plea bargaining and determining sentences were upheld by the Supreme Court in *Bordenkircher v. Hayes*.<sup>35</sup> There, a prosecutor offered Paul Hayes a sentence of five years in prison for forging a check for \$88.30 and warned Hayes that if he rejected the offer the prosecutor would file repeat offender papers requiring a mandatory sentence of life imprisonment. Hayes declined the offer, and the prosecutor carried out his threat, obtaining the mandatory life sentence. The Supreme Court upheld the prosecutor's actions, calling them part of the "give-and-take" of plea bargaining.<sup>36</sup>

Prosecutors exercise this power with virtually no oversight or accountability. They have absolute immunity for their work in prosecuting cases<sup>37</sup> and may not be held liable even when their failure to train their assistants results in the suppression of exculpatory evidence and conviction of innocent people.<sup>38</sup> The Supreme Court has made it impossible for a defendant to prevail on a claim of selective prosecution,<sup>39</sup> and has refused to require prosecutors to reveal the basis for their charging decisions, even when these decisions produce racial disparities.<sup>40</sup> Although prosecutors are, in theory, bound by the ethics rules promulgated by each state, the reality is that disciplinary measures are almost never imposed on prosecutors.<sup>41</sup> As is often

34. See, e.g., Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html> (describing how sentencing laws give prosecutors power to determine sentences).

35. 434 U.S. 357 (1978).

36. *Id.* at 363. The Court relied on the "relatively equal bargaining power" between the prosecution and the defense. *Id.* at 362 (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting)). However, Hayes had no power—only a choice between accepting the plea offer for a sentence of five years and rejecting it and spending the rest of his life in prison.

37. *Burns v. Reed*, 500 U.S. 478 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

38. *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

39. See *McCleskey v. Kemp*, 481 U.S. 279, 292-97 (1987); *Wayte v. United States*, 470 U.S. 598, 607 (1985).

40. See *United States v. Bass*, 536 U.S. 862 (2002) (per curiam); *McCleskey*, 481 U.S. at 296-97 & n.18; see also *In re United States*, 397 F.3d 274 (5th Cir. 2005) (per curiam).

41. See David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011), <http://yalelawjournal.org/2011/10/25/keenan.html>; Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial*



the case in various contexts, unchecked power sometimes leads to abuse.<sup>42</sup>

An inquisitorial system masquerading as an adversary system with all power concentrated in the prosecution is not fair or just. Prosecutors evaluate cases not as objective inquisitors, but as adversaries and politicians.<sup>43</sup> Many are elected on tough-on-crime platforms, promising convictions and severe sentences. Moreover, even the most conscientious prosecutor committed to a just outcome lacks critical information about the accused—his or her version of events as well as personal characteristics relevant to culpability and punishment—necessary to make fully informed decisions. Justice in America supposedly requires a working adversary system, as the attorneys general of twenty-three states and territories recognized in 1963 by filing an *amicus curiae* brief in the Supreme Court in support of Clarence Earl Gideon's argument that the Sixth Amendment required counsel for defendants in the state courts.<sup>44</sup> Today, however, denying the poor adequate representation is a strategy for winning cases, used by some prosecutors.<sup>45</sup>

## II. GOVERNMENTS HAVE DISREGARDED THEIR CONSTITUTIONAL OBLIGATION TO PROVIDE COUNSEL

Fifty years after *Gideon*, the right to counsel and equal justice are as much a fiction as the adversary system. The kind of justice people receive depends very much on the amount of money they have. It determines whether they have counsel, when they obtain counsel, whether they have access to investigators

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*Misconduct in California 1997–2009*, VERITAS INITIATIVE, [http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct\\_Exec\\_Sum.pdf](http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct_Exec_Sum.pdf) (showing that prosecutors are not penalized for misconduct).

42. See Gershman, *supra* note 21, at 408 (decrying the regular overcharging, discrimination, vindictiveness, plea bargaining abuses, and other misconduct that occurs “without meaningful judicial review or correction”).
43. All but four states (Connecticut, Delaware, New Jersey, and Rhode Island) elect their chief prosecutors. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 n.3 (2012). The United States is the only country in the world where citizens elect prosecutors. *Id.*
44. See Brief for the State Government Amici Curiae, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), 1962 WL 75209; ANTHONY LEWIS, *GIDEON'S TRUMPET* 147–52 (1964).
45. For example, after a trial judge permitted a public defender in Miami to decline representation in one complex case carrying a sentence of life imprisonment because the public defender could not competently and ethically handle it due to obligations to 164 clients in pending felony cases, the prosecutor appealed and obtained a reversal of the order. *Bovens v. State*, 39 So. 3d 479, 480–82 (Fla. App. 2010). It is hard to imagine the prosecutor having any interest in seeking reversal of a judge's decision allowing a public defender to decline a single complex case except to take advantage of the public defender's excessive workload.

and expert witnesses, and whether the representation provided is zealous or perfunctory. This is apparent from the moment someone is arrested and jailed. A person who can afford a lawyer usually retains one at once. The lawyer will attempt to secure the person's immediate release from jail, often successfully, so that the client can maintain employment, take care of family, and prepare for trial. A team of lawyers, investigators, paralegals, and support staff will begin an investigation while the evidence is available and the memories of witnesses are fresh. If it appears that the charges lack merit, the lawyers will attempt to secure dismissal of the case and, if unsuccessful, prepare for and represent the client at trial, asserting and protecting all of the client's rights. If the client appears to be guilty of the crime charged or a lesser offense, the lawyer will engage in plea bargaining based upon a detailed knowledge of the facts of the crime and the background of the client. If the client is convicted at trial or by entering a guilty plea, the lawyer will provide individualized advocacy with regard to sentencing.

In contrast, poor people accused of crimes, although entitled to counsel "within a reasonable time" after "the initiation of adversary judicial proceedings,"<sup>46</sup> may languish in jail for days, weeks, or months after arrest without a lawyer.<sup>47</sup> They do not receive the "consultation, thoroughgoing investigation and preparation" that are "vitaly important" from the outset in a case.<sup>48</sup> As a result, they may lose their jobs, homes, and means of transportation, even though the charges may later be dismissed. Jacqueline Winbrone even lost her husband. She was detained after arrest in New York because she could not make \$10,000 bail. With no lawyer to seek a reduction, she remained in jail and was unable to take her husband to dialysis, and, as a result, he died.<sup>49</sup> She was later released on her personal promise to return to court, and ultimately the charge was dismissed.<sup>50</sup> Diego Moran, facing the

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46. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008) (quoting *Michigan v. Jackson*, 475 U.S. 625, 630 n.3 (1986)). Defendants are entitled to counsel at preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970), which are scheduled in most jurisdictions within ten to twenty days of arrest and provide an opportunity for dismissal of the charges or a reduction of bond, but defendants without counsel may not receive preliminary hearings because there is no counsel to ask for them.

47. See NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 85-87 (2009), <http://www.constitutionproject.org/manage/file/139.pdf> [hereinafter JUSTICE DENIED].

48. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

49. *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff'd as modified*, 930 N.E.2d 217 (N.Y. 2010).

50. *Id.*

death penalty in Del Rio, Texas, asked for a lawyer the day after his arrest, but did not receive one for over eight months.<sup>51</sup> A woman in Mississippi charged with shoplifting spent eleven months in jail before a lawyer was appointed to her case, and three additional months before entering a guilty plea.<sup>52</sup> Many poor people spend more time in jail waiting for the appointment of a lawyer and a hearing than they would spend if found guilty and sentenced.<sup>53</sup> Some jurisdictions have “jail clearing days,” when people who have spent more time in jail than any sentence they might receive can plead guilty for time served. Innocent people plead guilty to get out of jail.<sup>54</sup>

An ABA report in 2004 reached “the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.”<sup>55</sup> A national study in 2009 found that in misdemeanor cases—which far outnumber felonies and which affect millions of people<sup>56</sup>—judges were encouraging defendants to plead guilty without counsel, prosecutors were talking directly with defendants and convincing them to plead guilty without counsel, defendants were discouraged from asking for counsel because of application fees for a public defender as high as \$200, and defense lawyers usually had too many cases to

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51. Brian Chasnoff, *Indigent Often Are Left in a Legal Limbo*, SAN ANTONIO EXPRESS-NEWS, Oct. 10, 2010, at A1.
  52. *Assembly Line Justice: Mississippi’s Indigent Defense Crisis*, NAACP LEGAL DEF. & EDUC. FUND, INC. 3 (Feb. 2003), [http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms\\_assemblylinejustice.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf).
  53. JUSTICE DENIED, *supra* note 47, at 86–87; Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAW. 18–19 (2009), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808>.
  54. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* 16–17 (Cornell Legal Studies Research Paper 2012), <http://ssrn.com/abstract=2103787> (“[I]nnocent persons charged with relatively minor offenses often plead guilty in order to get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial.”); see also *When the Innocent Plead Guilty*, INNOCENCE PROJECT (last visited Apr. 1, 2013), [http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php).
  55. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, at iv (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf).
  56. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–82, 297–303 (2011) (discussing the number of misdemeanor cases and the significant consequences of convictions in those cases); Boruchowitz et al., *supra* note 53, at 11 (estimating that at least ten million misdemeanor cases are filed each year).

provide competent representation.<sup>57</sup>

Other studies confirm that judges and prosecutors are routinely ignoring the right to counsel established by *Gideon* and its progeny. For example, one report found that seventy percent of defendants in misdemeanor cases in twenty-one Florida counties entered pleas of guilty or no contest at arraignments that lasted an average of 2.93 minutes in 2011.<sup>58</sup> One-third were not represented by counsel.<sup>59</sup> Some defendants were not advised of their right to counsel and others were handed forms encouraging them to waive counsel.<sup>60</sup> Poor defendants in Florida must pay a minimum fifty-dollar fee for representation, which cannot be waived or reduced by trial judges no matter how destitute the defendant.<sup>61</sup> Unrepresented defendants were more likely to plead guilty or no contest than defendants represented by counsel.<sup>62</sup> In Kentucky, even fewer people accused of misdemeanor offenses—about thirty percent—were represented by counsel.<sup>63</sup> Less than ten percent of the accused were provided counsel in two populous counties near Cincinnati, Campbell and Kenton.<sup>64</sup> Many courts in Michigan “simply do not offer counsel in misdemeanor cases” while others “avoid their constitutional obligation to provide counsel” by accepting “uninformed waivers,” sentences of time served without counsel, and “the threat of personal financial strains” because of “unfair cost recovery measures,”<sup>65</sup> and mass guilty pleas in misdemeanor cases

57. Boruchowitz et al., *supra* note 53, at 14-22.

58. Alisa Smith & Sean Maddan, *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, NAT'L ASS'N OF CRIM. DEF. LAW. 23 tbl.9 (July 2011), <http://www.nacdl.org/reports/threeminutejustice>.

59. *Id.*

60. *Id.* at 15, 23.

61. *Id.* at 18.

62. *Id.* at 15.

63. David Carroll, *Underrepresentation in Kentucky Misdemeanor Courts*, NAT'L LEGAL AID & DEFENDER ASS'N (Nov. 16, 2011, 3:34 pm), <http://nlada.net/jscri/blog/underrepresentation-kentucky-misdemeanor-courts>; see also Dave Malaska, *Trampling over the Sixth Amendment: NKY Courts Play Fast and Loose with Rules*, CITYBEAT (Cincinnati), Nov. 9, 2011, <http://www.citybeat.com/cincinnati/article-24355-trampling-over-the-sixth-amendment.html>; *Average DPA Appointment Rate to "M" Cases in District Court Over Three Fiscal Years, By County*, KY. DEP'T OF PUB. ADVOCACY, <http://dpa.ky.gov/NR/rdonlyres/82134EDC-6545-4238-9923-9F3202C27005/0/StatewideMisdemeanorAppointmentsFY09FY10FY11.xlsx> (last visited Apr. 1, 2013).

64. Malaska, *supra* note 63.

65. NAT'L LEGAL AID & DEFENDER ASS'N, *A RACE TO THE BOTTOM: SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS*, at ii-iii (2008), [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf); see *id.* at 29, 34, 36, 46.

on “McJustice Days.”<sup>66</sup> A Colorado statute requires defendants in misdemeanor cases to be informed of plea offers by a prosecutor before applying for a public defender.<sup>67</sup>

Fees for counsel may be waived in most states that have them, but defendants are often not told that the fee can be waived or that they have a right to a lawyer if they cannot afford one. A typical example is the case of Hills McGee, who was told only that he had to pay \$50 to apply for a public defender when he appeared in court in Augusta, Georgia, on charges of public drunkenness and obstruction of the law enforcement officer who arrested him. Mr. McGee, a fifty-three-year-old man whose sole source of income was a Veterans Administration disability payment of \$243 per month, was unable to pay the \$50 fee and pleaded guilty without a lawyer. Without any inquiry into his income or ability to pay, a judge fined him \$200 plus \$70 in fees and surcharges. Because Mr. McGee did not have \$270 that day, the judge told him he could pay the fine in installments to a private probation company. The probation company charged an “enrollment fee” of \$15 and \$39 a month for accepting Mr. McGee’s monthly payments. After struggling to make monthly payments for over a year, Mr. McGee had paid \$552 on his \$270 fine. He was jailed because he still owed but was unable to pay the last \$186.<sup>68</sup>

Many poor people do not see a lawyer until moments before the court proceeding in which their cases are resolved. They have a few minutes of conversation with harried lawyers with little knowledge of their clients and cases and few resources to hire investigators and experts. Some do not even talk to a lawyer. Reontay Miller, a seventeen-year-old African-American high school freshman charged in adult court with stealing a go-cart (a felony) with his brother, asked for a lawyer the first time he appeared before the superior court in Cordele, Georgia, in March 2012. An investigator from the public defender office had a brief conversation with him. He did not speak to an attorney. Later that morning he was in one of seven groups of defendants who pleaded guilty. While accepting the pleas, the judge asked the defendants if they were satisfied with their attorney’s services. The teen looked around, confused, and said, “I don’t have one.” A public defender standing near the group of defendants entering pleas volunteered that he represented him, but said nothing on behalf of Reontay. The court sentenced Reontay to five years’

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66. *See id.* at 15, 20, 22, 32.

67. COLO. REV. STAT. § 16-7-301(4) (West 2006). The statute has been challenged in *Colorado Criminal Defense Bar v. Suthers*, No.10-CV-02930 (D. Colo. filed Jan. 20, 2012), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=23584&I:6ID:23554>.

68. Petition for Writ of Habeas Corpus, *McGee v. Companaro*, No. 2018-RCHM-1 (S.D. Ga. filed Jan. 22, 2010).

probation, a \$300 fine, and \$500 restitution, and imposed the \$50 public defender fee.<sup>69</sup>

One of the three public defenders in the office for that same circuit in Georgia wrote a client in jail: “[E]xplain to me why you are requesting a preliminary hearing. I would like to know why you feel like a preliminary hearing is needed in your case.”<sup>70</sup> The public defender also advised the client that she would not file a motion to reduce bond for ninety days.<sup>71</sup>

Those in custody may have their only conversation with a lawyer while handcuffed to other defendants on either side of them.<sup>72</sup> Despite the complete inability of the lawyers to meet even the most minimal professional responsibilities—such as having confidential communications and being sufficiently informed about the charges and their clients to give advice—these discussions are very often followed a few minutes later by the entry of a guilty plea and sentencing. A California lawyer explained that he was able to handle a high volume of cases because seventy percent of his clients entered guilty pleas at the first court appearance after he spent thirty seconds explaining the prosecutor’s plea offer to them.<sup>73</sup> The lawyer processed cases in one of the twenty-four California counties that contract with lawyers to handle the cases of people unable to afford lawyers.<sup>74</sup> Contracts are often awarded to the lowest

69. Memorandum from Abigail Leinsdorf & Atteeyah Hollie Regarding Proceedings in Cordele Superior Court (Mar. 13, 2012) (on file with authors).

