

FIGHTING FOR CLIENTS' LIVES: THE IMPACT OF DEATH-PENALTY WORK ON POST-CONVICTION CAPITAL DEFENCE ATTORNEYS

Susannah Sheffer¹

Introduction

Defence attorneys would be the first to declare that they do not stand at the centre of the death-penalty story and cannot claim the greatest suffering. Working as advocates for individuals who will lose their lives if they lose their cases, capital defenders' focus is, quite rightly, on their clients and not on themselves. If you see a capital defender quoted in a news story about the death penalty, the comment will not be about the stress inherent in doing such a job or the particular helplessness and grief that a client's execution engenders in his or her attorney.

The experience of capital defenders is, nevertheless, part of the story of the impact of the death penalty. Defence attorneys' distinct role has distinct emotional consequences, and perhaps especially so for those who work at the post-conviction stage. Representing clients who are already sentenced to death, post-conviction capital defence attorneys enter the story charged with the task of trying to stop an execution – in other words, to save an individual's life.

Taking on that task when the odds are so great that they frequently don't succeed puts post-conviction capital defence attorneys in a

1 Susannah Sheffer, a US based-writer and clinical mental health counselor, directed the No Silence, No Shame project at MurderVictims' Families for Human Rights. She is the author of the book *Fighting for Their Lives: Inside the Experience of Capital Defense Attorneys*. Vanderbilt University Press, 2013. All quotations from attorneys from the United States are from *Fighting for Their Lives: Inside the Experience of Capital Defense Attorneys*. Vanderbilt University Press, 2013, and these interviews were conducted in 2010. Quotations from attorneys outside the United States are from interviews conducted in 2014 for a briefing paper published by Penal Reform International, as follows: attorney from Iran: interview with Hossein Raeesi; attorney from India: interview with Yug Mohit Chaudhry; attorney from Japan: interview with Maiko Tagusari; attorney from Nigeria: Interview with Ja'afaru Adamu.

unique relationship to each pending execution; they feel that their clients' lives are in their hands. Realistically, the attorneys may understand that many factors influence the outcome of a capital case, but when they do speak about what it is like for them to do what they do, they reveal the weight of the responsibility they carry and how personal the losses feel. No understanding of the death penalty can be complete without taking the impact on defence attorneys into account.

So much need

The looming threat of execution makes death row prisoners' need for representation extremely urgent, and the enormity of that need when relatively few attorneys are sufficiently knowledgeable in this area can place great demand on those who do have the necessary expertise. "I'm already juggling too many things, and yet there is so much need," an attorney from the United States explains. "There's so many people saying *help, help, help*. ... That is the thing I'm haunted by: the people I cannot help."

In the US, the American Bar Association estimates that there are hundreds of prisoners on death row without any representation at all. At one time, federally funded Capital Resource Centers enabled attorneys who specialized in capital defence to represent clients on death row and to provide extensive guidance to other attorneys who agreed to take a capital case. The US Congress eliminated funding for these resource centres in 1995, however, and today's capital post-conviction offices, often operating as struggling nonprofits, are typically deluged with more requests than they can fulfil.

The situation is comparably urgent in other retentionist countries, where the challenge may be a scarcity of lawyers who view the death penalty as a human rights violation and are willing to defend those who are facing execution. An Iranian attorney with two decades of experience, for example, estimates that of 50,000 lawyers in the country, less than 50 were his colleagues in this sense, and he eventually had to leave the country because of the risk he faced working as a lawyer for people on death row.

As well, attorneys at the post-conviction stage are often working under great time pressure. As one from the US explains, a court can set a deadline such that a defence attorney has to do “five years of work in three months.” Having more essential work to do than it seems possible to complete in the required time frame can cause an acute stress that one attorney describes as “paralyzing, feeling like you’re going to come out of your skin, feeling like you’re losing it, or screaming.” The combination of urgency and time pressure can feel almost intolerable.

Sometimes prisoners are unaware of their right to seek relief at such a late stage and do not contact an attorney until the execution is imminent. An attorney from India explains:

Most death row prisoners are illiterate and extremely poor. They have no access to knowledge about rights, remedies, etc., and no real access to lawyers. Their families, already impoverished and defeated, have long given up hope or abandoned the prisoner to his fate. ... They usually only manage to reach me just a few days or hours before the execution. It is in this very small window of time that I have to devise some way of getting an interim stay on the execution on the grounds of breach of rights or due procedure.

Attorneys at this stage seek an interim stay with the hope that doing so will buy them time to do the more extensive investigative and legal work that could overturn the death sentence and thus halt the execution entirely. In some cases, attorneys may be trying to show that a client is innocent of the crime and was wrongfully convicted, but it is important to note that belief in a client’s innocence is not the only reason defence attorneys will choose to represent a client at the post-conviction stage and to work under such immense pressure to save that client from execution. Whether out of general opposition to the death penalty as a human rights violation or out of a commitment to ensuring that the death sentence was issued fairly and in accordance with the country’s constitution or other laws, defence attorneys can believe that both the guilty and the innocent deserve representation at the post-conviction stage.

