Mend It or End It?

An Opportunity to Reconsider the Death Penalty

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Late in 2003, the president of the American Bar Association (ABA) came to Hofstra for an academic conference to launch the organization's revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.[1] The conference was held at Hofstra because I serve as reporter to the project, meaning that I was in charge of coordinating and editing the work of the numerous specialists who contributed to it and am now leading efforts to have its recommendations adopted.

The Guidelines, which articulate the national standard of practice for the defense of capital cases, are not the work of an organization opposed to capital punishment, nor are they intended to address the issue of its desirability. Rather, their core is a mandate that any jurisdiction wishing to impose a death sentence must, at minimum, provide representation for the convicted client that meets their quality requirements.

Read holistically and quite apart from the specifics of their prescriptions, though, the Guidelines offer a lens through which to consider whether retention of capital punishment is sensible public policy. The product of many people actively at work in different aspects of the field, the Guidelines set forth a number of discrete problems that will confront states seeking to provide capital defendants with effective defense representation. Taken together, these form a vivid mosaic portrait of the death penalty system as it exists in America today.

To view that sobering picture is to gain a new appreciation of the reasons why we should end the death penalty rather than make the effort — which is certain to require enormous investments for uncertain payoffs — to mend it. Below are some key issues that the Guidelines bring to light.

Earl Washington, Jr. was wrongly accused of murder. After receiving incompetent legal representation at trial, he came within 9 days of execution in 1985 before his pro bono lawyer, Eric M. Freedman, won him a stay of execution. Almost 16 years later, after innumerable legal battles and DNA tests proving his innocence, he became the first person ever freed from Virginia's Death Row. *Photos from Margaret Edd's book* An Expendable Man, *published by NYU Press, Spring 2003.*

Severely Impaired Clients

The Guidelines make clear that the lawyer venturing into Death Row is entering a mental hospital at least as much as a prison:

> Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."

In criminal defense work, "significant cultural and/or language barriers between the client and his lawyers" exist in general. The special characteristics of the Death Row population only exacerbate it. Regarding attorney-client communications, the Guidelines suggest that "a mitigation specialist, social worker, or other mental health expert can help identify and overcome these barriers."

But the disabilities of the clients raise legal issues as well, ones that arise only in the capital context. First, the Eighth Amendment creates certain categorical exemptions from execution (e.g., mental retardation) that do not apply to non-capital sentences. Second, because of the penalty at stake, the sentencing phase of a capital case is uniquely searching; as a matter of Constitutional mandate, the defendant must be allowed to proffer, and have the sentencer consider, any factor that might in justice or mercy militate in favor of a lesser punishment.

As a result, not only is mental retardation "a necessary area of inquiry in every case," but counsel must also arrange to compile "extensive historical data," obtain "a thorough physical and neurological examination" and any needed additional "diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies" as may be needed "to detect the array of conditions (e.g., posttraumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, schizophrenia . . .) that could be of critical importance."

Moreover, even a client who suffers from none of these organic deficits may well be profoundly psychologically damaged as a result, for example, of a history of childhood sexual abuse. Hence, counsel must also conduct a searching inquiry into the client's personal history. Beginning with the moment of the client's conception, counsel must explore:

> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage).
>
> (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities).
>
> (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities.
>
> (4) Military service (including length and type of service, conduct, special training, combat exposure, health and mental health services).
>
> (5) Employment and training history (including skills and performance, and barriers to employability).
>
> (6) Prior juvenile and adult correctional experience (including conduct while under supervision in institutions of education or training, and while receiving clinical services).

"the history of capital punishment in this country is intimately bound up with its history of race relations," the Guidelines urge defense counsel to make every effort "to determine whether discrimination is involved in the jury selection process."

Having unearthed this data, counsel is expected to present it persuasively to the jury and to all subsequent decision makers so that they may act on a well-informed basis.

A System Permeated With Racism

In the 1987 case of *McKleskey v. Kemp*, the Supreme Court rejected a Constitutional attack based on the fact that race — both the race of the defendant and that of the victim — significantly influenced who was chosen to die in Georgia's electric chair.

Whatever may be said about the merits of the Court's holding, there is no doubt as to the correctness of the underlying factual premise. In repeated studies, capital sentencing decisions have consistently been found to turn primarily on the race of the victim and secondarily on the race of the defendant. The ultimate result of a series of discretionary decisions from charging through clemency is that the lives of African-Americans are doubly devalued.

In response to the reality that "the history of capital punishment in this country is intimately bound up with its history of race relations," the Guidelines urge defense counsel to make every effort "to determine whether discrimination is involved in the jury selection process."