70. Letter from Rashawn Clark, Assistant Pub. Defender, to Client (Dec. 28, 2011) (on file with authors).

71. *Id.*; Letter from Rashawn Clark, Assistant Pub. Defender, to Client (Jan. 19, 2012) (on file with authors).

72. Both authors have observed this in various courtrooms in the South.

73. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 305 (2009).

74. *See id.* at 300. In California, twenty-four of fifty-eight counties use contract defenders. One county relies primarily on an assigned counsel program, and the rest have public defender offices as the primary provider of representation. *Id.* at 284, 307. California and Pennsylvania are the only states that require counties to provide all funding for indigent defense. Several states, including Colorado, Connecticut, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin, provide all funding for representation of indigent defendants. Alabama, Alaska, Iowa, Kentucky, and Wyoming provide primary funding (fifty-one percent or more), supplemented by their counties. Counties provide primary funding in Arizona, Arkansas, Georgia, Idaho, Illinois, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, Ohio, South Carolina, Texas, Utah, and Washington, with supplemental funding by the state. *See* Kathleen E. Mollison, *50-State Survey of Indigent Defense Systems* (2012) (unpublished manuscript) (on file with authors).

bidder, creating an incentive for lawyers to handle a high volume of cases and spend as little time as possible on each case in order to make a profit. One contract defender repeatedly fought off low bidders by reducing his budget, which had been forty-one percent of the prosecutor's budget in 2000, to only twenty-seven percent of the prosecutor's budget in 2005. Yet in 2006, he was undercut by a bid that was almost fifty percent less than his by a firm employing even fewer lawyers spending even less time on each case.<sup>75</sup>

Such unconscionable low-bid contracts are the most egregious example of how inadequate funding "continues to be the single greatest obstacle to delivering 'competent' and 'diligent' defense representation."<sup>76</sup> Whether the poor are represented by public defenders, assigned counsel or contract lawyers, "the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads."<sup>77</sup> Seven public defenders in one office in Georgia each completed representation or "closed" over 250 felony cases in the twelve months ending June 30, 2012, according to records of the state public defense agency.<sup>78</sup> Other jurisdictions have struggled with similar caseloads.<sup>79</sup> As a result of such caseloads, "defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules."<sup>80</sup> It is doubtful that a lawyer can competently handle 150 felonies in a year, a maximum established in 1973.<sup>81</sup>

The workload of Missouri's statewide public defender program increased by more than twelve thousand cases in a six-year period ending in 2005, but the program received no additional staff during that time.<sup>82</sup> At the end of 2012, it was seventy-one lawyers and sixty investigators short of what it needed to

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75. *Report and Recommendations on Funding of Defense Services in California*, CAL. COMMISSION ON THE FAIR ADMIN. OF JUST. 10-12 (Apr. 14, 2008), <http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf>.

76. JUSTICE DENIED, *supra* note 47, at 7.

77. *Id.*

78. Ga. Pub. Defender Standards Council, Attorney Caseload Comparison: July 1, 2011, to June 30, 2012, at 6-8 (Dec. 14, 2012) (unpublished data) (on file with authors).

79. See JUSTICE DENIED, *supra* note 47, at 65-70.

80. *Id.* at 7.

81. *Id.* at 66. Some public defender offices have conducted weighted caseload studies to determine how much time different kinds of cases require. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 140-60 (2011), [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf). For example, the public defender office in Lincoln, Nebraska, established a caseload standard of 127 felonies per year. *Id.* at 157.

82. *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 877 (Mo. 2009).

handle its workload.<sup>83</sup> The program had one investigator for every 1,461 cases.<sup>84</sup> The director of the state public defender commission informed the governor and the state's justices, judges, and legislators in 2011 that "[t]riage has replaced justice in Missouri's courts," people languish in jail "for weeks or even months with no access to counsel," and attorneys are forced to take "shortcuts that lead to wrongful convictions."<sup>85</sup> The number of public defenders in Minnesota fell from 423 in 2008 to 350 in 2010, prompting a judge there to comment that the courts were "fast becoming the courts of McJustice" because "[q]uality is sacrificed for efficiency."<sup>86</sup>

Lawyers for the poor are often under financial and political pressures to ignore ethical standards regarding conflicts, zeal, competence, and loyalty.<sup>87</sup> Some public defenders are appointed by governors,<sup>88</sup> commissions whose members are all appointed by governors,<sup>89</sup> county commissions,<sup>90</sup> judges,<sup>91</sup> or political entities that may be more interested in processing a high volume of

83. *Fiscal Year 2012 Annual Report*, MO. PUB. DEFENDER COMMISSION 10-11 (2012), <http://www.publicdefender.mo.gov/about/FY2012AnnualReport2.pdf>.

84. *Id.* at 11.

85. Memorandum from Cathryn R. Kelly, Dir., State Pub. Defender Comm'n, to Governor Nixon, Members of the Supreme Court, Members of the Gen. Assembly, and Presiding Judges 2 (Oct. 1, 2011) (on file with authors).

86. Jeff Sevcans Guntzel, *Minnesota's Public Defender Shortage: "We Are Fast Becoming the Courts of McJustice"*, MINNEAPOLIS POST: INTELLIGENCER (Oct. 13, 2010), <http://www.minnpost.com/intelligencer/2010/10/minnesotas-public-defender-shortage-we-are-fast-becoming-courts-mcjustice>.

87. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 2 (explaining the duty of zealous representation); *id.* R. 1.1 (requiring competent representation); *id.* R. 1.6 (requiring confidentiality); *id.* R. 1.7 (prohibiting representation of clients with conflicting interests).

88. *See, e.g.*, ALASKA STAT. § 18.85.030 (2012); DEL. CODE ANN. tit. 29, § 4601 (2003); GA. CODE ANN. § 17-12-5(a) (2008); IOWA CODE ANN. §§ 13B.1-BB.11 (West 2012); NEV. REV. STAT. ANN. § 180.010 (LexisNexis 2011); N.J. STAT. ANN. § 2A:158A-4 (West 2011); R.I. GEN. LAWS § 12-15-2 (2002); VT. STAT. ANN. tit. 13, § 5252(a) (2009); WYO. STAT. ANN. § 7-6-103(b) (2011).

89. *See, e.g.*, ARK. CODE ANN. §§ 16-87-202 to -204 (2005); HAW. REV. STAT. ANN. §§ 802-9, -11 (LexisNexis 2007); MO. ANN. STAT. § 600.015 (West 2011); MONT. CODE ANN. § 2-15-1028 (2011); WIS. STAT. ANN. § 15.78 (West 2012); WIS. STAT. ANN. §§ 977.01-04 (West 2007).

90. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-581 (2012); CAL. GOV'T CODE §§ 27700-27704 (West 2008); IDAHO CODE ANN. § 19-859 (2004); 16 PA. CONS. STAT. ANN. § 9960.4 (West 2012).

91. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/113-3.1 (West 2011); MICH. COMP. LAWS ANN. § 775.16 (West 2010). Colorado's supreme court appoints a commission, which then appoints the state public defender. COLO. REV. STAT. § 21-1-101 (2012).



cases at low cost than complying with ethical rules.<sup>92</sup> Some lawyers in private practice are dependent upon appointments by judges for their livelihoods. Resistance to higher caseloads, motions for experts—or any motions for that matter—and zealous representation may cost them future appointments. It is no secret that some judges determine the outcome of cases by the attorney appointed to defend the accused. In Georgia, as a result of financial pressures, the state public defense agency and some local public defenders joined the Attorney General's office in arguing that public defenders should be exempt from the rules of professional conduct that prevent lawyers from representing clients with conflicting interests.<sup>93</sup>

This underfunded, overloaded system of pleas with divided loyalties is often not up to the task of providing lawyers for trials. Shanna Shackelford, a twenty-three-year-old African-American woman charged with arson in Georgia, wrote a desperate plea for help in 2012, explaining that an arson charge against her had left her jobless and homeless. Despite her protestations of innocence, her public defenders urged her to take a plea offer that would result in her spending fifteen years in prison. She lost her two jobs and could not get another because of the charges. She was sleeping in her car but was about to lose it because she could not make the next loan payment. Finally, she “asked to just be placed in jail while they decide how much longer they want to

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92. Several states—including Connecticut, CONN. GEN. STAT. ANN. § 51-289 (West 2013), Kentucky, KY. REV. STAT. ANN. §§ 31.010-.250 (West 2012), Maryland, MD. CODE ANN., CRIM. PROC. §§ 16-101 to -403 (West 2012), Minnesota, MINN. STAT. ANN. § 611.215 (West 2013), New Hampshire, N.H. REV. STAT. ANN. §§ 494:1, 604-B:4 (West 2013), North Dakota, N.D. CENT. CODE ANN. §§ 54-61-01 to -03 (West 2011), South Carolina, S.C. CODE ANN. § 17-3-310 (West 2012), Virginia, VA. CODE ANN. §§ 19.2-163.01 to .04 (West 2012), and the District of Columbia, D.C. CODE §§ 2-1603 to -1605 (West 2012)—have created public defense commissions appointed by different officials, which gives them greater independence than ones where a single official, such as the governor or a judge, appoints all the members. New Mexico's chief public defender was until recently appointed by the governor. N.M. STAT. ANN. § 31-15-4(A) (West 2012). In November 2012, the New Mexico electorate passed a constitutional amendment to make the public defender office separate from the state government, and the New Mexico legislature is currently drafting enabling legislation to create an independent public defender commission. See *Minutes of the Fifth Meeting of the Courts, Corrections and Justice Committee*, N.M. LEGISLATURE 6-7 (Nov. 29-30, 2012) (describing an initial hearing debating the duties and composition of an independent public defender commission), <http://www.nmlegis.gov/lcs/minutes/CCJminNOV30.12.pdf>. For a comprehensive survey of which states have created public defense commissions, see JUSTICE DENIED, *supra* note 47, at 151; and Mollison, *supra* note 74.

93. See Brief of Appellant, *In re* Formal Advisory Opinion 10-1, No. S10U1679 (Ga. filed Feb. 28, 2011) (on file with authors). The brief was filed by the Georgia Attorney General and a local public defender who was a member of the Public Defender Standards Council. The Georgia Supreme Court unanimously rejected the argument. *In re* Formal Advisory Opinion 10-1, No. S10U1679, 2013 WL 1499445 (Ga. Apr. 15, 2013).

play with my life . . . because I fear I may take my own life or die from conditions [of] being homeless.” Even that plea was rejected, and she went days without eating. Ultimately, she was represented by pro bono counsel who provided zealous representation. Her case was dismissed.<sup>94</sup>

James Fisher, Jr., spent twenty-six-and-a-half years in the custody of Oklahoma—most of it on death row—without ever having a fair and reliable determination of his guilt. The lawyer assigned to represent Mr. Fisher tried his case and twenty-four others during September 1983, including another capital murder case.<sup>95</sup> The lawyer made no opening statement or closing argument at either the guilt or sentencing phase and uttered *only nine words* during the entire sentencing phase.<sup>96</sup> Nineteen years later, the Tenth Circuit set aside the conviction, finding that Mr. Fisher’s lawyer was “grossly inept,” had “sabotaged” Mr. Fisher’s defense by repeatedly reiterating the state’s version of events, and was disloyal by “exhibiting actual doubt and hostility toward his client’s case.”<sup>97</sup> At the retrial in 2005, Oklahoma gave Mr. Fisher a lawyer who was drinking heavily, abusing cocaine, and neglecting his cases.<sup>98</sup> The lawyer physically threatened Mr. Fisher at a pre-trial hearing and, as a result, Mr. Fisher refused to attend his own trial.<sup>99</sup> He was again convicted and sentenced to death, but again the conviction was set aside for ineffective assistance of counsel.<sup>100</sup> Prosecutors agreed to Mr. Fisher’s release in July 2010, provided that he be banished from Oklahoma forever.<sup>101</sup>

Lawyers have been asleep,<sup>102</sup> intoxicated,<sup>103</sup> under the influence of drugs, and mentally ill while supposedly defending clients. They have been unaware in death penalty cases of their client’s intellectual disabilities, brain damage, mental illnesses, childhood abuse, and other mitigating factors, and, in one

94. Letter from Shanna Shackelford to Stephen B. Bright (May 2, 2012) (on file with authors).

95. *Fisher v. Gibson*, 282 F.3d 1283, 1293 (10th Cir. 2002).

96. *Id.* at 1289.

97. *Id.* at 1289, 1300, 1308.

98. *Fisher v. State*, 206 P.3d 607, 610-11 (Okla. Crim. App. 2009).

99. *Id.* at 610.

100. *Id.* at 612-13.

101. See Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. TIMES, Aug. 10, 2010, <http://www.nytimes.com/2010/08/11/us/11land.html>.

102. See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (vacating, by a vote of nine to six, a conviction in a capital case because defense counsel slept during trial).

103. See, e.g., *Haney v. State*, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991) (stating that an intoxicated lawyer had been held in contempt and jailed during a capital trial).

case, of their client's real name.<sup>104</sup> Convictions and death sentences have been upheld despite such incompetence because twenty-one years after *Gideon*, the Supreme Court eroded the reach of *Gideon* by applying presumptions—even in the face of facts to the contrary—that lawyers are competent and make strategic decisions.<sup>105</sup> No matter how incompetent the lawyer, the Court has decreed that “counsel is *strongly* presumed to have rendered adequate assistance,” and, no matter how clueless, counsel is presumed to have “made all significant decisions in the exercise of reasonable professional judgment.”<sup>106</sup> The Court has also abandoned its previous position that “[t]he right to the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial”<sup>107</sup> and has allowed judges to make crude guesses as to whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>108</sup> Of course, appellate judges cannot possibly know whether the outcome might have been different because they do not see the witnesses who testified at trial and have no idea how the jury assessed the case. Nevertheless, courts shrug off one travesty after another based on a guess that no matter how bad the representation was, it did not matter.

Justice Marshall, the sole dissenter in *Strickland*,<sup>109</sup> correctly predicted that the majority’s standard was “so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts.”<sup>110</sup> He also objected

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104. See, e.g., *Wilson v. Rees*, 624 F.3d 737, 739-40 (6th Cir. 2010) (Martin, J., dissenting from denial of rehearing en banc) (stating that the “defense was clearly a charade” because “two wholly unqualified attorneys did a deplorable job” in a case in which the death penalty was upheld); *Slaughter v. Parker*, 467 F.3d 511, 512 (6th Cir. 2006) (Cole, J., dissenting from denial of rehearing en banc) (noting that counsel was not aware of his client’s name or brain damage in a case in which the death penalty was upheld); see also Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455-62 (1996). For more cases, see *Counsel*, SECOND CLASS JUST., [http://www.secondclassjustice.com/?page\\_id=42](http://www.secondclassjustice.com/?page_id=42) (last visited Apr. 1, 2013).

105. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

106. *Id.* at 690 (emphasis added).

107. *Glasser v. United States*, 315 U.S. 60, 76 (1942).

108. *Strickland*, 466 U.S. at 694.

109. Justice Brennan joined the Court’s opinion but dissented from its judgment based on his view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. 466 U.S. at 701-07 (Brennan, J., concurring in part and dissenting in part).