Even if the “breach of rights or due procedure” was egregious, overturning a death sentence is generally understood to be harder than preventing that sentence from being issued in the first place. Post-conviction capital defence work is about stopping a train that is already barreling towards a client, rather than blocking that train from leaving the station.

An attorney from Nigeria explains some of the challenges he faces as a capital defence attorney in that country:

There are several challenges to being a death-penalty lawyer here: a judicial and justice system that stacks the deck against you and your client, especially, God save you, if they are poor/indigent, and the fact that over 90% of convictions in all criminal matters are substantially based on confessions, mostly secured under torture. Also other legal and constitutional rights are ignored or abused without remedy.

Attorneys at this stage know that the odds are not in their favour. As one from the United States puts it, “It’s the norm to lose”, and this is true even for the most experienced and skilful defenders. Managing their clients’ and their clients’ families’ hope and disappointment—and their own as well—is a core part of the challenge. They don’t want to make false promises but don’t want to leave their clients in total despair, either. They need to have enough hope, themselves, to get up and do the work each day, and they want to be able to offer hope to their clients who are otherwise left to anticipate their fate without even that buffer. But attorneys also feel the need to help their clients prepare for the (all too likely) possibility that the legal efforts will not be successful. One attorney from the US explains that he tries to maintain this delicate balance by saying to clients, “I’m going to file a petition on your behalf. There’s a minimal chance that it might work, but the chance is so slim that you should be doing all you need to do to prepare for dying, including meeting with everyone you need to see and saying everything you need to say.”

These defence attorneys are managing hope and disappointment within the context of a broader society that is typically indifferent or even hostile to the need the attorneys perceive. Working without

much cultural approbation and sometimes under outright threat from their government puts further pressure on attorneys who specialize in capital defence.

The weight of responsibility

Scarcity of available attorneys, time constraints, and long odds all exacerbate the challenge, but the primary burden that post-conviction capital defence attorneys bear is inherent in the task itself: trying to save each client's life. The attorneys describe this ever-present weight in similar terms, regardless of where they practice:

Taking a death-penalty case is a huge responsibility of course and the realization that a life hangs in the balance can motivate you at some times and scare you at others. — attorney from Nigeria

When a client gets an execution date, it's like the big dark cloud for many weeks or months. It's a really hard thing to live with, the rising panic. ... It's always present. — attorney from the United States

I specialize in end-stage death cases. ... I dread these cases and shudder every time a new one comes my way. Having taken it on, I feel I am living with a coffin tied to my back. It takes over my life, dominates my thoughts during the day, corrupts all pleasure and invades my dreams at night. — attorney from India

With this sense of responsibility permeating their lives, it is difficult for attorneys whose clients are imminently facing execution to maintain any kind of reasonable balance between their work lives and their personal lives; capital defence is not an endeavour that can easily be put out of mind at the end of the day. "It is really difficult to separate between your job and your private life," an attorney from Iran observes. "I am involved in the case all the time." Attorneys talk about having to miss family events, or being distracted and preoccupied, or fearing that they are bringing their worry, outrage, and grief into their family lives even if they do not discuss their work directly.

Even if they know that the responsibility for preventing the execution does not rest entirely on their shoulders, the weight nevertheless feels very personal, and thus the loss does as well. “You know, intellectually, that the execution is not your fault. But your job is to save this person’s life!” an attorney from the US observes. “No matter how much you tell yourself that you’ve done everything you could do, your job was to save his life and you didn’t.” Another attorney from the US echoes this thought with the comment, “Every time someone’s executed, you feel like you’ve failed. Even if you know going into it that the deck is stacked against you.”

“It’s just so deeply personal,” a third attorney from the United States explains. “It’s the notion that you put yourself between your client and the execution. And so when you fail, what that means is that they’ve walked *over you and gotten your client in the [execution] chamber.*”

The impact of clients’ executions

When they lose in the biggest possible way and are unable to save their clients’ lives, attorneys describe a devastation that, once again, is common across national borders:

I felt incapacitated for a while, after each execution. I couldn’t move. My body felt very heavy. — attorney from the United States

I think when executions have gone through, what I’ve felt is a devastating numbness. A complete sapping of energy. — attorney from the United States

After my client was executed, I was always thinking of what else I could have done or what I could have done differently. For a few months, I could not sleep well, and I sometimes dreamed of my client. I could not eat much and lost weight. I was depressed for a long time. — attorney from Japan

It stayed with me for months. It would come on you unbidden, in the same way that all kinds of really bad trauma do, in

that you wouldn't even be thinking about it, and suddenly it would intrude on your thoughts, and you couldn't get it out of your thoughts. — attorney from the United States

When I am not successful and a client is executed, it is very sad and upsetting, especially when I know the details about the person and how he or she got involved in this situation. I never forget the face of the person who was executed. — attorney from Iran

Though all the defence attorneys interviewed here describe client executions as devastating, the nature of the experience is affected by whether the attorney is working in a country that announces execution dates in advance or not. Knowing exactly when an execution is scheduled to occur creates one kind of burden; being taken by surprise is difficult in its own way. “The lack of information, lack of transparency about the death penalty and execution process, is a big challenge,” explains an attorney from Japan. “When a client of mine was executed, I only learned about it after it happened, when I heard the Ministry of Justice announce it at a press conference that morning. That was very hard.”

