VOLUNTEER LAWYERS AND THEIR EXTRAORDINARY ROLE IN THE DELIVERY OF JUSTICE TO DEATH ROW PRISONERS

Robin M. Maher

Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. It is fundamental that justice should be the same, in substance and availability, without regard to economic status.

U.S. Supreme Court Justice Lewis Powell, Jr.

Few things worth doing are easy. This is especially true for volunteer death penalty lawyers. Representing a death-sentenced prisoner is intellectually challenging work, requiring a significant commitment of time and resources. It is high-stakes, politically-charged litigation that may last for years in a state far from home and family. It is too daunting a concept for many.

That's why it is something of a small miracle when we find the exceptional individuals whose belief in justice moves them past the obstacles that stop others. These are lawyers whose sensibilities are offended at the idea of an execution without judicial review or due process, to whom the concepts of a fair trial and the effective assistance of counsel are more than distant echoes of a constitutional law class. They see what doesn't make sense to them and they do not look away. They extend themselves to invest in the worth of another human being, even one who has been convicted of a terrible crime. These are the lawyers whose stories are told in this special edition of the Toledo Law Review.

The Need

My job is to find volunteer lawyers to represent death row prisoners who lack counsel. I fail far more often than I succeed. But recruiting is not the most difficult part of my job. That is nothing compared with telling a death-sentenced prisoner that I cannot help him. Every week I receive phone calls from frantic mothers and letters from prisoners and their families. They are often supplemented with pages and pages of painstaking, hand-written notes about their trial and potential issues for appeal. Many prisoners protest their innocence, expressing bewilderment at finding themselves on Death Row. Too many tell me how their trial lawyers failed them. They all ask the same thing: please, find a lawyer for my case. I reply that I will do

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* Robin M. Maher, Esq. is the Director of the American Bar Association Death Penalty Representation Project in Washington, D.C. The Project recruits, trains and supports volunteer lawyers to handle death penalty cases nationwide. The opinions expressed in this article are her own.

my best but my heart is heavy with the unspoken truth. I cannot come close to finding enough lawyers for those who need them.

There are hundreds without legal representation on Death Rows around the country. That is because there is no guarantee that a prisoner will be appointed counsel in post-conviction proceedings. Federal funding was discontinued in 1995, and many states fail to provide adequate resources to the post-conviction public defender offices that represent poor people. Consequently, these offices are under-funded, poorly staffed, lacking resources, and overwhelmed with too many cases.

At trial, some states rely on appointed counsel instead of funding and training public defenders. But an absence of meaningful standards for defense counsel and grossly inadequate compensation almost guarantees that many capital defendants receive terrible representation. Volunteer lawyers are astounded to find that drunk, incompetent, or inexperienced trial counsel represented their clients at trial. The continuing taint of racial prejudice, human error, and government misconduct contribute to a capital punishment system that is increasingly viewed as inaccurate and unreliable.

In an attempt to address these profound failures of the criminal justice system, the American Bar Association recently adopted revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The Guidelines set forth a national standard of care for the defense of capital cases. Among other things, the Guidelines call for an independent appointing authority, performance standards for counsel, and a defense team adequately funded and staffed with expert assistance. ABA President Dennis Archer recently called upon all death penalty jurisdictions to adopt and enforce the Guidelines and bring about badly needed reform to capital defender systems.

2. In Murray v. Giarratano, 492 U.S. 1 (1989), the Court rejected the claim of a Death Row prisoner who argued that he was constitutionally entitled to the appointment of counsel to pursue his state post-conviction remedies.

3. For example, the state of Alabama provides no funds for post-conviction representation of Death Row prisoners. See also Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 BUFF. L. REV. 329 (1995).

4. Compensation for Alabama capital trial counsel is a meager $60/hour in court and $40/hour out of court. See ALA. CODE § 15-12-21 (2003); compensation for Mississippi capital trial counsel is capped at $1,000 (or $2,000 if 2 attorneys are appointed), plus reimbursement of actual expenses. See MISS. CODE ANN. § 99-15-17 (2003); in Florida, compensation for capital trial counsel is capped at $3,500. See FLA. STAT. ANN. § 925.036 (West 2003).


6. A Gallup poll taken in May of 2003 found that 73% of Americans believe an innocent person has been executed in the last five years. A Pew Research poll from July 2003 found that public support for the death penalty had dropped to 64%, compared to 78% in 1996. See Death Penalty Information Center, Resources, Public Opinion, available at http://www.deathpenaltyinfo.org (last visited Jan. 28, 2004).


8. Id. at 919.

9. Id. at 944.

10. Id. at 961.

11. Id. at 952.
Only a dramatic transformation of capital defender systems will end the injustice of the wrongfully convicted on Death Row. Since 1973, one hundred and thirteen persons have been released from Death Row with evidence of their innocence. Some came within hours of being executed for crimes they did not commit. United States Supreme Court Justice Sandra Day O'Connor has warned, “Given the statistics, the system may well be executing innocent people.” This, I fear, is the inevitable result if we do not commit ourselves to improving the quality and availability of legal representation for poor people.

Recruiting civil lawyers for volunteer capital defense work is an inadequate answer to the problems caused by a criminal justice system that repeatedly fails poor people. But without significant and meaningful reform of capital defender systems, it is the only answer. Simply put, there is no one else to do this work.

The Rewards

The 3500 people on Death Row are often described with words that invite us to deny their status as human beings. The truth is harder to hear. All are poor. Some are innocent. Many are mentally retarded, mentally ill, and uneducated. Most have experienced lives of profound abuse and neglect. These damaged and vulnerable people are unable to deal with the criminal justice system on their own. Their crimes horrify us. But they are no less deserving of the rights we want for ourselves—the right to a fair trial, to due process, and to competent legal advocacy. Justice belongs to all of us, not just those who can afford it.

This principle is recognized by the volunteer lawyers who represent death-sentenced prisoners. They prove that even those without criminal law experience can do this work and do it well. There is an abundance of resources available to assist volunteer lawyers with their cases, from on-line practice areas with sample pleadings and briefs to training programs and counseling from experienced capital defenders. Volunteer lawyers demonstrate the difference that an effective, adequately funded lawyer can make in a capital case. Some have even had the privilege of walking their wrongfully convicted client off Death Row to freedom. Without exception, each describes their experience as among the most rewarding and fulfilling of their career.

Of course, the real value of this work cannot be measured by examining the outcome of the case, the number of hours recorded, or amount of money spent. The significance is seen in the faces of the condemned, when they learn that they have a competent lawyer to advocate for them, many for the very first time. At that moment, hope for justice replaces fear and abandonment, and the dignity of a human being is restored. That is the true meaning and reward of this work.

To learn more about representing someone on Death Row who needs a lawyer or the law firms that represent death-sentenced prisoners, please contact the ABA Death Penalty Representation Project at 202-662-1738 or visit its website at www.abanet.org/deathpenalty.