110. *Id.* at 707 (Marshall, J., dissenting).

to the presumptions adopted by the Court because they imposed “upon defendants an unusually weighty burden of persuasion,”<sup>111</sup> and he argued that a defendant who establishes deficient performance should not be required to show prejudice.<sup>112</sup>

The Court and Congress have added yet another layer of deference, requiring federal judges in habeas corpus proceedings to be exceptionally deferential to the decisions of elected state-court judges.<sup>113</sup> Thus, the Court of Appeals for the Eleventh Circuit upheld a death sentence by doubly deferring under *Strickland* and the habeas corpus statute to a state court’s conclusion that the outcome of the case at issue would not have been different<sup>114</sup> even though the lead defense lawyer drank a quart of vodka every night of trial. The lawyer was also preparing to be sued, criminally prosecuted, and disbarred for stealing client funds, and he failed to present evidence that his intellectually limited client had been “subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home ‘the Torture Chamber.’”<sup>115</sup>

In this system, poverty, not justice, dictates outcomes. Inexcusable injustices occur every day in the criminal courts. As former federal judge and FBI Director William S. Sessions has observed, the widespread resistance to *Gideon* and its progeny “should be a source of great embarrassment” to the judiciary, the bar and public officials because it has “created one of our legal system’s most shameful deficiencies, greatly exacerbated by the Court’s unrealistic and damaging 1984 decision in *Strickland v. Washington*.”<sup>116</sup>

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111. *Id.* at 713.

112. *Id.* at 712.

113. See 28 U.S.C. § 2254(d)(1) (2006) (providing that habeas relief may not be granted unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”); *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))). The *Richter* Court added: “If this standard is difficult to meet, that is because it was meant to be.” *Id.*

114. *Holsey v. Warden*, 694 F.3d 1230, 1273 (2012) (holding that the state court’s decision was not “beyond any possibility for fairminded disagreement” (quoting *Harrington*, 131 S. Ct. at 786-87)).

115. *Id.* at 1275 (Barkett, J., dissenting).

116. William S. Sessions, *Foreword* to LEFSTEIN, *supra* note 81, at ix, ix.

## CONCLUSION

In the absence of a capable lawyer, a person accused of a crime is virtually defenseless against a prosecutor acting as both inquisitor and adversary, exercising unchecked power over everything from the crime charged to the disclosure of information to the sentence imposed. That so many are left defenseless so often is shameful. That the courts give so little attention to defendants as individuals that they are compared to fast-food restaurants is a disgrace to the courts and the legal system. However, the criminal courts are not a concern of most people because they deal primarily with racial minorities and the poor. As Attorney General Robert F. Kennedy observed at the time of *Gideon*, "the poor person accused of a crime has no lobby."<sup>117</sup> States, counties, and municipalities have no incentive to provide those they are prosecuting with capable lawyers. Quite to the contrary, a bad or mediocre system of providing lawyers facilitates pleas, move dockets, and lessens the risk that anyone accused of a crime will not be convicted.

But these failings matter not only because they permanently damage lives, families, and communities, but also because they leave the criminal courts without credibility or legitimacy. The media, public officials, the judiciary, the legal profession, law schools, and everyone in society should be concerned with a major public institution that is supposed to be about justice and is failing so badly. They must examine what is happening in the criminal courts and hold it up to public examination. The Georgia legislature created a public defender system in 2003 only after repeated criticism of deficient representation by three consecutive chief justices of the state in addresses to the legislature and the bar, lawsuits, reports, and extensive coverage by the *Atlanta Journal-Constitution* and other media.<sup>118</sup> After creating the system, the state has failed to fund it adequately,<sup>119</sup> but there have been significant improvements in representation

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117. LEWIS, *supra* note 44, at 211.

118. See Bill Rankin, *Busy Barristers: Caseloads Swamp Public Defenders Throughout State*, ATLANTA J.-CONST., Aug. 13, 2001, at B1 (reporting that "many indigent defendants languish in jails for months before seeing their lawyer," that many cases are "never investigated," and that guilty pleas "are often entered by poor defendants after meeting their lawyer for the first time in court and only a brief conversation about the case"); Bill Rankin, *'I Felt Like I Was Just Nothing': Suspected Months After Charges Dropped*, ATLANTA J.-CONST., Dec. 20, 2003, at A1 (describing the case of a man arrested on loitering charges who was "found" in jail thirteen months after arrest, having never seen a lawyer or judge, and four months after the charges had been dismissed); Bill Rankin, *Indigent Defense Bill Beats the Odds*, ATLANTA J.-CONST., Apr. 27, 2003, at C9 (describing the passage of the bill).

119. Bill Rankin, *Indigent Defense Budget in Flux: Georgia's Strapped Public Defender System May Have To Divert Funds To Cover Costs of the Next Few Months*, ATLANTA J.-CONST., Nov. 21, 2007, at B1.

provided in many parts of the state.

While there is little chance that the U.S. Supreme Court can be shamed into modifying its decision in *Strickland v. Washington*, some state courts have been responsive to challenges to systemic deficiencies such as the failure to provide counsel and excessive caseloads.<sup>120</sup>

Members of the legal profession have a responsibility to lobby for poor people accused of crimes. With their government-granted oligopoly on legal services, lawyers have a responsibility to ensure that the criminal justice system has integrity and works for the poorest and most powerless, just as for the most prosperous and powerful. Lawyers should visit courts and observe how poor people are processed through the system and bring suits to obtain systemic reforms. Lawyers—no matter what their area of practice, from corporate lawyers to small firm lawyers, to prosecutors and other government lawyers—should educate legislators, civil groups, and people concerned about public policy about the importance of an effective public defense system if there is to be justice in the courts. Bar associations and lawyers should be the primary advocates in state legislatures for full funding for the public defense. Some bar associations and lawyers have provided exemplary leadership in this regard, but others have avoided indigent defense as too controversial.

Professors, students, and their associations also have an important role to play. Professors should teach the reality of criminal law by requiring students to visit different courts, write down what they see, and then discuss what they have seen and how it compares to what is required. Many law schools have criminal defense clinics.<sup>121</sup> More are needed so that students see the desperate needs of poor people accused of crimes and learn to provide competent and ethical representation.

All of these efforts must be used to persuade governments to establish and

120. See *State v. Peart*, 621 So. 2d 780 (La. 1993) (adopting a presumption of ineffectiveness where counsel had an excessive caseload and lacked resources for investigation and other expenses); *DeWolfe v. Richmond*, No. 34, 2012 WL 10853 (Md. Jan. 4, 2012) (holding that people accused of crimes have a right to counsel at first appearance hearings); *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012) (holding that a trial court must consider whether appointing counsel to a case will cause counsel to violate the Sixth Amendment and ethical rules); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (holding that people accused of crimes could maintain a class action suit seeking counsel at arraignment and subsequent critical stages); *Heckman v. Williamson Cnty.*, 369 S.W.3d 137 (Tex. 2012) (holding that people accused of crimes could maintain a class action suit seeking counsel in misdemeanor cases); LEFSTEIN, *supra* note 81, at 162–89; Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751 (2010).

121. The E. Barrett Prettyman Program at the Georgetown University Law Center has provided graduate and undergraduate clinical experience in criminal defense for over fifty years.

fully fund public defense programs that are independent of judges and politics and provide representation through public defender programs and assigned attorneys. This has already occurred in several jurisdictions,<sup>122</sup> and the requirements for competent and ethical representation have been set out in detail in standards and guidelines.<sup>123</sup> The programs must be led by experienced, client-oriented defense lawyers and must provide training and supervision to both public defenders and private lawyers who are assigned to represent poor defendants. Lawyers must have reasonable caseloads and resources for investigation, interpreters, and experts, and, of course, they should not represent clients with conflicting interests. Programs with these features can ensure that every person arrested has “the guiding hand of counsel”<sup>124</sup> from the initial bail hearing through every subsequent proceeding.

Fifty years ago, the Supreme Court began to chart a course toward the realization of the constitutional guarantees of counsel and equal justice in *Gideon v. Wainwright* and other decisions. However, most state governments have treated the Supreme Court’s decision in *Gideon* not as a bright star pointing the way to justice, but as an unfunded mandate to be resisted. A sober assessment of the defiance of and resistance after *Gideon* makes clear that to go from the pretense of representation to the reality of it, there must be a new commitment to counsel and equal justice with a sense of urgency to make up for so much time lost. This will occur only when courts begin enforcing the right to counsel, instead of being complicit in its denial; when the legal profession meets its responsibility to make the legal system work for everyone; and when the media, law professors and law students, and others hold the system up to public examination until governments are shamed into providing the lawyers that are “fundamental and essential”<sup>125</sup> for fairness and justice.

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122. See, e.g., LEFSTEIN, *supra* note 81, at 191-228 (describing some programs that provide high-quality representation).

123. See JUSTICE DENIED, *supra* note 47, at 181-213 (setting out extensive recommendations with commentary); LEFSTEIN, *supra* note 81, at 230-68 (making recommendations to improve representation and suggesting strategies for achieving them); *Ten Principles*, *supra* note 3, at 1-3 (setting out basic principles based on numerous studies, reports, and guidelines).

124. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

125. *Id.* at 344.

# MCLANE MIDDLETON

GREGORY H. SMITH  
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Admitted in NH

March 26, 2019

The Honorable Martha Hennessey  
Chairman, Senate Judiciary Committee  
State House, Room 100  
107 North Main Street  
Concord, NH 03301

**Re: HB 455-FN  
Relative to the penalty for capital murder**

Dear Chairman Hennessey and the Honorable Members of the Committee:

I have had the great privilege to serve as the New Hampshire Attorney General from 1980 to 1984 and a homicide prosecutor in that office from 1973 and 1980. For over 11 years, I had authority, and responsibility for criminal prosecutions, including capital cases. Having had the responsibility for enforcing the criminal law of this State for many years, and after careful consideration, I have concluded that the death penalty does not serve the purposes of sentencing in the criminal justice system any better than life without parole, and cannot be imposed fairly and justly. Accordingly, I write to urge you to adopt HB 455-FN, repealing the death penalty in New Hampshire, because I believe it is the right thing to do.

In the nearly 35 years since I left office, I have learned more about our evolving understanding of the prosecution of capital murder cases in the United States and in New Hampshire. It seems clear to me the weight of evidence supports the following conclusions:

1. Despite the best efforts of those working within the system, we are unable to prosecute capital cases with the level of confidence that we can do so with the justice and fairness, that those cases certainly require.
2. We know this in part because more than 150 defendants convicted and sentenced to death in the United States since 1973 have subsequently been exonerated. In other words, the system produced the wrong result in at least 10% of the cases. And by the very nature of these

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cases, the procedures upon which we rely to correct errors are utterly unavailing to innocent, executed prisoners.

3. We cannot be assured that such cases are handled fairly. We know this because the sequence of decisions in each of these cases by police, prosecutors, judges and juries results in the clearly disparate imposition of this penalty on certain racial and ethnic groups, and the economically disadvantaged in our society.

4. The selective nature of the imposition of this penalty is demonstrated by the fact that we have not executed anyone in a capital case in New Hampshire in the last 80 years, although there have been numerous cases that qualified for prosecution as capital cases under our law.

5. There are approximately 15,000 murders committed in the United States each year. Of those, only about 100 are charged with capital murder, and only a small percentage are convicted and sentenced to death. To say the death penalty is both selectively and arbitrarily applied is truly an understatement. I would estimate there have been between 1000 and 1500 murder cases in New Hampshire since 1939, and in only one of these cases was the death penalty imposed.

6. It is the only penalty imposed by a jury, and not by a judge. But the jury asked to impose a death penalty has never been called upon to sentence anyone in such a case before. And while the sentence can be reviewed, that review of a jury's decision is quite limited.

7. There is yet another reason for us to know that the death penalty will likely be imposed selectively. At the very least, in New Hampshire public opinion is sharply divided. Any New Hampshire jury will be made up of people with differing views. Given the disagreement over the wisdom of the death penalty, one defendant may be sentenced to death simply because he or she draws a jury favorably disposed to the death penalty. An equally culpable defendant may be spared because he or she draws a jury made up of those who are opposed to the death penalty and think it is unwise. The death penalty will likely be applied unfairly when support for it at best is sharply divided

8. Moreover, the decision to charge the death penalty in the first place may depend upon the personal views of the Attorney General in office when a crime occurs, and equally culpable people may face different penalties based on the views of the prosecutor at the time.

There are some who say that by the imposition of the death penalty we show honor and respect for our law enforcement officers. I have served with dedicated law enforcement officers and have the highest regard for, and honor their sacrifice and service. I do not believe that we show our deep respect for law enforcement officers or the rule of law, by putting our prisoners to death.

The Honorable Martha Hennessey  
Chairman, Senate Judiciary Committee  
March 26, 2019  
Page 3

Today, we stand alone among the Western democracies in continuing to use the power of the State to put our prisoners to death. In doing so, we place ourselves in the uncomfortable company of an Iran, Saudi Arabia, China and North Korea. Company, I submit, in which we do not belong.

The purposes of sentencing in the criminal justice system are; rehabilitation, reform, protection of society, and deterrence. But the weight of the evidence is compelling; the possibility of a death sentence offers no greater deterrent effect than a sentence of life without parole. And in New Hampshire the sentence of life without parole means just that. Those who receive it without exception spend the rest of their lives in prison. There is not one single case in New Hampshire of a person receiving life without parole who has been released. And there are some who believe, as I do, that life without parole is as severe, or more so, than the death penalty in its enduring effect on the convicted prisoner.

The death penalty indisputably serves none of these purposes of criminal sentencing beyond protection of society. Yet the sentence of life without parole fully meets this objective.

While I think we would not make this decision on the basis of cost alone, it is also inescapably true that the enormous costs of death penalty prosecutions far outweigh the costs of life without parole, consuming scarce public resources that could be much better put to the benefit of our society.

I realize this is a judgment that is placed in your hands, but it seems to me that the time has come for New Hampshire to join the increasing number of States that are moving away from any use of the death penalty. I urge you to abolish the death penalty New Hampshire.

I would be glad to try to answer any questions you may have now, or anytime later while you have this legislation under consideration.

Respectfully submitted,



Gregory H. Smith

Hannah New Hampshire Testimony  
February 19<sup>th</sup>, 2019

Mr. Chairman and Members of the Committee, I'd like to thank you for allowing me to join you today to discuss HB 455.

My name is Hannah Cox, and I am the National Manager of an organization called Conservatives Concerned About the Death Penalty. We are a network of conservatives who question the alignment of capital punishment with our conservative principles, and I am therefore here in support of HB 455.

I changed my stance on the death penalty a number of years ago for the reasons that many other conservatives have. I learned about the death penalty's high costs, the lack of a deterrent effect, the arbitrariness and bias in the system, and the real risk of executing an innocence person.

This year alone, New Hampshire is actually one of nine states considering Republican-sponsored legislation to repeal the death penalty. This is on trend with a study produced by my organization that shows a sharp increase in the number of conservative repeal efforts since 2012.

The facts are that the death penalty is in rapid decline. Last year was the fourth year in a row that the country carried out less than 30 executions. Those executions occurred in only eight states, and over half of them stemmed from Texas alone. New death sentences are also down 60% since 2000. And of the 30 states that still have the death penalty on their books, 11 – more than 1/3 – of them have not carried out an execution in a decade or more. New Hampshire is one of them.

A recent Gallup poll found that less than half of Americans believe the death penalty is carried out fairly. That makes sense, because it's the place where someone *commits* a crime that is the largest determinate for whether they receive the death penalty, not what they did. The majority of people sentenced to death are convicted in only 2% of all U.S. counties, and *all executions* since reinstatement of the death penalty have come from less than 16% of all U.S. counties.

So usage is down *and* highly concentrated.

Last year, in seven districts where the death penalty is in high use, voters removed district attorneys who frequently sought the death penalty in favor of reform-minded prosecutors. Considering the expense of capital cases and the burden they place on the clearance rates for other crimes, it makes sense that voters would turn against those who consistently waste their tax-payer dollars on these proceedings.

In 2018, two Republican U.S. Senate candidates — one in Michigan and the other in Montana — announced their opposition to the death penalty while still in the

primary. They both won their party's nomination, even after their Republican primary opponents attacked them on their death penalty positions.

When you combine all of these stories, it becomes clear that the headline quietly flying under the radar for some time has been bipartisan support for ending the death penalty. It has often been said that support of the death penalty runs a mile wide and an inch deep, meaning that support for the death penalty is high until a person takes a moment to examine the facts — upon which support quickly wanes.

