Bearing Witness and Writing History in the Struggle Against Capital Punishment

Austin Sarat

I had no evil intent when I taught the tricks of pleading, for I never meant them to be used to get the innocent condemned but, if the occasion arose, to save the lives of the guilty.

St. Augustine

Lawyers must . . . bear witness to the shameful injustices which are all too routine in capital cases . . . . It is only by the witness of those who observe the injustices in capital cases firsthand that others in society can be accurately informed.

Stephen Bright

The struggle against capital punishment goes on every day in courtrooms across the United States. On the front lines are criminal defense lawyers who try to prevent the initial imposition of death sentences by judges and juries. When that effort fails, the struggle is carried on by a small cadre of lawyers who specialize in providing legal representation in appellate and postconviction proceedings for

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persons on death row.4 For much of the criminal defense bar, the legal work of opposing capital punishment is neither ideological nor political. For most specialized appellate death penalty lawyers, however, their legal work is part of an ideologically motivated campaign against capital punishment.5 They carry on that campaign by representing individual clients; sometimes they use an individual case to bring a broader challenge to some aspect of the capital sentencing system, or even to attack the constitutionality of the death penalty itself. More often, however, they studiously avoid such frontal assaults in the hope of saving one life at a time.6

Whether these lawyers pursue wholesale challenges to capital punishment or limit themselves to detailing the injustice of a particular death sentence, death penalty lawyers today find themselves engaged in what looks increasingly like a losing cause.7 While they have the advantage of being able to invoke the formal rights and protections of liberal-legalism,8 the legal system seems ever more inhospitable to them and their work.9 To oppose the death penalty through the legal process in the United States in the 1990’s is not

4. It is impossible to give a precise estimate of the number of people comprising the “death penalty bar” in the United States. Practitioners estimate that there are about two hundred such lawyers. Approximately that number regularly attend the annual Airline Capital Punishment Conference sponsored by the NAACP Legal Defense Fund. Those who do appellate and postconviction work practice in a variety of settings. Some work for public interest organizations like the Southern Center for Human Rights, the Minnesota Advocates for Human Rights, the American Civil Liberties Union, or the NAACP Legal Defense Fund. Some are in private practice, and some worked until recently in agencies like the Federal Capital Defense Resource Centers funded by states or the federal government for the purpose of providing representation to persons sentenced to death. During the last session of Congress, funding was cut off for the Resource Centers. See Scrimping on the Court System, CHI. TRIB., Apr. 12, 1996, at 28; Saundra Torry, Juggling the Issue of Representing Death-Row Inmates, WASH. POST, Feb. 5, 1996, at F7. As a result, the current extent and organization of appellate and postconviction representation in capital cases is unclear.

5. For a discussion of the political views and commitments of death penalty lawyers, see Austin Sarat, Between (the Presence of) Violence and (the Possibility of) Justice: Lawyer ing Against Capital Punishment, in LEFT LAWYERING: RIGHTS, POLITICS, AND PROFESSIONAL RESPONSIBILITY 1 (Austin Sarat & Stuart Scheingold eds., forthcoming 1997), providing an extended version of the argument presented here.

6. Michael Mello, Outlaw Attorney: The “Banality of Evil” in the System of Capital Punishment and My Collaboration with that System 180 (1996) (unpublished manuscript, on file with author). Mello notes that “[c]apital postconviction representation today and for the foreseeable future involves not so much debates about the wisdom of the death penalty in theory . . . but rather case-by-case constitutional attacks upon the legal system that selects which citizens have lost their moral entitlement to live.” Id.


unlike fighting apartheid in the courts of South Africa in the 1970's, or litigating on behalf of Palestinian rights in the occupied territories in the 1980's.\textsuperscript{10} In the face of a legal system seemingly ever more intent on imposing the death penalty and ever more resistant to abolitionist arguments, one might then ask why and how anti-death penalty lawyers adapt and explain their lawyering in the prevailing hostile legal climate. Answering these questions is the subject of this Essay.

II

The usual answer to the apparent paradox of combating a hostile legal regime on its own terms is that legal discourse, because it provides the legitimating ideology of the powerful, can be an important weapon in political struggle.\textsuperscript{11} However, in the case of the death penalty in the contemporary United States, this answer seems increasingly problematic. The legitimating promises of the law, found in the recognition that "death is different,"\textsuperscript{12} and the promise of "super due process"\textsuperscript{13} in death cases, have been gradually but openly stripped away.\textsuperscript{14} There is now little room to hold law to its promises because so many of those promises seem to have been broken without embarrassment.\textsuperscript{15}

Another answer to the question of why (and/or how) law can be used by lawyers in the struggle against capital punishment might be found in Druclia Cornell's admonition that "[l]egal interpretation


\textsuperscript{11} See E.P. Thompson, Whigs and Hunters: The Origins of the Black Act 258-69 (1975) (arguing that "the law," as a logic of equity, must always seek to transcend the inequalities of class power which, instrumentally, it is harnessed to serve").