A Tilted Playing Field at the Guilt Phase

Death penalty cases are tried under rules that systematically increase the chances that the innocent will be convicted compared to the trial of the same case where the death penalty is not sought.

This jarring injustice flows from the "death qualification" of the jury. Death penalty cases are bifurcated into guilt and penalty phases. States are entitled to exclude those jurors with a fixed conviction in opposition to capital punishment from both phases. But such jurors are more likely to acquit at the guilt phase, and thus their exclusion results in a non-representative pro-prosecution jury at that phase. Nevertheless, says the Supreme Court, the state may "death qualify" the jury before the guilt phase — even though views about the death penalty are not relevant at that phase — and thus obtain a more conviction-prone jury than would be sitting if the charges were non-capital.

The Guidelines make clear that — short of a reversal by the Supreme Court — the defense can only mitigate this problem, not solve it:

> Counsel's jury selection strategy should be designed to minimize the problem, created by current law, of "death qualified" juries: that excluding potential jurors who firmly oppose the death penalty creates a more pro-prosecution jury pool not only as to imposition of the death penalty but also as to conviction.

Less Effective Defense Counsel

Any rational system of criminal justice would assign its most effective defense lawyers to the most serious cases. Our country, however, systematically

provides capital defendants with less effective counsel than they would receive in the equivalent non-capital case. The scandal of "representation" by defense lawyers who are drunk, on drugs, mentally ill, or simply don't perform — whether through ignorance, sloth, or lack of resources — is qualitatively worse in death penalty cases than in others.

The Guidelines straightforwardly recognize the cause of the problem: lack of government money. "For better or worse, a system for the provision of defense services in capital cases will get what it pays for." As the Guidelines stress throughout, death penalty representation is uniquely demanding. The daunting personal stakes for the client with the resulting emotional demands on the lawyer, the complexity of the governing law, the two-fold effort required by a bifurcated trial, and the likelihood of involvement in prolonged appellate proceedings are just some of the factors that make death penalty representation exponentially more demanding than non-capital representation. Because "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases," representing a capital defendant as competently as a non-capital one requires vastly more resources. But the states do not provide them. Since no economically rational lawyer would choose to take a death penalty case under these circumstances, the ones who do are often, like the borrowers from a usurer, those with no choice in the matter — and present the same risk of defaulting on their responsibilities.

The Guidelines' strategy for providing the Death Row population with high-quality legal representation is to require the states to allocate significant resources toward a two-part effort, one aimed at obtaining competent lawyers and the other at providing the structural conditions (such as the provision of training and access to expert resources) within which they are able to function effectively.

A Post-Conviction Review System Constructed of Barbed Wire

It is a near certainty that if a death sentence is imposed, a capital case will enter what the Guidelines describe as "The Labyrinth of Post-Conviction Litigation." As a statistical matter, the prisoner's life is overwhelmingly most likely to be saved during the second or third round of appeals.

Press conference on February 12, 2001, the day of Earl Washington, Jr.'s release.
Photos from Margaret Edd's book* An Expendable Man, *published by NYU Press, Spring 2003.

Our current system, however:

- Does not recognize a right to counsel after the initial round of appeals but does hold the client to be bound by the errors of such counsel as he does obtain. In other words, the system works only one way: A lawyer may default claims on behalf of a petitioner, but a petitioner may not attack the lawyer as ineffective for having done so. The Court explained in the 1991 case of *Coleman v. Thompson* – which sent the prisoner to his death with his claims unreviewed because his lawyers mistakenly filed their papers three days late — that this "allocation of costs" between the prisoner seeking to avoid execution pursuant to a possibly unconstitutional sentence and the state "that must retry the petitioner if the federal courts reverse his conviction" is "appropriate [since] the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden."
- Routinely provides shorter deadlines in capital than in non-capital cases, enforcing those deadlines by the threat of execution. Thus, in addition to having less time to do their jobs than the non-capital defense lawyer, the attorneys for a Death Row defendant must often spend a valuable portion of that time seeking a stay of execution simply to preserve the client's right to any review at all.
- Has so far held that for a state to execute a person for a crime of which he is innocent does not in itself violate any Constitutional right.
- Systematically makes obtaining review in the Supreme Court of the United States more difficult for capital defendants than for any other class of litigant, thus compounding the inescapable structural problem that a system that accepts at its discretion roughly 100 appeals a year in cases of all sorts is neither designed for nor capable of providing individual justice to capital prisoners. Thus, there is an appalling toll of inmates who have been executed despite presenting the precise claim that succeeded in a later case, when the Court granted review at the behest of some luckier defendant.

Well aware of these problems and concerned that recent Congressional actions may make post-conviction review even less effective as a check on error, the Guidelines require the states to provide effective counsel throughout the post-conviction process and urge those counsel to be aggressive in challenging existing legal limitations.