The facts are that the death penalty is vastly more expensive than any other sentence or component of the criminal justice system. It is arbitrary and largely applied to the poorest among us. The system is marked with racial bias, wrongful convictions, poor representation, corruption, and trauma. It does not deter crime, and it consumes resources that could be used to actually make our communities safer.

While New Hampshire may be more judicious in its usage of this antiquated system than most, it does not mean that the state does not still pay a high price by keeping this law. The opportunity costs wasted on this system are resources that could be spent on programs that actually deter crime and on solving more crimes.

Given these things, it is no wonder those on both the right and left are turning against this outdated system and looking for solutions that actually produce results in our communities. I ask that you join this growing consensus and support HB 455.

My name is Jane W Van Zandt, Chester NH. I've been an Episcopal priest for more than 35 years, and I was a registered nurse for nearly 50. Neither my professions, nor my conscience, would allow me to participate in state sanctioned pre-meditated murder, if I were ever asked to do so. I could never kill another person. In our baptismal covenant, in the Episcopal Church, we promise to seek and serve Christ in all persons, loving our neighbor as ourselves. And, we further promise to strive for justice and peace among all people, and to respect the dignity of every human being. Every human being. Without exception. I speak in favor of abolishing the death penalty.

\* I celebrate the Eucharist at the men's prison here in Concord, and I can assure you that spending one's life in prison <sup>with the monotony + fear</sup> is punishment.



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Richard N. Van Wickler, Superintendent

Phone: (603) 903-1600

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26 March 2019

**RE: HB 455, Senate Hearing**

For the record my name is Richard N. Van Wickler. I am a life long resident of NH. I have been in NH Law Enforcement for 32 years, the last 26 years as the Superintendent of the Cheshire County Department of Corrections. I am a retired Army Reservist of 26 years and a former Adjunct of Keene State College of 14 years teaching Criminal Justice. Thank you for taking my testimony today.

In the US, the reasons cited in favor of the Death Penalty by its advocates are:

Retribution

Deterrence

Incapacitation

As we consider each of these, it ought be done responsibly through the eyes of objectivity and in the absence of emotion. It should hail our morality and highlight the value of due process and a mature, responsible means of punishment.

Over 200 studies clearly show that the Penalty of Death has NO deterrent effect either generally or specifically.

When a State kills a person guilty of homicide, isn't this a message that violence is an appropriate response to violence among our citizenry in the view of our Government?

Is this also confirmation that the State is exempt from criminal and immoral acts where its citizens are not? Truly, how does State Sanctioned Homicide of an offender pass any test of morality, one's higher faith belief's or scientific proof that it serves the greater good? The Truth is, the Death Penalty fails miserably in the face of all of these attempted justifications.

I have testified several times before committees of the House and Senate of this great State in opposition to the Death Penalty. My career in this State has demanded of me to be a subject matter expert on American Corrections. I am confident in my recommendation to each of you, and our Governor, to abolish the Death Penalty in our State. It is the right thing to do.

Years ago a member on a Senate subcommittee said to me after my testimony:

“You are aware that as a corrections professional you are a member of the protected class for which the death penalty exists?” “I am aware of that” I replied. “Aren’t you concerned that if this penalty did not exist that you and your staff face a greater likelihood of being killed on duty?” he asked. My response was “There has never been an offender anywhere who harmed his captor because he was being treated with respect and basic human rights.”

“Further, my professional life should have no more retribution value than your non-law enforcement family members”.

There is no one universal truth among all People. The issue of whether or not the Death Penalty has been appropriate justice depends entirely on one’s personal frame of reference. Certainly, one’s frame of reference will be influenced by their connection with the victim, or the perpetrator or their particular cloak of politics.

This fact is true and that is that the moral and monetary loss to society that death penalty policy delivers are significantly greater than the benefit to society or any one individual.

I have experienced the pendulum swing of my personal feelings about the issue of the “penalty of death by the State”.

There are many different beliefs about what happens to “life after death”.

What we know for certain is that we are all going to die.

Several people have well-rounded faith that in the after life there is a heaven and a hell and that when the State kills someone, there is a deep-rooted hope that the deceased will go to the right place.

Others believe that the Universe, in its vast expanse and power, has somehow created us and will accept our return ~ not our consciousness, but our energy. In essence, death then will be the same as what we remember before we were born. Our energy returns to the universe and our consciousness ceases to exist.

100% of us will get there, whatever it is.

I have a 32 year correctional practitioners view of what incarceration is like. I have no idea what death is like. My hope for a sentence is that it will include an aspect of punishment. I know that prison will deliver on this promise. I do not believe that death will.

There is no one universal truth for all people.

I believe that the penalty of death sets an offender free. They escape the misery of who are they are. I want dangerous offenders who harm others to be incapacitated and I want them to live an uncomfortable existence with restricted liberty. I want them to serve a penalty THAT I KNOW is being served. I believe that death is eternal early release, far too early, with no possibility of revocation.

Now if I am wrong, and there IS a hell that “the offender deserves” for eternity in keeping with many beliefs, well, the offender will inevitably get there. All of us will. Justice will be served.

My truth is that life in Prison permits the government to ensure a full sentence of punishment. My truth is that the penalty of death costs the government significantly more resources and certainly tarnishes its moral compass.

Incapacitation can be served through life as well as death.

Retribution is sufficiently achieved with a life of punishment and discomfort. No offender will be put to death with the same pain and horror that his victim and their family endured. The hope that death is worse than life for such an offender at the hands of the State is little more than hope itself.



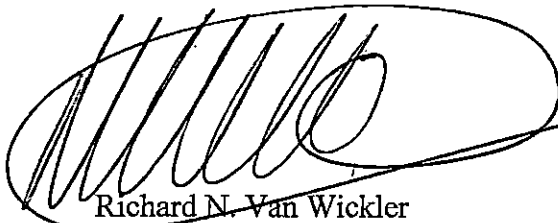
Deterrence is not served by the Death penalty as over 200 studies have shown.

I do not know from experience what death brings for any of us. When it comes to the punishment of an offender for a capital crime, I want to have control over them and know that they are being punished for all the remaining days of their life ~ not gamble on the fact that death will set them free or not.

This is my truth.

One thing is for certain; NH can live without the Death Penalty.

Thank you.

A handwritten signature in black ink, consisting of several overlapping loops and strokes, enclosed within a large, hand-drawn oval.

Richard N. Van Wickler  
Superintendent

Nine years ago I became part of a group no one wants to join, which is okay, because we don't want anyone to join us. We are murder victims' family members.

Some of us believe the death penalty should remain in place. Others would like to see it abolished. Within grieving families, members don't always agree, which adds to their pain.

Every victim's family member has an important contribution to make in the discussion of justice around the taking of human life. We need safe settings in which we can listen to one another respectfully, to allow our broken hearts to unite us rather than our differing opinions to separate us.

When my daughter was murdered, several newspapers around the state quoted a statement I made that reflected our family's values. "We will not turn to hatred." The online community came roaring back.

Here was one stunning comment:

"If they won't hate, we will hate for them."

And here are a few moral equivalents, made in reference to the death penalty:

"As far as I'm concerned, you can't hang 'em high enough."

"Just takes one bullet. I'll even donate one so it won't cost the state anything."

"I'd volunteer to pull the switch."

I've lost track of how many times I've come before Senate and House committees to testify either *for* repeal of the death penalty, or *against* expanding the criteria for its use in our state. The three comments above didn't come from online. They were all made by New Hampshire legislators, either directly to me or audibly among themselves as I was speaking.

I urge you not to lose track of the gravity of this discussion. We're talking about state-sanctioned killing, which calls for as much weighty deliberation as a jury is expected to give any capital murder case.

We speak of a murderer having blood on his or her hands. When a state executes a prisoner, every adult in the state is responsible for the premeditated killing of a breathing, living human being. Willingly or not, we all wind up with blood on our hands, starting with elected officials who keep capital punishment on the table.

Governor Sununu pushed victims' loved ones into two camps with his handling of the 2018 veto. His intention to veto the repeal bill was in part, he said, to take the feelings of murder victims' family members into account. Yet he made himself consistently unavailable to listen to family members who oppose capital punishment.

The governor then invited family members who favor the death penalty to stand with him at a press conference as he signed his veto. Family members who advocated for repeal were barred from the room. (I'll note that at least one police officer who supported repeal was also barred.) Regardless of positions taken, by privileging one group over another the governor promoted divisiveness instead of offering compassion and support.

Should the governor chooses to veto again in the name of victims' family members, please remember he doesn't speak for all, and he hasn't made himself available to hear from those with whom he disagrees.

The death penalty should be a matter of conscience, not politics. If your conscience tells you to vote to abolish, and an override becomes necessary, please stay with your conscience.

Margaret Hawthorn  
Rindge  
March 26, 2019

March 26, 2019

**NH Senate Judiciary Committee  
HB 455 to Abolish the Death Penalty for Capital Murder**

My name is Art Brennan. I am a veteran and I went to law school on the GI bill. I was governor's legal counsel to Judd Gregg. I served as a superior court judge from 1992 to 2007. In the summer of 2007 I directed the US Embassy's effort to stop the murderous corruption in Iraq.

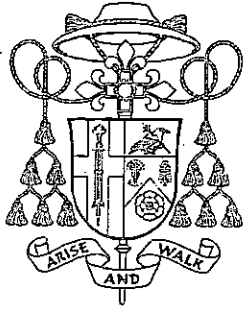
I have presided over hundreds of trials. I have seen the best and the worst in people, not only as a judge in New Hampshire, but in war torn Cambodia and Iraq.

The death penalty should be abolished because it is not a deterrent and it gives the state we fear (not the same thing as the New Hampshire we love) a power that it should not have.

I respect the judicial process, but the truth is that we all make mistakes. As a sitting judge, and even today in my retirement, I reflect on my decision-making and ask "Did I mistakenly believe a liar? Did I not believe a person who was telling the truth?"

In thinking about the state's power to kill we should consider (1) whether we really believe that the state should have the power at all; and (2) whether we believe that the government can be trusted to kill without error. For me, the answer to both questions is "No." Therefore, I support HB 455.

Thank you.



OFFICE OF THE BISHOP  
DIOCESE OF MANCHESTER

March 26, 2019

The Honorable Martha Hennessey, Chair  
Senate Judiciary Committee  
State House, Room 100  
Concord, New Hampshire 03301

**Re: HB 455 (Relative to the Penalty for Capital Murder)**

Dear Senator Hennessey and Members of the Senate Judiciary Committee:

As the Roman Catholic Bishop of Manchester, I write to express support for HB 455, a bill seeking to repeal the imposition of the death penalty in New Hampshire. I am disappointed I cannot be with you today to share my thoughts with you personally, but having testified before this Committee on the issue of capital punishment, I know how seriously you will assume the responsibility before you to evaluate this legislation.

The crime of murder is outrageous. It is an attack directly on the individual victim and indirectly on the victim's grieving loved ones and, indeed, civilized society itself. Such a grievous offense against humanity demands a response.

However, the death penalty has been shown to be a faulty response. It neither deters others, nor brings the perpetrator to understand the magnitude of the evil of which he or she was capable. The teachings of the Church which I represent and to which I hold firm, recognize that the imposition of the death penalty signals neither a firm commitment to the sacredness of human life itself nor the desire for the betterment of society, but instead signals a collapse into defeat by a society that tries to make itself believe falsely that we can defend life by taking life.

Saint John Paul II challenged followers of Christ to be "unconditionally pro-life," reminding us that "the dignity of human life must never be taken away, even in the case of someone who has done great evil." Although in the past our teaching allowed for capital punishment in rare instances, the Catechism of the Catholic Church, informed by a heightened sense of the dignity of human life, rehabilitation, and mercy now holds that "the death penalty is inadmissible because it is an attack on the inviolability and dignity of the human person." (CCC, 2267)

In making this important decision, I ask you to keep in mind those most directly affected by violence and who grieve even now – the families and loved ones of murder victims. I urge you to repeal our death penalty and devote more resources to providing services for them so we may offer a true path of support and healing.

Grateful for your consideration of these thoughts and with deep appreciation for your service to the State of New Hampshire, I remain

Sincerely in Christ,

Most Reverend Peter A. Libasci  
Bishop of Manchester

## **TESTIMONY ON DEATH PENALTY REPEAL BILL**

**March 26, 2019**

My name is Phil Runyon. I'm from Peterborough. I've been a member in good standing of the New Hampshire Bar for 45 years, and I was the presiding justice of the 8<sup>th</sup> Circuit Court for 27 years, before reaching the mandatory retirement age last year.

Because of time constraints, I want to summarize my position in strong support of repeal of New Hampshire's death penalty statute.

Why in this day and age when the death penalty has seen its demise in every other New England state and in every other country that we care about, why would we cling to it here in New Hampshire?

The two primary arguments always advanced are (1) that fear of being executed deters murder and other capital offenses, and (2) that some crimes are just so heinous that we owe it to the victims' families to impose the ultimate retribution.

Let's take deterrence first. I never had the authority to impose the death penalty in Circuit Court, but over 27 years I learned a lot about how the criminal

mind works. And what I learned is that criminals don't give even a moment's thought to the eventual consequences of their actions.

In the first place, most violent crimes don't occur with any forethought at all – they happen in the heat of a moment, in the midst of an argument, under the influence of alcohol or drugs, or all of the above.

In the second place, if a crime is premeditated, the criminal doesn't think he'll be caught, or he wouldn't commit the crime to begin with.

So that's basic psychology 101, as I've seen it played out hundreds of times.

But in New Hampshire, the psychology is further exaggerated. In the history of New Hampshire since 1734, there have been 24 executions. That's 24 executions in 284 years. And as I know you know, there's been no execution here since 1939 – that's 80 years. If you were a criminal and knew those statistics, would they deter you from committing a capital offense?

Now let's look at the death penalty's deterrence in broader terms. Of the 10 states with the highest murder rates in the country, 8 of them still have the death penalty and use it – often quite a lot. New Hampshire, on the other hand – which hasn't executed anyone in 80 years - has the lowest murder rate in the country year in and out.

And why is that? There could be lots of reasons, but it's certainly not because of fear of the death penalty. I submit it's because we have a well-educated, peace-loving, law-abiding population - and because we have highly-trained, well-respected local law enforcement officers whom we know personally and who treat us with respect in return.

The bottom line is that we just don't need the death penalty as a weapon of law enforcement here and abolishing it would have nothing to do with respecting and supporting our officers.

OK, but what about those situations where the very worst happens no matter what we do to avoid it? Shouldn't those killers be made to pay the ultimate price, and isn't it disrespecting the victims' families otherwise?

I submit that's not the case at all and that executing a murderer is letting him off the hook. I submit that having a convicted murderer know that he's going to sit in a cell for the rest of his life, without any hope of release and have to think every single day about what he's done to his victim's family, his own family, and himself is a much more worthy and effective penalty. And has more deterrence value, too.

Furthermore, if we're concerned about a victim's family, wouldn't it be more humane to them to have a murderer likely plead guilty, as often happens when a death sentence is off the table, without the need for a long and stressful



trial, without the risk of no conviction at all because of a “technicality”, without more than 10-20 years of appeals in most cases, without the fear of a conviction being overturned, and without perhaps having to endure yet another trial and the aftermath again?

More and more victims’ families are answering yes, yes, yes, especially if they had known at the outset what they’ve come to experience since then.

Let me conclude with this. I know we tend to do things our own way in New Hampshire, without being swayed by what happens anywhere else. But in the family of nations worldwide, every one of our closest relatives has abolished the death penalty and has a lower murder rate than we do – in most cases dramatically lower – and the only places where the death penalty remains in full force are the places where life is cheap and where respect for justice and the law are non-existent: China, Syria, Iran, Iraq, Afghanistan, Saudi Arabia, Yemen and North Korea. Is that really the company we want to keep? I’m afraid that’s what we’re saying if we don’t pass and enact the repeal bill.