It is difficult to learn about a client's execution from a news story or to arrive at the prison for a visit only to be told that the individual has already been executed. Even in the United States where attorneys know when an execution date is set, they (and their clients) may not know until the final hours that the execution will actually take place, as the attorney is often litigating until the last possible moment, hoping to stay the execution at least for that day.

Attorneys who do have an opportunity for a last visit or phone call with a client describe those conversations as extremely wrenching. After working so hard and trying to maintain some hope, they are now forced to explain that there is nothing else that can be done. One attorney from the United States remembers a client with intellectual disabilities who “was too impaired, too distraught and angry and confused” to comprehend fully what his attorney was telling him. “I did everything I could,” his lawyer explains. “We were litigating in every possible realm. ... He came to trust me at a certain point, but

then I think he felt like I had betrayed him because I couldn't keep him from being executed."

Even when clients are more accepting, that too can be emotionally wrenching, as it was for the attorney from the United States whose client assured him, "It's OK, son, you did your best" just before he was taken to be executed. Moreover, in addition to having to explain that they have run out of litigation options, attorneys are faced with the challenge of trying to console or at least simply be present with an individual who is about to be put to death. As one attorney wryly notes, "There's no course in law school in bedside manner at an execution." Another, also from the United States, observes that last visits with clients before execution are the hardest part of the whole experience:

That's the most emotional stuff for me, the most loaded, the stuff that puts me over the edge, the stuff that's the hardest to talk about. ... You're trying to offer solace to somebody who's about to die. It's unbelievable. No one can be adequate in that situation. How could you possibly?

It frequently falls to defence attorneys to explain to clients' family members that an execution date has been set or that all possible legal remedies have been exhausted. Helplessness in the face of the anguish of clients' families is another wrenching aspect of the experience, as this attorney from the United States describes:

[I was outside the prison with my client's mother], who's hunched over, and she is just—broken down. Sobbing, delirious, you know, she's just said goodbye to her son for the last time. That was one of the hardest moments. And, you know, that's the thing about the death penalty that people don't see. It was just brutal. I remember that scene so vividly. What can you do? You can't leave, and you can't change anything. You can't do anything for her.

In some countries, attorneys are prohibited from witnessing a client's execution. Even when witnessing is allowed, as in the United States, some attorneys opt not to do so, either because witnessing would

make them feel complicit with the process or because they worry that it would make it harder for them to carry on as a capital defence attorney. Attorneys who choose to witness the execution generally do so out of a personal commitment to the client and a desire to stick with him or her through to the end.

Long-term impact

Capital defence attorneys who have lost clients to execution describe feelings of numbness, sadness, and anger; they recall having panic reactions at films or lectures that depict execution scenes; they recount feelings of alienation and depression that can last for days, weeks, or even longer. Are these symptoms of what is known as secondary traumatic stress—the result of hearing about traumatic events indirectly—or are the attorneys themselves directly traumatized?

The newest edition of the Diagnostic and Statistical Manual of Mental Disorders, the DSM-5, includes among its criteria for post-traumatic stress disorder “exposure to actual or threatened death”, with the possible circumstance, “learning that the traumatic event(s) occurred to a close family member or close friend.” Notably, the DSM-5 also includes the following criterion not for secondary traumatic stress but for post-traumatic stress disorder itself: “Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse).”² Apparently, this criterion was added to the newest edition of the manual in order to take into account the experiences of “professionals who have never been in direct danger, but who learn about the consequences of a traumatic event day-in and day-out as part of their professional responsibilities.”³

The expansion of PTSD criteria in this way may reflect an expanded understanding of the kinds of experiences and encounters that leave individuals vulnerable to developing symptoms of trauma, and it highlights the particular vulnerability of those in the front lines of helping

2 American Psychiatric Association. 2013. *The Diagnostic and Statistical Manual of Mental Disorders: DSM-5*. Washington, DC: American Psychiatric Association Publishing.

3 Friedman, M.J. 2013. “Finalizing PTSD in the DSM-5: Getting from here to there and where to go next.” *Journal of Traumatic Stress*, 26(5):548-556.

professions. We can reasonably count capital defence attorneys among the professionals whose work contains this inherent risk, with the added dimension that defence attorneys are not only exposed to the traumatic event of the execution but must bear the knowledge that it had been their specific job to try to avert it.

The inclusion of capital defenders in this group may not be obvious to all, however. Societal support for the death penalty and a lack of sympathy for those who suffer as a result of trying to defend “monsters” suggest that recognition of capital defenders’ traumatic experience will be less readily forthcoming than will similar recognition for others who are in the business of working to save lives. Nevertheless, any inventory of the impact of the death penalty as a societal practice must take capital defence attorneys’ experience into account. It is clear that they are deeply affected by the challenges and losses inherent in this high-stakes work.