Are There Possible Solutions?

Problems that are unique to the death penalty could be ended by its abolition. They could also be ameliorated by large expenditures of resources. The Guidelines take the second approach. However, while avoiding a stance in favor of abolition may perhaps enhance the ABA's political credibility on the death penalty issue, the organization's position has two significant weaknesses from the perspective of public policy design.

First, regardless of how much money is spent, the problems can only be lessened, not solved. The unique barriers to communicating with Death Row clients, for example, may be lowered by enlisting a specialist to assist counsel. But a system built on the foundation that such assistance will be sufficient to "overcome these barriers" is premised on a triumph of hope over experience.

Second, the additional substantial resources required to address the major structural flaws in the current system of capital punishment will have to come from somewhere. This leads to two questions: (A) what affirmative benefits is the money buying, and (B) are there better uses for that money?

(A) Whatever the benefits of the death penalty may be, they are not ones that reveal themselves to social science research. If there are some immeasurable benefits, such as sending an especially strong message of condemnation of certain crimes, they are just that — immeasurable.

(B) The costs incurred in the effort to patch up the death penalty system, on the other hand, will be substantial. Those resources could be better directed. The money spent on a relatively small number of cases to solve problems unique to capital litigation (e.g., implementing a dual-jury system to overcome the problem of death qualification) would, if spent on sensible criminal justice reforms (e.g., improving crime labs, videotaping interrogations), have a far bigger impact on the system as a whole. After all, many of the concerns in capital cases (like race discrimination or conviction of the innocent) are ones common to the entire criminal justice system. To spend a large amount of money fixing problems unique to the death penalty — or even problems common to the criminal justice system that cost uniquely more to fix in the death penalty context (e.g., provision of effective post-conviction counsel) — in the absence of tangible benefits unique to the death penalty is simply inefficient.

In contrast to the strategy of throwing good money after bad, a decision in favor of abolition would yield an immediate windfall that could be spent on sensibly directed improvements to the entire criminal justice system.

The Road Ahead

The intended effect of the Guidelines was to improve capital defense representation in death penalty states. As New York and other states consider the problem, perhaps an unintended but welcome effect of the Guidelines' stark portrayal of the realities confronting them will be to prompt a reconsideration of their choice to have a death penalty at all.

End Note

1. The text and official commentary to the Guidelines along with a number of scholarly articles discussing them are to be found at 31 Hofstra L. Rev. 913 (2003).

An expanded version of this article (which provides citations to all the quotations from the Guidelines and its commentary that appear below) is being published in the Spring 2005 edition of the Ohio State Criminal Law Bulletin. As will become clear, the opinions expressed herein are my own and not those of the ABA.

Eric M. Freedman earned a B.A. with a double major in history and English from Yale University. Upon graduation, he was the recipient of a Fulbright Scholarship that enabled him to travel around the world and study in New Zealand, where he subsequently earned an M.A. in history from Victoria University in Wellington. Professor Freedman then earned a J.D. from Yale Law School in 1979. After a judicial clerkship on the U.S. Court of Appeals for the Second Circuit, and seven years of practice as a litigator at a major New York law firm, he joined the Hofstra Law School faculty in 1988.

In 1992 he was chosen by the University to deliver the Distinguished Faculty Lecture and was awarded the 1993-94 Stessin Prize for Outstanding Scholarship. He was elected a member of the American Law Institute in 2000. In 2004 he received the Dybwad Humanitarian Award from the American Association on Mental Retardation for his work in exonerating Virginia death row inmate Earl Washington Jr. Later that year Hofstra Law School named Professor Freedman the Maurice A. Deane Distinguished Professor of Constitutional Law.

Professor Freedman is the author of many articles in scholarly and other publications. His book Habeas Corpus: Rethinking the Great Writ of Liberty was published by NYU Press in 2002 and has become a principal reference for journalists and Supreme Court justices alike.

Professor Freedman's academic interests center in two areas. One is constitutional law, particularly the First Amendment and issues of presidential power and constitutional history, with an emphasis on the Revolutionary and early national periods. His other interest is litigation, and includes civil and criminal procedure and strategy, with a special concentration on the death penalty. He has testified before Congress on several of these subjects, most recently with respect to proposed legislation regarding the Schiavo case.

Professor Freedman is an active pro bono civil rights litigator. He has recently been involved in the representation of the detainees at Guantanamo Bay, while continuing his work in the death penalty field.

He serves as a member of the Executive Committee of the Association of the Bar of the City of New York, as counsel to the National Coalition Against Censorship, and as a member of the Steering Committee of the American Bar Association's Death Penalty Representation Project.