I urge you to support repeal of the death penalty and to bring our law into conformity with the rest of our New Hampshire values.

## TESTIMONY AGAINST THE DEATH PENALTY

I am speaking on behalf of the NH Council of Churches.

We are an ecumenical body consisting of 10 denominations, with approximately 475 congregations and 500,000 members.

In our united statement written in 2010 we included that as Christians we believe that:  
Every human being is created in the image of God and thus should be treated with equality and justice.  
Capital punishment will not restore a broken society full of violence, it perpetuates violence.  
(Violence begets violence.) and  
And we can all be redeemed after committing bad acts.

As I stated at the House of Representatives Hearing on this bill, I recently returned from East Africa while doing humanitarian ministry and mission work and a Kenyan showed me a video of President Trump introducing and praising a violent criminal who in jail had become a Christian and who is now helping many others not to be violent and not to end up in jail. Even President Trump agrees that people can be redeemed.

The major thing I want to share is that all ten of our denominations have issued statements against the death penalty, often at the national or regional level.

The New England Yearly Meeting of Friends (Quakers) wrote minutes both in 1956 and 1985- a long time ago.

Unitarians passed a resolution against the death penalty in 1979

American Baptists of Vermont and New Hampshire made a resolution in 1982

New Hampshire Conference of United Church of Christ called for abolition of the death penalty in 1999

The Presbyterians of Northern New England passed a resolution in 2010.

The Patriarch of Greek Orthodox of New Hampshire and Massachusetts issued a proclamation against the death penalty in 2013

The Episcopal Diocese of all of NH issued a statement in 2015

The United Methodist Church put an anti death penalty statement in their book of discipline in 2016.

Catholics include a statement on the death penalty in their catechism-revised in 2018

Clearly, it is time to get rid of the death penalty this year.

Marian Baker,  
Secretary of NH Council of Churches

My name is Paul Lutz. I'm a retired, 30-year veteran of the Derry Police Department. I retired as a lieutenant in that capacity, I wasn't an administrator but a field commander. I supervised a regional special operations unit which covered a number of the most populous towns in south central New Hampshire. By its nature, the unit frequently responded to situations where one or more people was armed and predisposed to violence, usually including deadly force.

You've doubtless heard from representatives of professional law enforcement organizations that oppose this bill. Please don't think these organizations represent every rank and file member. I would ask how many of you have spoken to individual officers on a one to one basis on this topic. If you had, I'm sure you've found police a microcosm of the population, reflecting generally the feeling of the general population.

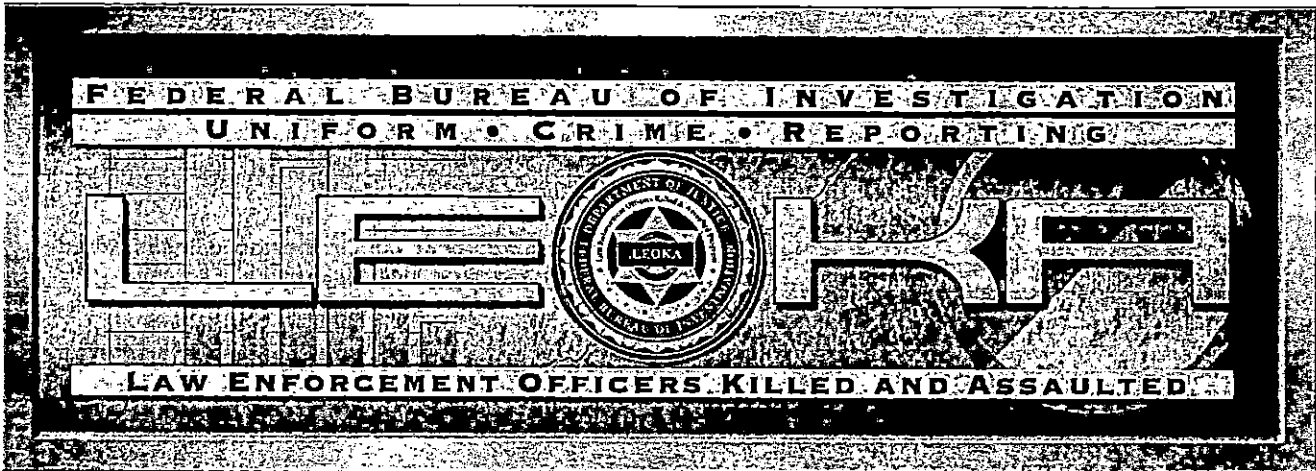
I've spoken to countless members of the General Court over the years and I've found one reoccurring theme; that they are opposed to repeal because they feel it makes a safer environment for law enforcement. Certainly, fear is a positive influence, one which we don't enjoy but an emotion that keeps us from doing careless things, indeed sometimes it keeps us alive. Please let me present this scenario; If the unit I served with was involved in a drug raid, a hostage situation, a random shooter, whatever and those officers were about to deploy. In the exact moment before those officers begin to take action, right before they make entry to a situation I've described, if you could stop the action pausing it as you'd pause a movie you were watching, and ask any of those officers if they felt any less fear, if they felt they were in less jeopardy, if their lives were less in danger all because the state retained the death penalty you can imagine the looks you might get.

There are few situations involving a criminal who acknowledged giving thought to the death penalty before murdering a police officer but I'd like to remind you of the more notable one. The situation was eventually chronicled in a non-fiction book which became a best seller. In 1963 two Los Angeles police officers were kidnapped by two career criminals. In the middle of the night they brought the officers to the Bakersfield area. One of the criminals voiced he thought California had the death penalty for the kidnapping of an officer. He was incorrect but his response was that he executed Officer Ian Campbell. The fear of the death penalty caused him to commit a murder. The thought was the destruction of a witness would help him avoid the death penalty. Officer Karl Hettinger, watching this, knowing he was likely the next victim, would probably not have felt any safer

knowing the death penalty was a potential factor. Hettinger was able to escape fortunately and was able to tell the story.

Some of the legislators I've spoken to have confided their ambivalence about voting in favor of this bill. It makes them feel better knowing the death penalty was retained. I will tell you unequivocally, if you vote against this bill and it makes you feel good, that will be the only good thing coming out of this process.

# Law Enforcement Officers Killed and Assaulted (LEOKA) Program



Through the Law Enforcement Officers Killed and Assaulted (LEOKA) Program, the FBI is committed to providing data and training that helps keep law enforcement officers safe as they protect the nation's communities. The goal of the program is to provide relevant, high quality, potentially lifesaving information to law enforcement agencies focusing on why an incident occurred as opposed to what occurred during the incident, with the hope of preventing future incidents. The data collected is analyzed by the LEOKA team and the results are incorporated into the officer safety awareness training the FBI provides for partner agencies.

## LEOKA's Latest Preliminary Statistics

### As of 03/22/2019:

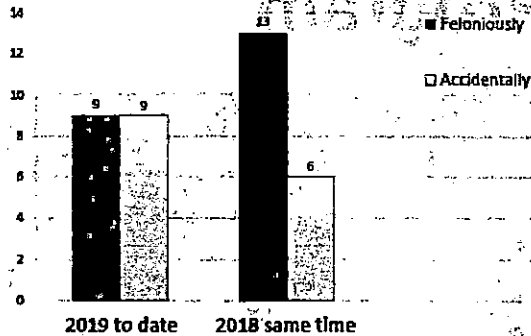
- Eleven law enforcement officers have been reported feloniously killed in 2019. During the previous year for the same time period, 19 officers were feloniously killed. At the time the 11 law enforcement officers were fatally wounded in 2019:
  - Two were victims of an ambush (entrapment/premeditation)
  - One was a victim of an unprovoked attack
- Twelve law enforcement officers have been reported accidentally killed in 2019. During the previous year for the same time period, 9 officers were accidentally killed.



# 2019 LAW ENFORCEMENT OFFICERS KILLED

This is a graphic presentation of data regarding line-of-duty deaths, both felonious and accidental, collected from law enforcement agencies across the United States and U.S. territories by the FBI's Law Enforcement Officers Killed and Assaulted Program. This preliminary information is provided for officer safety studies, training, and other initiatives. The data are also published annually in the *Law Enforcement Officers Killed and Assaulted* publication.

## Law Enforcement Officers Killed



Law Enforcement Officers Killed:	2019 to date	2018 Same time
Feloniously	9	13
Accidentally	9	6

## Officers Accidentally Killed: Type of Accident/ Call for Service or Reason for Involvement

- 5 Pedestrian officer struck by vehicle
  - 2 Traffic control
  - 1 Assist another officer
  - 1 Traffic enforcement
  - 1 Other
- 3 Motor vehicle crash
  - 1 Administrative assignment
  - 1 Escorting dignitary or funeral
  - 1 Training
- 1 Firearm-related incident

## Officers Feloniously Killed: Weapons Used by Offenders

- 9 Officers were killed with firearms
  - 4 Handguns
  - 1 Rifle
  - 4 Not reported
- 0 Officers were killed with vehicles

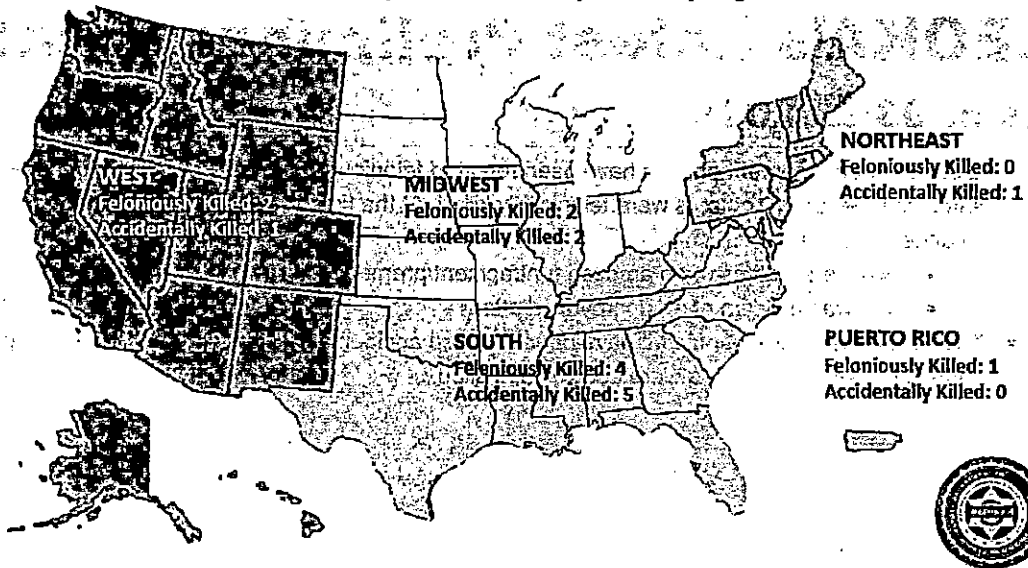
## Officers Feloniously Killed: Circumstance Encountered Upon Arrival at Scene of Incident

- 3 Tactical situation
- 2 Ambush
- 2 Arrest situation
- 1 Unprovoked attack
- 1 Wanted person

## Officers Feloniously Killed: Location of Firearm Wounds

- 1 Front head
- 2 Front upper torso/chest
- 6 Not reported

## Officers Feloniously and Accidentally Killed: By Region



As of March 1, 2019

(<https://www.fbi.gov/file-repository/ucr/2019-leoka-infographic.pdf>)

**NH Senate**  
**March 26, 2019**

**Madam President,**

**The Risk of Killing an Innocent Person**

The State of New Hampshire has not conducted an execution since 1939 yet it is the safest state in the nation when it comes to crime (*CQ Press study*). Despite these facts, in 2010 the New Hampshire Legislature and Governor Lynch expanded the death penalty. This law has increased the risk the state could kill an innocent person yet the same politicians have repeatedly refused to pass the **FBI Domestic and Investigation and Operations Guide (FBI recommendations (DIOG))** that would protect against wrongful convictions. This is dangerous public policy that is not justified by any known research or study.

I come before the Senate with a heavy heart yet peaceful heart. I have for many years been an advocate against the death penalty, African American, others of colors and economically deprived have been disproportionately sentenced to death at an alarming rate. While the verbiage is clear now as to what it does not do, and what it does do ruin additional families. I believe we need to walk/run with this battle until the change comes.

Data collected across the united states and abroad confirm the death penalty is in a historic decline. The Death Penalty Information Center provides an in-dept look at the historic decline in the death penalty by states. Since we passed HB455 in the house, miraculously the Governor of California Gavin Newsom placed a moratorium on the death penalty, while America watched the dismantling of the death chambers.

I know you all have heard all the arguments, not a deter, discriminatory based on race, geographic bias in the administration of capital punishment. It's ruins/hurts both families, it does not allow for redemption. The perpetrator is not afforded the opportunity to see the damage they have done to the victim's family, not theirs. Also, it's expensive, as the inmate is afforded many opportunities to hear the case again, painful for all families involved each time they are in court, hearing the details of the murder again. The same applies across the united states.

We often speak of the public safety aspect and deterrents. We also sometimes allude to the safety of a police officer. After hearing testimony from the Robert Durham, ED for from the Death Penalty Information Center in DC, who had no position for against, but facts from their research. However, after gathering data from the states that have capital punishment, those that don't abolished during the 20<sup>th</sup> century, and those in transition abolished during 2007 forward, the results were very clear. The outcome was the states with the lowest murder rates were consistent, with the states that had abolish the death penalty or rarely carried it out. Also states with the death penalty continue to have higher murder rates than states without. Again, it's not a deterrent.

On a more personal note. In February 1980 shortly after moving to NH in August 1979, we received a call that my brother in-law, four years older than my husband had been murdered. At the time I was 29 and my husband 31. We came to NH for his job, he left the City of Philadelphia, seeking opportunities with Polo/Ralph Lauren in 1979. I a teller in the phone center store for Bell of Pa, transferred to New

England Tel, another subsidiary at time of AT&T. Prior to the split employees were able to transfer anywhere under the umbrella of AT&T.

My brother in-law Edward Westley Gathright, a military vet was murdered, shot gangland style to the head. It continues to be a cold case in Philadelphia. We speak of him often for he was the elder of 8 children. I new him since the age of 14. We truly miss him. I speak for the family. We would rather have the perpetrator spend his life in prison verse the death penalty which if finite. We would rather they internalize and know the impact of their actions. We would rather have them to say I am sorry from their heart and seek redemption then to die without that opportunity.

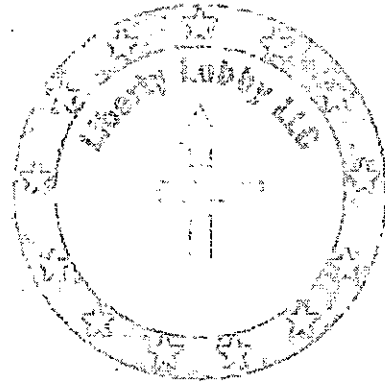
The Gathright Family request you support HB455 100% and past.

Thank you for the opportunity to speak before you this day.

Alt/Rep Linda Harriott-Gathright  
Hills 36, Ward 9  
Nashua, NH 03063  
603-880-4537



MINIMAL GOVERNMENT  
MAXIMUM FREEDOM



Testimony on HB455: Relative to the penalty  
for capital murder.

To the members of the Senate Judiciary Committee:

I ask your support for HB455, a bill to abolish the death penalty in NH, a bill that overwhelmingly passed the NH House.

Nationwide, in the last decade there have nearly 3 dozen people exonerated from death row, most of whom had served 15 or more years behind bars,\* with an average of 11.3 years between being sentenced to death and exoneration.

According to the Death Penalty Information Center, there have been 164 people exonerated from death row since 1973. DNA evidence was a substantial factor in establishing innocence in 21 of those cases, meaning the other 143 people to be exonerated from death row had been convicted because of false confessions, unreliable witnesses, police misconduct, faulty evidence, etc. This alone should raise some questions not only about the use of the death penalty as a means of punishment, but about the accuracy of the entire justice system.

The Death Penalty Information Center lists nearly 2 dozen people as either executed but possibly innocent OR as having been posthumously pardoned, in one case the pardon came 94 years after execution.\*\* Considering that 1,492 people have been executed since 1973, and 164 people have been exonerated in that same time period, it is statistically probable that some innocent people have been executed in the name of justice.

Thomas Jefferson once said, "To compel a man to furnish funds for the propagation of ideas he disbelieves and abhors is sinful and tyrannical." If only 1 innocent person has been executed for a crime they did not commit, that should be enough to oppose state-funded executions; because state-funded executions use tax-payer dollars to carry out a punishment that some find objectionable.

I am morally opposed to having any amount of my money being used to kill another human, whether that be via war or so-called justice. Therefore, I encourage this committee and the full NH Legislature to vote in favor of HB455!

Darryl W. Perry  
CEO, Liberty Lobby LLC

\* <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>

\*\* <https://deathpenaltyinfo.org/executed-possibly-innocent>

1

My name is Kelly Ayotte. I had the privilege of serving as Attorney General for the State of NH from July 2004- July 2009, having been appointed to that position by both Republican and Democratic Governors.

I am here to ask you to oppose the repeal of NH's Death Penalty Statute.

NH has a narrow capital murder statute and the death penalty can only be sought under limited circumstances, in very egregious murder cases.

As you know, no one has been executed in NH since 1939 because our laws are narrowly drawn and very few capital murder cases have been prosecuted.

One of the circumstances in which a capital murder case can be brought in NH is when an individual knowingly murders a law enforcement officer in the line of duty.

While I was serving as Attorney General, I brought the case against Michael Addison, for capital murder for knowingly killing Manchester Police Officer, Michael Briggs while officer Briggs was in the line of duty serving on bike patrol.

2

I will never forget the day of October 16, 2006--- that was the day that Michael Addison shot Officer Michael Briggs in the head. He did so to avoid being apprehended by Officer Briggs, who right before his death shouted more than once stop police.

In the week leading up to Officer Briggs murder, Addison had been on a crime spree which threatened the city of Manchester. He committed several violent crimes, including 2 armed robberies and a drive by shooting.

Addison was not a neophyte to the criminal justice system. He was a felon who had served time in prison for prior assaults.

That night, Addison knew the police were looking for him.

With the armed robberies and shooting he had committed the week before, Addison was already facing a life sentence when Officer Briggs shouted stop police to him in that alley in Manchester. Addison chose to shoot Officer Briggs in the head to make a getaway. He did escape for a period, but he was arrested the next day in Boston.

Addison was convicted of capital murder for the murder of Officer Briggs and because there were aggravating circumstances in the case, he was eligible for the death penalty. A unanimous NH jury sentenced him to death for the murder of officer Briggs and he is the only person currently on death row in NH.

If you repeal the death penalty, I want you to understand that Michael Addison's sentence will be commuted to life without parole which would not be just and would send the wrong message to criminals when it comes to killing our police officers.

On the night, that Addison shot Officer Michael Briggs in the head and murdered him, he did it to get away. Because Addison, a felon, was already facing a life sentence for the armed robberies and shooting he had committed the week before the murder. He knew it and he shot Officer Briggs in the head to get away because he thought he had nothing to loose. And if you, effectively commute Addison's sentence to life without parole by repealing the death penalty, there will have been no added penalty for murdering Officer Michael Briggs that night.

What are we saying if you're a career criminal whose been on a crime spree and is already facing a life sentence, and there is no death penalty, no other punishment to impose, why not kill the police officer to get away. Because that is what happened that night. That is why the jury imposed the death penalty.

Our law enforcement officer go out there every day at every our when we are sleeping, during every holiday when we are home with our families.

Killing a police officer while he is serving us is an affront to all of us and the fabric of our society.

There needs to be an added penalty for murdering a police officer even if, like Addison, you have already been on a crime spree and are facing a life sentence.

Otherwise, we are sending the wrong message to criminals and our police officer will not be sufficiently protected.

I also want to spend a couple of minutes talking about the procedural protections in place in our statute. Because rightly so, it should be extremely difficult to seek and impose the death penalty and it is in NH and that is another reason, there have been so few cases.

First, in all NH capital murder cases and in the Addison case, there were 3 phases to the trial. The jury had to be unanimous in its verdict 3 times for the death penalty to be imposed.

In the first phase, the jury had to be unanimous in finding him guilty of capital murder. But, that was not enough to impose the death penalty,

There is a second phase, where the jury had to unanimously agree that the state had proven at least two aggravating factors beyond a reasonable doubt. It is not sufficient to have committed capital murder to receive the death penalty, there must be aggravating factors.

Then there is a third phase the sentencing phase, in that phase, the jury must weigh the aggravating and any mitigating factors. For the jury to consider an aggravating factor, it must be unanimous and find that factor beyond a reasonable doubt. If any one juror disagrees, the aggravating factor is not proven and cannot be considered. But mitigating factors are treated very differently-- any juror can consider any mitigating factor on its own—they do not need to be unanimous and they do not need to be proven beyond a reasonable doubt.

The jury is also instructed that they are never required to impose the death penalty under any circumstances.

The jury must also be unanimous on a death sentence. If any juror disagrees, the death sentence cannot be imposed.

So in Addison and in all NH death penalty cases, the jury must be unanimous 3 x—not just once like most murder cases.

And then if the defendant is sentenced to death, under RSA 630:5, he is also entitled to a separate review by the NH Supreme Court to ensure that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor and to a determination by the NH Supreme Court of whether the sentence is disproportionate to the penalty imposed in similar cases.

This is another layer of added protection with a separate review that does not happen in other murder cases.

In the case of Addison, he appealed his conviction and raised over 22 legal issues in the case. The Supreme Court found no legal error in the case.

7

The NH Supreme Court also did a separate review and found that Addison's that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor and that his sentence was proportionate to other cases.

It is very difficult – as it should be-- for a death sentence to be imposed in NH and there are many protections in place for the defendant in those limited set of cases that are death eligible.

However, there some cases which warrant the death penalty. Addison's case was one. Murdering a police officer in the line of duty to avoid apprehension is a crime against all of us. And, criminals need to understand that no matter how much prison time they are facing for what they have done, there will be an added penalty for murdering a police officer.

In the case of Michael Addison, unfortunately if you repeal the death penalty, there won't be an added penalty for the murder of Officer Michael Briggs and for future cases, if god forbid one of our police officers confronts another career criminal in an alley whose already facing a very long sentence—there will be no deterrent or added penalty if the criminal decides to murder another one of our police officers to get away.



**Senate Hearing on HB 455**  
**March 26, 2019**

My name is Bess Klassen-Landis. My mother, Helen Klassen, was murdered at age 41, during what is now termed a home invasion. She was stripped, beaten, raped, strangled and shot 4 times by an unknown intruder while my sisters and I were at school and my father was away.

Her murder happened 50 years ago, on March 14, 1969, before DNA technology was available. In 1996, her case was reopened, however, the evidence had been lost and her case has never been solved.

Because her murderer was never locked up, just to begin healing our grief, rage and fear took years. I knew viscerally that there was no place that was safe --not in my community, not in my home, not in my family, not as a woman.

Hate never helps one heal, or find inner peace or joy. The death penalty is a physical manifestation of hatred. It is pre-planned, state sanctioned, homicide. It is unnecessary to keep society safe and it is devoid of life and love, which is what victim family members need to go on.

In a death penalty case, victim family members endure years and years of troubling re-victimization. Every time a step in the death penalty process is gained, the news is plastered all over the pages of state newspapers, each time retelling the story of the murder. What had originally been a shocking, unbelievable personal and public horror, is now callously reiterated as old news. Yet for the family--each time this happens, a deep, deep wound is reopened.

I implore you to repeal the death penalty, thus giving victim family members a speedier legal resolution to the crime, which may in turn, help them move on in their own emotional healing.

If there had been a conviction in my mom's case, and the death penalty was involved, that would be the worst possible tribute that I can think of, to my mother.

Some of the millions of dollars saved by not pursuing the death penalty, could be spent working on cold cases and building a stronger society, where every child has a chance to feel safe. The death penalty only creates more murder victim family members. It is money wasted, while the families in cold cases are still waiting for answers.

Please help reshape the lives of murder victim family members and repeal the death penalty in New Hampshire.

Making the world a better place is our hope, and our best chance at healing.

Bess Klassen-Landis  
33 Clough Ave  
Windsor, VT 05089

## Remarks to the New Hampshire Senate Judiciary Committee – Tuesday, March 26, 2019

My name is Blake Allison. I live in Lyme, NH.

I thank the Senate Judiciary Committee for giving me the opportunity to speak this morning at this hearing on HB 445.

I am in favor of repealing New Hampshire's death penalty and urge members of state Senate to vote yes on HB 455.

Regrettably, I know firsthand the searing trauma of losing a loved one to violent crime. My late wife Anna S. W. Allison was murdered in the September 11 attacks. She was a passenger on American Airlines Flight 11 that was flown into the North Tower of the World Trade Center.

Despite the horror of that event, I never considered "eye for an eye" retribution for its perpetrators. I am a longtime opponent of the death penalty dating back to my young adulthood. That belief is not situational. Just because I suffered great and deep emotional hurt, I would not waver in my conviction that taking a person's life in the name of another's is wrong.

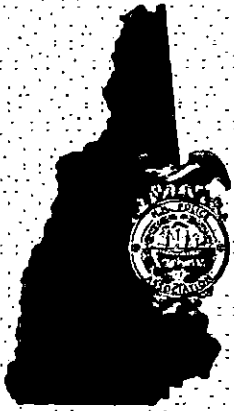
Over the years since 9/11, I have had the privilege of meeting many people who similarly lost loved ones in the attacks. Their views of how justice should best be served are varied and numerous. Some think death is the only appropriate punishment for those accused of plotting the attacks while others have worked diligently to show the public that there is another path forward that does not advocate violence in the name of violence.

Governor Sununu in vetoing last year's death penalty repeal, approved by the state legislature, argued that the death penalty was necessary to stand with crime victims to ensure justice is served, but as my presence before you and the testimony of other crime victims attests, not all of us share his view that justice can be served only through violent retribution. The idea that imposing the death penalty brings some kind of closure for the families of the victims leaves unaddressed the deep emotional suffering they have and will continue to endure.

On the 10th anniversary of the September 11 attacks, I was invited to represent the families of Massachusetts 9/11 victims at an annual gathering at Boston's "Garden of Peace;" a memorial to victims of homicide. According to its mission statement, the garden is to be "a symbol of hope and peace, and for renewal in our lives, our community, and the world."

Sitting with the other speakers, looking out at the assembled crowd, I was struck by how many stories of loss, pain and trauma were in front of me. As a member of the Massachusetts 9/11 families, I had been privileged from the beginning to benefit from a large support network that helped address a wide range of emotional and practical needs aimed at helping me to recover and heal. I wondered what recovery support these family members received. Wouldn't they be better served by a system of justice that provided help in recovery and healing rather than putting violence upon violence? I appear before you this morning as living proof of the possibility there could be another way forward that provided both justice and healing.

Thank you for this opportunity to publicly register my opinion. I encourage you and your colleagues to vote in favor HB 455 and repeal New Hampshire's death penalty statute.



**New Hampshire  
Police Association**  
est. 1940

### **New Hampshire Police Association Testimony Against HB 455**

Members of the Committee, good morning/afternoon. I am John Yurcak and I am here as a representative of the New Hampshire Police Association (NHPA) to testify against House Bill 455, Changing the penalty for capital murder to life imprisonment without the possibility for parole. By way of background, I have been a Nashua police officer for over 24 years. I am also a past President of the NHPA and I am currently on the Board of Directors. The NHPA is strongly against HB 455.

I would like to begin by outlining the NHPA's position and reasoning for supporting the death penalty in NH:

- 1). Deterrence – All negative consequences deter some
- 2). Just deserts - The concept that the punishment should fit the crime and the recognition that justice must contain a sense of proportionality
- 3). Protecting the innocent - This is done through providing the accused with additional due process protections and by keeping dangerous people away from innocent people

We would like to address some of the claims you will hear today for repealing the death in NH.

- 1). **CLAIM:** The death penalty is biased by race. **FACT: There is no race of the defendant nor race of the victim bias effect within capital murders<sup>1</sup>.**
  - a. Nationally, white murderers are twice as likely to be executed than black murderers<sup>2</sup> and have an execution rate 41% higher than black death row inmates<sup>3</sup>.
  - b. From 1980-2008, when comparing white-black serious crime rates, the black level is 12.7 times greater than the white level for homicide, 15.6 times greater for robbery, and 6.7 times greater for rape<sup>4</sup>. Robbery and rape murders are the most common death penalty crimes<sup>5</sup>.

2) **CLAIM:** The death penalty is biased against the poor. **FACT:** There is no bias against the "poor".

- a. This claim is solely dependent upon one's definitions of "poor" and "rich", as to whether the "rich" (an incredibly small minority of capital murderers), are executed at rates higher or lower than the "poor" (which constitute the overwhelming majority of capital murderers).
- b. According to the bill analysis prepared for HB 455, Addison has been the beneficiary of over \$2.9 million in legal defense expenditures to date. Is anyone seriously arguing that Addison (who by most definitions would be considered "poor") did not receive adequate resources to mount a vigorous and effective defense?

3) **CLAIM:** The death penalty is more expensive than Life Without Parole (LWOP). **FACT:** In some cases, yes, but not always.

- a. Many studies/estimates that find LWOP less expensive than the death penalty are seriously flawed. Some of the more common mistakes are:
  - i. Using the average annual cost of incarceration for an average inmate in general population, not the cost of a maximum-security inmate serving LWOP
  - ii. Failing to account for trial costs saved by LWOP parole pleas by defendants facing the death penalty. Repealing the death penalty would end LWOP pleas, leaving Life *With* Parole as the only plea option.
  - iii. Failing to account for the inevitable LWOP conviction appeals costs when LWOP trials are the only option
  - iv. Using unrealistic lengths of confinement (20 years) vice actual lengths of confinement for those serving LWOP
  - v. Failing to account for geriatric care costs of inmates serving LWOP, which can be 3-9 times the average cell cost<sup>6</sup>
  - vi. Failing to account for the lives saved, and thus murder trial costs, by the deterrent effect of the death penalty
- b. For example, two recent California studies<sup>7</sup> on death penalty vs life costs used \$15,000/yr for capital murder lifers, when the "average" cell cost was \$45,000/yr<sup>7</sup> (Actually now \$80,000/yr, 2017-2018<sup>8</sup>), with high security cells up to \$174,000/yr<sup>9</sup>, or about \$5 million for 50 years at \$100,000/yr per inmate for capital murder lifers. This does not include pre-trial, trial, or appeals costs, or specific geriatric care, adding millions more to the total. When properly taking all the above costs into consideration, LWOP is often more expensive than the death penalty.

- c. A substantial portion of the costs associated with prosecuting death penalty cases results from mismanagement of those cases. Responsible death penalty case management exists in Virginia. Since 1976, Virginia has executed 112 murderers, *within 7 years of full appeals*, on average<sup>10</sup>.
- 4) CLAIM: The death penalty puts innocents at risk and that innocent people have been executed. **FACT: The death penalty provides more protection for innocents and there is not a single, definitive case of an innocent person being executed in the modern death penalty era.**
- a. Death penalty opponents currently claim 164 death row inmates (1.8% of all death row inmates since 1973) have been "exonerated"<sup>11</sup>, leading one to believe that hundreds of innocent people have been falsely convicted and sentenced to death. They arrive at this number by defining "exonerated" to include those who are "legally innocent", as well as those who were "factually innocent"<sup>11, 12, 14</sup>.
  - b. The NY Times reported these "innocent" claims to be 71% false<sup>14</sup>. That means that of the current 164 people claimed to have been "exonerated", 116 of these are false claims. For perspective, this means that approximately 0.6% of all death penalty convictions have been proven innocent—all of whom have been released<sup>14</sup>. Other audits of the "exonerated" claims have found false claims of innocence in 71-83% of the cases reviewed<sup>15</sup>.
  - c. Defendants in death penalty cases receive greater due process protections than defendants in non-death penalty cases. (Some Supreme Court justices have referred to it as "super due process".)
  - d. As tragic as those actually innocent cases are, there is not a single, definitive case of an innocent person being executed since the death penalty was reinstated in 1973 following the Supreme Court's ruling in *Gregg v. Georgia*.
  - e. Since 1973, 21,000 innocent people have been murdered by known murderers that have been allowed to murder again<sup>16</sup>. 440,000 innocent people have been murdered by known, violent criminals that have been allowed to harm again<sup>16</sup>. Living murderers can harm and murder again. Executed ones cannot.
- 5) CLAIM: The death penalty does not deter murders. **FACT: The deterrent effect of severe negative sanctions has never been negated and cannot be.**
- a. There is substantial evidence that the death penalty deters some. There question is not whether the death penalty deters some. The question is to what degree and how can it be measured. 24 recent studies found that 1-28 homicides are deterred per execution<sup>17,18</sup>. All negative consequences deter some. This is a truism. There is no credible evidence to the contrary.

- b. Nobel Prize Laureate Gary Becker - "the evidence of a variety of types — not simply the quantitative evidence — has been enough to convince me that capital punishment does deter and is worth using for the worst sorts of offenses." (NY Times, 11/18/07) Note – The NY Times stated "(Becker) is the most important social scientist in the past 50 years" (NY Times, 5/5/14)
  - c. Without the death penalty/executions, more innocent lives are risked. With the death penalty/executions, more innocent lives are saved.
- 6) CLAIM: LWOP can effectively protect innocent people from further harm, thus making the death penalty unnecessary. **FACT: Murderers serving LWOP can harm and murder innocents, and there have been numerous incidents of such.**
- a. LWOP sounds good in theory, but lacks in implementation and puts innocent people at risk
- 
- b. People who have been sentenced to LWOP for murder have done all the following:
    - i. Killed other inmates, prison workers, or guards
    - ii. Been released after changes in the law only to kill again
    - iii. Have escaped and have killed while at large
    - iv. Have had their sentences commuted or reduced, been released, and have claimed additional innocent victims (The Kenneth McDuff case being a particularly egregious example of this.)
  - c. Before the committee considers whether or not to support this legislation, it should consider the following: what is the appropriate punishment for someone serving LWOP who kills another inmate, a civilian, or a corrections officer? If this question cannot be adequately answered, the death penalty in NH must remain in place.

Lastly, in 2014, in response to HB 1170, an effort to repeal the death penalty in NH, the NHPA sought a legal opinion from Kent Scheidegger, Legal Director of the Criminal Justice Legal Foundation (and whose legal arguments have been incorporated into several precedence-setting US Supreme Court decisions), regarding HB 1170's potential impact on the Michael Addison death penalty conviction. He was of the opinion, supported by events in Connecticut and Maryland that ended the death penalty in those states, that the legislation could be used to block Addison's execution. From his 2014 opinion:

"Given the multiple ways that this bill could be used to prevent the execution of Michael Addison, there is a strong possibility that one would succeed. Anyone who purports to guarantee that this bill will have no effect on his case is either naïve or dishonest."

The NHPA would argue that HB 455, would have the same predicted impact on the Addison case as HB 1170 would have, that being, the prevention of his execution.

We strongly urge the members of this committee not to support this bill.

Thank you.

## CITATIONS

- 1) Paragraphs 1, 2, 4, 5, 6, 7 & 8, Race & the Death Penalty: A Rebuttal to the Racism Claims <http://prodpinncc.blogspot.com/2012/07/rebuttal-death-penalty-racism-claims.html>
- 2) 56% of those executed are white, 34% black (a). The black level is 12.7 times greater than the white level for homicide (fn 3). - DPIC, Facts About The Death Penalty, March 12, 2019, <https://deathpenaltyinfo.org/documents/FactSheet.pdf>  
  
NOTE: 2016 - 20 prisoners were executed, 16 white, 2 Hispanic, 2 black. 70 prisoners released from under sentence of death by means other than execution, p 2, Highlights, BJS Capital Punishment Report, 2016, April, 2018,
- 3) From 1977-2012, white death row murderers have been executed at a rate 41% higher than are black death row murderers, 19.3% vs 13.7%, respectively. (Table 12, Executions and Other Dispositions of Inmates Sentenced To Death, By Race And Hispanic Origin, 1977-2012, Capital Punishment 2012, Bureau of Justice Statistics, last edited 11/3/14)
- 4) Reassessing Trends in Black Violent Crime, 1980-2008: Sorting Out The "Hispanic Effect" In Uniform Crime Reports Arrests, National Crime Victimization Survey Offender Estimates, And U.S. Prisoner Counts, see pages 208-209, fn 5, Darrell Steffensmeier, Ben Feldmeyer, Casey T. Harris, Jeffery T. Ulmer, Criminology, Volume 49, Issue 1, Article first published online: 24 FEB 2011  
<http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9125.2010.00222.x/pdf>
- 5) Death Row Information, Offenders on Death Row, Texas Department of Criminal Justice, (Unfortunately, you have to go through each "Offender Information" link as there is no source for aggregate data)  
  
[https://www.tdcj.texas.gov/death\\_row/dr\\_offenders\\_on\\_dr.html](https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html)
- 6) Older prisoners (2005 and 2011) cost 3-9 times more than younger prisoners, from: Human Rights Watch. Old Behind Bars: The Aging Prison Population in the United States. Human Rights Watch, Jan 27, 2012 - American Civil Liberties Union. At America's Expense: The Mass Incarceration of the Elderly. American Civil Liberties Union, New York, NY: Jun, 2012.  
  
Also see - \$10,000-\$40,000/yr/inmate (2012), additional, ONLY for geriatric prisoner medical care. Medical Expenditures for Older Inmates, IV. Aging Bodies, Soaring Costs, Old Behind Bars, Human Rights Watch, 1/27/12, <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states#b87216>
- 7) Death Penalty Costs: California  
  
<http://prodpinncc.blogspot.com/2012/08/death-penalty-costs-california.html>
- 8) Ibid
- 9) Figure 1, (Prisons plus Administration), Total Expenditures for the California Department of Corrections and Rehabilitation, 2017-2018 Proposed, The 2017-2018



Budget, California Department of Corrections and Rehabilitation, March 1, 2017,  
<https://lao.ca.gov/Publications/Report/3595>

10) Path to execution swifter, more certain in Va. , FRANK GREEN, Richmond Post-Dispatch, December 4, 2011 Page: A1 Section: News Edition: Final  
[http://www.timesdispatch.com/archive/path-to-execution-swifter-more-certain-in-va/article\\_6a4bf4fc-bff8-52b5-be5b-7d2598439957.html](http://www.timesdispatch.com/archive/path-to-execution-swifter-more-certain-in-va/article_6a4bf4fc-bff8-52b5-be5b-7d2598439957.html)

11) The Innocence List, DPIC, as of November, 2018,  
<https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>

12) Ibid – Note: The modern era of death penalty cases did not begin until after Gregg v Georgia, 1976. However, based upon the numbers, the end of 1978 is when all the Gregg issues were finally resolved. This means 34 of those cases should be omitted (1963-1978), bringing the number down to 130, minus the 71%, or 38 innocents – see TABLE 16 Prisoners sentenced to death and the outcome of the sentence, by year of sentencing, 1973–2013; Capital Punishment, 2013, Statistical Tables, Bureau of Justice Statistics, December 2014, <https://www.bjs.gov/content/pub/pdf/cp13st.pdf>

13) See sections 3 and 4, The Innocent Frauds: Standard Anti Death Penalty Strategy  
<http://prodpinncc.blogspot.com/2013/04/the-innocent-frauds-standard-anti-death.html>

and The "Innocent", the "Exonerated" and Death Row: An Open Fraud in the Death Penalty Debate: How Death Penalty Opponents Lie  
[http://prodpinncc.blogspot.com/2013/03/the-innocent-exonerated-and-death-row\\_19.html](http://prodpinncc.blogspot.com/2013/03/the-innocent-exonerated-and-death-row_19.html)

14) Liptak: "To be sure, 30 or 40 categorically innocent people have been released from death row," (NY Times, 1/23/05) Note: At the time of the article, there were 119 listed on the Innocence List (fn 13) 35 innocent, as per average by Liptak, means a 71% error rate with the 119. 'The Death of Innocents': A Reasonable Doubt, by Adam Liptak, NY Times, JAN. 23, 2005

15) Ibid, fn 15

16) Section 4 b and d, The Death Penalty: Saving More Innocent Lives  
<http://prodpinncc.blogspot.com/2013/10/the-death-penalty-do-innocents-matter.html>

17) Section 4 b and d, The Death Penalty: Saving More Innocent Lives  
<http://prodpinncc.blogspot.com/2013/10/the-death-penalty-do-innocents-matter.html>

18) Of Course The Death Penalty Deters: A Review Of The Debate And Murderers Much Prefer Life Over Execution, 99.7% of murderers tell us "Give me life, not execution"  
<http://prodpinncc.blogspot.com/2013/03/of-course-death-penalty-deters.html>

Testimony

HB 455-FN - Relative to the penalty for capital murder

Senate Judiciary Committee

March 26, 2019

Dear Senator Hennessey and Members of the Committee:

Good morning. Thank you for giving me the opportunity to speak with you today. My name is Mark Chase, and I am the President of the NH Association of Chiefs of Police. I am here to represent the Chiefs Association in **opposition** of HB 455-FN.

First, I would like to say that I very much respect the views of those who are in favor of this bill and recognize this is a personal and an emotional topic. It is important for me to explain why the NH Association of Chiefs of Police is in opposition to removing the option of the death penalty.

New Hampshire's Capital Murder statute is one of the most restrictive in the country, and it only applies to the most heinous cases. History has shown that even when there have been cases where the death penalty could have been applied, it has not been. On the contrary, it has been applied sparingly which is evident by fact that the last execution took place in 1939.

It is also important to recognize with the current law that the people of New Hampshire still have the final say. Let's not forget that to receive the death penalty, **it requires a unanimous decision by all the jurors**. If one juror opposes the death penalty, a life sentence is issued. The jury has heard all the facts and evidence in the case and it is their job to make the decision. I do not believe it is appropriate to take away the ability of the people of New Hampshire to make this decision.

For these reasons, the NH Association of Chiefs of Police requests that you vote Inexpedient to Legislate on HB 455-FN.

Thank you for your consideration.

## Testimony in Favor of HB 455 • March 26, 2019

Good <sup>Morning</sup> ~~afternoon~~; my name is Robin Nafshi. I am the Rabbi at Temple Beth Jacob here in Concord. Thank you for taking my testimony. I speak in favor of House Bill 455.

I am aware that many in the New Hampshire legislature feel very strongly that their religious views guide them in making law and public policy for our state and frequently look to the Bible for direction. I therefore wish to offer some insights into the biblical application of the death penalty.

The Bible – what Jews call the Hebrew Bible and others call the Old Testament – lists at least 21 offenses that are punishable by death. Yet, within the Bible itself we see no actual application of the death penalty. In fact, approximately 2000 years ago, the ancient Rabbis who interpreted the laws of the Bible concluded that application of the death penalty had never occurred in the Bible – or perhaps only once. They ruled that going forward, in order to apply the death penalty, the prosecution would have to prove that:

- a witness saw an individual about to commit a crime for which the punishment was death
- the witness would have to warn the person not to act
- the person committed the crime nonetheless
- and a minimum of two witnesses saw the person commit the crime.

In other words, they <sup>set the bar so high that they</sup> created a standard making application of the death penalty impossible. The Rabbis stated specifically, “Perhaps a witness testifies that he saw a man running after his fellow into a ruin, the witness pursued him and found him with a sword in his hand dripping with blood while the murdered man was writhing in agony. If this is what you saw,” the Rabbis say, “then you saw nothing.”<sup>1</sup>

Jews, like Christians, Muslims, Buddhists, Hindus, and other religious people, are not of one mind. Jews have divided ourselves into four groups – denominations – and we frequently disagree on issues. On the death penalty, however, we are united in our opposition. We believe that:

- Only God is infallible. Humans being human will make mistakes. We know that hundreds of people are been wrongly convicted of capital offenses.
- No evidence has proven that the death penalty is a deterrent to crime.
- All human beings possess the power of repentance; the death penalty removes this possibility.

The modern state of Israel is the only nation in the world that governs in accordance with both democratic and Biblical principals. Israel repealed its death penalty after using it once. To kill whom? Not Yigal Amir who assassinated Prime Minister Yizchak Rabin. He sits in prison.

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<sup>1</sup>Sanhedrin 37b

Not terrorists who have blown up university cafeterias, pizza places, coffee houses, discos, and scores of other public gathering places. They, too, sit in prison. No, the only application of the death penalty in Israel was to kill Adolph Eichmann, a Nazi war criminal.

No matter how heinous a murder may be in New Hampshire, I implore you not to sully the memories of the six million Jews murdered in the Holocaust by equating a killing in our state with the behavior of the Nazis.

Others have raised the Biblical injunction of “an eye for an eye, a tooth for a tooth” as showing support for the death penalty. This is not so. There is no evidence anywhere, literary or archaeological, that a literal “eye for an eye” was the Jewish practice at any time. Nor is there the slightest hint in the Talmud, the principle body of Jewish law, that this verse was ever taken literally.

This might sound outrageous. It says so in the Bible, so it must mean what it says. But please note that for the Jewish people read, the Hebrew Bible is understood only through the ongoing process of interpretation. The first and primary source of that interpretation is the Talmud, which dates from around the 6<sup>th</sup> century.

The Talmud records a lengthy discussion among Rabbis concerning the verse “an eye for an eye.”<sup>2</sup> The Rabbis cite several compelling proofs showing that one should not even entertain the thought that “an eye for an eye” is to be taken literally. Later rabbis who offered additional interpretations of the verse agreed. Maimonides, a renowned 12<sup>th</sup> century sage, notes that the verses in Exodus<sup>3</sup> regarding the payment of money to compensate someone for damages are just a few verses earlier and thus applicable in the situation of “an eye for an eye.”

If the Biblical text is about monetary damages, why does it seem to say otherwise? The Maharal, a 16<sup>th</sup> century sage, suggests that it is based upon the idea that a person who injures or even kills another must feel a profound sense of responsibility for one’s actions. Had the Bible simply ordered the aggressor to pay damages, he might have thought that it is sufficient to simply write a check to the victim and be done with it.

The Bible, however, is teaching that if one causes the loss of limb or even life to another, he emotionally deserves to have the same done to him, in order to contemplate the profound damage done to the other – or to the other’s survivors. The aggressor should know the pain and suffering and losses endured by the other, other’s survivors – for the rest of his life. But society cannot endure the actual retribution of taking another’s eye or limb or life. And so monetary payment – and we hope repentance – are the most we can demand.

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<sup>2</sup>Bava Kama 83b-84a

<sup>3</sup>21:18-19

Judge  
Lewis  
+ Blake  
Allison  
along  
with

not in this room

If the Jewish application of the Biblical death penalty does not persuade you to pass this bill and suspend the use of the death penalty, perhaps a look at the status of the death penalty in nations where Christianity is the official religion or where the governments give or gave special recognition to Christian religions will.

- Andorra, outlawed in 1990
- Angola, outlawed in 1992
- Argentina, outlawed in 2008
- Benin, outlawed in 2016
- Bolivia, outlawed in 2013
- Burundi, outlawed in 2009
- Colombia, outlawed in 1910
- Congo, outlawed in 2015
- Costa Rica, outlawed in 1877
- Denmark, outlawed in 1933
- Dominican Republic, outlawed in 1966
- Ecuador, outlawed in 1906
- Finland, outlawed in 1949
- Gabon, outlawed in 2010
- Republic of Georgia, outlawed in 1997
- Great Britain, outlawed in 1969
- Greece, outlawed in 1993
- Guatemala, outlawed in 2017
- Haiti, outlawed in 1987
- Honduras, outlawed in 1956
- Iceland, outlawed in 1928
- Italy, outlawed in 1948
- Latvia, outlawed in 2012
- Liechtenstein, outlawed in 1987
- Madagascar, outlawed in 2015
- Malta, outlawed in 1971
- Monaco, outlawed in 1962
- Northern Ireland, outlawed in 1973
- Norway, outlawed in 1905
- Panama, outlawed in 1903
- Paraguay, outlawed in 1992
- Poland, outlawed in 1997
- Portugal, outlawed in 1867
- Rwanda, outlawed in 2007
- Slovenia, outlawed in 1989
- Spain, outlawed in 1978
- Suriname, outlawed in 2015
- Switzerland, outlawed in 1942
- Uruguay, outlawed in 1907
- Venezuela, outlawed in 1863

Thank you.

Even Russia <sup>has</sup> suspended  
imposition since 1996.



## **American Friends Service Committee**

**Arnie Alpert, Co-Director**

**New Hampshire Program**

**4 Park Street, Suite 304, Concord NH 03301**

### **Testimony of Arnie Alpert in Support of HB 455 Repealing the Death Penalty**

March 26, 2019

It was 1985 when the American Friends Service Committee showed up at the State House for the first time to oppose the death penalty. The bill in question that year was intended to change the state's method of execution from hanging to lethal injection, a polite way of saying poison. New Hampshire Quakers (members of the Religious Society of Friends) took a position that instead of debating the best way to kill people, the state should take killing off its menu of options for dealing with serious crime. That has been our consistent message ever since.

For Quakers, and for the American Friends Service Committee, which bases its work on Quaker principles, a moral objection to killing is reason enough to support death penalty repeal. But over the last thirty-five years, as we have observed multiple debates over bills to expand or eliminate the use of execution, the AFSC has come to understand many other reasons why the death penalty should be repealed.

Simply put, the death penalty fails as a matter of public policy.

For starters, there is no evidence that the death penalty protects public safety by deterring people from committing homicide, especially compared with the risk of long-term or life imprisonment. The examples of people who have committed crimes potentially punishable by death proves the opposite.

For those who have lost family members to homicide, there is reason to believe a judicial process that can lead to execution can exacerbate the trauma they have already experienced, not promote "healing" or "closure." In my own case, I am grateful that when I was 11 years old and lost my grandfather to a brutal murder, my family devoted its attention to my grandmother, not to the killer.

We all know that the prosecutorial and judicial process is run by humans, and is therefore prone to human error, misjudgment, and malfeasance. Over the years the death penalty has been debated in New Hampshire we have met perhaps a dozen people who found themselves accused of crimes they did not commit and were

sentenced to be put to death. Fortunately for them and for society, evidence exonerating them was brought forward before it was too late.

We know the death penalty system judges more harshly people of color who are accused of crimes, people of any racial background who are accused of murdering white people, and those who do not have access to competent counsel due to their economic status. But we cannot know how many innocent people are on death row or in prison due to simple mistakes made by police or prosecutors. And we do not know how many people are behind bars and even facing execution due to official judgments clouded by prejudice or politics.

We also know that death penalty cases are far more expensive to prosecute and defend than homicide cases where execution is not an option. This is true even when the alternative is lengthy or life imprisonment for an offender who is found guilty. With so many pressing needs – treatment and prevention for substance abuse, infrastructure repair, public education at all levels, services that enable people with mental illness and other disabilities to lead dignified lives – there is no reason for the state to spend millions of dollars on death penalty cases.

In short, there is no good reason for the state to engage in pre-meditated killing.

Please vote ought to pass on HB 455.



**EPISCOPAL**  
CHURCH OF NH

March 26, 2019

Dear Members of the New Hampshire State Senate:

I write you in support of House Bill 455 to repeal the Death Penalty in New Hampshire.

The Death Penalty is morally repugnant because it makes us all complicit in homicide. The Death Penalty is ineffective as a deterrent to capital crimes. The Death Penalty is an obscene waste of public resources that could otherwise advance more wholesome duties of good government; for instance, in addressing the ever-growing gap in educational opportunity in the Granite State or enhancing our response to mental illness and our continuing opioid crisis.

Though as a Christian bishop, I am reluctant to apply pastoral theology or scriptural teaching to a public political process, I am led to do so because of the distortion of Christian teaching put forward by supporters of the Death Penalty. I have heard legislators in these halls tell me that Jesus' own execution at the hands of the state serves as sufficient justification for the state's perpetuation of this inhumane practice. "Just look at all the good that came out of the crucifixion," I have been told. Such reasoning defies logic and could provide a warrant for just about any kind of cruelty or infliction of harm. Such reasoning reflects a toxic perversion of the Gospel message, the clear heart of which is that violence and hatred are not overcome, conquered or transformed by more acts of violence, but by the power of mercy.

When we put to death, even criminals who have committed heinous and contemptable acts, we do little but show how evil has succeeded in ensnaring us and in drawing us deeper into pernicious web of increasing malice, hatred and violence. We move closer to committing the very heinous and contemptable atrocities that those who have been convicted for the very inhumanity we condemn.

Alternatively, it is the hard work and high calling of good and sound government to prevent and protect society from being contaminated by this lethal dynamic. I urge, hope and pray that this legislature will not shirk its obligation to this hard, moral work and high calling and will finally Repeal the Death Penalty in our Great State of New Hampshire. Please put our money to more wholesome purposes. Much more importantly, save our consciences from the high and brutal cost of the moral injury capital punishment inflicts on us all.

Respectfully Yours,

A handwritten signature in black ink, appearing to read "A. Robert Hirschfeld". The signature is written in a cursive, flowing style.

The Rt. Rev. A. Robert Hirschfeld  
Bishop of the Episcopal Church in New Hampshire



March 26, 2019

Dear Judiciary Committee Members,

I am writing in support of HB455

My beliefs about the death penalty today were very different twenty years ago. The knowledge I had of the death penalty was based on other people opinions until I decided to further my education.

During the studies for a degree I researched the death penalty which caused my beliefs to change. I learned during this time that being sentenced to the death penalty depends on a person's race and economic status. I read the studies and statistics, some you will likely have heard today, that the death penalty is not a deterrent.

Later on in life I spent four years in a program studying the bible in a small group. Through reading and discussions of the bible my belief against the death penalty became even stronger. I believe in the New Testament message against retribution and violence. Because of the knowledge I learned through these religious and academic studies, I now firmly believe the death penalty should be repealed.

The following is a part of minute from the 1956 New England Yearly Meeting of Friends which speaks to my beliefs "... there is no crime for which the death penalty should be imposed. We hold life, given us by our father, to be sacred and hence not to be taken from any of us by the judgment of man"

Thank you,  
Kevin Woolley  
17 NH Route 119E  
Fitzwilliam, NH

My name is Richard Oleary I spent 33 years as a Manchester Police Officer. I began my career as a Parking Control Officer and I retired as a Deputy Chief—the #2 position in the department. I will share with you my reasons for supporting the repeal of the death penalty in NH.

- The criminal justice system is not perfect and innocent people can and have been killed. To date the Innocence Project has freed over 165 death row inmates from across the country. These people were wrongfully convicted. How do you bring back the life of someone who was executed and you later find was innocent?
- How do we decide which category of victims warrant the death penalty—whose life is more important? My wife and I are the parents of 6 young adults—all with careers working in social service careers—a police officer, nurse, coach/teacher, IT technician, and a Chef. All of these occupations have been involved in mass shootings throughout the country—is one life more significant than the other? All are working to better the people they work with on a daily basis—is the policeman more important?—I would argue that all of their lives are equally important! Should we as a society be distinguishing which life is more important—all are important to their loved ones and therefore should be weighed equally.
- The death penalty does not deter people from committing murder. Most people involved in dangerous activity are drug addicts and crackheads—they don't stop to reflect on the consequences of their behavior ahead of time! They act without thinking and without premeditation.
- The death penalty turns murders into celebrities on some level—this is horrible for the victims family. Today Michel Addison's name is well known. He killed Michael Briggs a great Manchester police officer. Addison is on death row and gets consistent notoriety. In the early 70's another Manchester Officer was gunned down—his name was Ralph Miller. Miller's killer served 50 years in prison—his name is Cleo Roy—Cleo lost his notoriety many years ago. He did not get the publicity because he was a "nobody" in prison and did not get the notoriety for his deed of killing the Officer.
- When I have spoken with family members of victims of heinous crimes—they just want the the bad guy put away for as long as possible. They don't want the reminder every few years when appeals are brought forward. They need closure to what happened to their loved one so they can move on.
- In my opinion, the death penalty takes another life for nothing. I strongly support death in prison whereby a person who commits a heinous crime has to live in a 6X10 ft.cell for the rest of their lives. Your freedom is taken forever from you. This protects society and allows for the possibility of rehabilitation which is the purpose of jail in the first place. It also allows the correction of the criminal justice system in a case where a mistake was made.
- Lastly—the cost of executing a person is phenomenal due to all the court proceedings, appeals etc. Imagine how the money saved could be used to help police officers on the street. Money could be used to further train new officers, better equipment, treat addicts on the streets, further rehab facilities, more trained drug/alcohol counselors, more money to curb homelessness, and so many other good uses.

In closing I would respectfully ask that you support the repeal of HB455 and encourage our Governor to follow suit.

Richard Oleary 97 Katinka Dr. Manchester, NH. 03109



# Voting Sheets

# Senate Judiciary Committee

## EXECUTIVE SESSION

Bill # H B 455

Hearing date: \_\_\_\_\_

Executive session date: \_\_\_\_\_

Motion of: OTP

VOTE: 4-1 (Carson)

<u>Made by</u> Hennessey <input checked="" type="checkbox"/>	<u>Seconded</u> Hennessey <input type="checkbox"/>	<u>Reported</u> Hennessey <input type="checkbox"/>
<u>Senator:</u> Chandley <input type="checkbox"/>	<u>by Senator:</u> Chandley <input checked="" type="checkbox"/>	<u>by Senator:</u> Chandley <input type="checkbox"/>
Carson <input type="checkbox"/>	Carson <input type="checkbox"/>	Carson <input type="checkbox"/>
Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>
French <input type="checkbox"/>	French <input type="checkbox"/>	French <input type="checkbox"/>

Motion of: \_\_\_\_\_

VOTE: \_\_\_\_\_

<u>Made by</u> Hennessey <input type="checkbox"/>	<u>Seconded</u> Hennessey <input type="checkbox"/>	<u>Reported</u> Hennessey <input type="checkbox"/>
<u>Senator:</u> Chandley <input type="checkbox"/>	<u>by Senator:</u> Chandley <input type="checkbox"/>	<u>by Senator:</u> Chandley <input type="checkbox"/>
Carson <input type="checkbox"/>	Carson <input type="checkbox"/>	Carson <input type="checkbox"/>
Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>
French <input type="checkbox"/>	French <input type="checkbox"/>	French <input type="checkbox"/>

<u>Committee Member</u>	<u>Present</u>	<u>Yes</u>	<u>No</u>	<u>Reported out by</u>
Senator Hennessey, Chairman	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Senator Chandley, Vice-Chair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Carson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Senator Levesque	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator French	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

\*Amendments: \_\_\_\_\_

Notes: \_\_\_\_\_

# Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Tuesday, April 2, 2019

THE COMMITTEE ON Judiciary

to which was referred **HB 455-FN**

AN ACT relative to the penalty for capital murder.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS

BY A VOTE OF: 4-1

Senator Martha Hennessey  
For the Committee

Jennifer Horgan 271-2609

**JUDICIARY**

**HB 455-FN**, relative to the penalty for capital murder.

Ought to Pass, Vote 4-1.

Senator Martha Hennessey for the committee.

**Docket of HB455**

Docket Abbreviations

**Bill Title:** relative to the penalty for capital murder.*Official Docket of HB455.:*

<b>Date</b>	<b>Body</b>	<b>Description</b>
1/10/2019	H	<b>Introduced</b> 01/03/2019 and referred to Criminal Justice and Public Safety <b>HJ 3 P. 15</b>
1/23/2019	H	Public Hearing: 02/19/2019 10:00 am Reps Hall
1/30/2019	H	Executive Session: 02/20/2019 10:00 am LOB 204
2/27/2019	H	Committee Report: Ought to Pass for 03/07/2019 ( <b>Vote 11-6; RC HC 14 P. 8</b> )
3/7/2019	H	<b>Ought to Pass:</b> MA <b>RC 279-88</b> 03/07/2019 <b>HJ 8 P. 11</b>
3/19/2019	S	Introduced 03/14/2019 and Referred to Judiciary; <b>SJ 9</b>
3/22/2019	S	<b>Hearing:</b> 03/26/2019, Room 100, SH, 09:00 am; <b>SC 15</b>
4/2/2019	S	Committee Report: Ought to Pass, 04/11/2019; <b>SC 17</b>
4/11/2019	S	<b>Ought to Pass:</b> <b>RC 17Y-6N, MA; OT3rdg;</b> 04/11/2019; <b>SJ 12</b>
4/25/2019	S	Enrolled (In recess 04/25/2019); <b>SJ 15</b>
4/25/2019	H	Enrolled 04/11/2019 <b>HJ 13 P. 127</b>
5/6/2019	H	Vetoed by Governor Sununu 05/03/2019 <b>HJ 16 P. 2</b>
5/23/2019	H	Veto Overridden 05/23/2019: <b>RC 247-123</b> by Required Two-Thirds Vote <b>HJ 16 P. 2</b>
5/30/2019	S	Notwithstanding the Governor's Veto, Shall HB 455-FN Become Law: <b>RC 16Y-8N, Veto Overridden by necessary two-thirds vote; 05/30/2019; SJ 18</b>
5/30/2019	H	Veto Overriden 05/30/2019: Eff: 05/30/2019; Chapter 42

NH House

NH Senate



# Other Referrals

## Senate Inventory Checklist for Archives

Bill Number: HB 455-FN

Senate Committee: Judiciary

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

Final docket found on Bill Status

### Bill Hearing Documents: {Legislative Aides}

Bill version as it came to the committee

All Calendar Notices

Hearing Sign-up sheet(s)

Prepared testimony, presentations, & other submissions handed in at the public hearing

Hearing Report

Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

### Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

Executive Session Sheet

Committee Report

### Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

### Post Floor Action: (if applicable) {Clerk's Office}

Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

Enrolled Bill Amendment(s)

Governor's Veto Message

### All available versions of the bill: {Clerk's Office}

\_\_\_ as amended by the senate      \_\_\_ as amended by the house

final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

\_\_\_\_\_  
Committee Aide

\_\_\_\_\_  
Date

Senate Clerk's Office jm



**STATE OF NEW HAMPSHIRE  
OFFICE OF THE GOVERNOR**

**CHRISTOPHER T. SUNUNU**  
Governor

May 3, 2019

**Governor's Veto Message Regarding House Bill 455**

By the authority vested in me, pursuant to part II, Article 44 of the New Hampshire Constitution, on May 3, 2019, I have vetoed House Bill 455, relative to the penalty for capital murder.

New Hampshire has always shown prudence and responsibility in its application of the death penalty. This bill is an injustice to not only Officer Briggs and his family, but to law enforcement and victims of violent crime around the state.

God bless Officer Briggs and his family,

A handwritten signature in cursive script that reads "Christopher T. Sununu".

\_\_\_\_\_  
Christopher T. Sununu  
Governor