\textsuperscript{13} Margaret Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. CAL. L. REV. 1143, 1143 (1980).


\textsuperscript{15} My claim that these promises have been broken "without embarrassment" refers to the attitude seemingly displayed by the majority in McClesky and Herrera. See supra note 14. However, this is not to say that the gradual unwinding of "super due process" in death cases has been uncontentious. One example of contention is provided by the Robert Alton Harris case. See Evan Caminker & Erwin Chemerinsky, The Lawless Execution of Robert Alton Harris, 102 YALE L.J. 225 (1992); Judge Stephen Reinhardt, The Supreme Court, the Death Penalty, and the Harris Case, 102 YALE L.J. 205 (1992).
demands that we remember the future.”16 In that phrase, Cornell suggests that law fixes its gaze temporally, not on the possibilities (or impossibilities) of the present, but on a future promise of justice.17 She reminds us that there are, in fact, two audiences for every legal act, the audience of the present (to which one might appeal for an end to law’s violence), and the audience of the future (which stands as a figure of law’s redeeming promise of justice). In this sense, law, as Robert Cover writes, is “a bridge to alterity.”18

In Cornell’s and Cover’s understanding, death penalty lawyering in the United States is a form of “redemptive constitutionalism.”19 Through their activities, death penalty lawyers refuse to recognize the present moment as the defining totality of law. In their work they serve as the carriers of a vision of a future in which justice prevails and the death penalty is abolished. For them, as Cover argues, “[r]edemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of one with the other.”20

Cover uses the example of an abolitionist struggle of another era, namely antislavery activism in the mid-nineteenth century, to suggest that the work of “redemptive constitutionalism” reveals “a creative pulse that proliferates principle and precept, commentary and justification, even in the face of a state legal order less likely to hold slavery unconstitutional than to declare the imminent kingship of Jesus Christ on Earth.”21 According to this view, death penalty lawyers must speak in a prophetic voice as they supply the argumentative and interpretive resources to bridge the gap between the present, with its insistent attachment to capital punishment,22 and a future in which the state no longer executes any of its citizens.23

There is perhaps a third way of understanding the work of death penalty lawyers in the present hostile climate. This understanding reverses Cover’s image; redemption gives way to judgment and the

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19. Id. at 34.
20. Id.
21. Id. at 39.
future is called upon to remember the injustices of the present. Thus, death penalty lawyers serve as witnesses testifying against the injustices of capital punishment. They provide

the testimonial bridge which, mediating between narrative and history, guarantees their correspondence and adherence to each other. This bridging between narrative and history is possible since the narrator is both an informed and an honest witness. All the witness has to do is to efface himself, and let the literality of events voice its own self-evidence. His business is only to say: this is what happened, when he knows that it actually did happen.

For death penalty lawyers, then, knowing what brought their clients to death row is essential to the legal representation they provide. Their work is fact-intensive in postconviction proceedings, especially when those proceedings focus on one of two kinds of claims: ineffective assistance of counsel or prosecutorial misconduct. In both of these claims, the job of the death penalty lawyer is to unearth facts that were omitted due to the negligent incompetence of trial counsel or the violation of the prosecutor's obligation of disclosure. Death penalty lawyers reinvestigate the case from beginning to end, reconstructing the social history of their clients, and carefully examining how the legal system processed their client's case. This fact-intensive work enables them to speak about the histories of poverty and abuse that are all too often associated with the violent lives that their clients have led. It also enables them to speak about the prejudice and racism, the extreme political pressures, and the inadequacies of representation that pervade the system of capital punishment.

25. Shoshana Felman & Dori Laub, Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History 101 (1992). Treating the lawyer for a losing cause as a witness giving testimony suggests that he is addressing his work to the community of the future as much as the law of the present. Feldman argues that “to testify before a court of law or before the court of history and of the future . . . is more than simply to report a fact or an event or to relate what has been lived, recorded and remembered. Memory is conjured here essentially in order to address another, to impress upon a listener, to appeal to a community.” Id. at 204.
29. See Bright, supra note 2.
However, death penalty lawyers do more than give testimony. They also write history. They use legal processes to record a history of the present and to preserve the present’s pained voice. The litigated case can be used to create a record, and the court can become an archive in which that record serves as the materialization of memory. Due process guarantees an opportunity to speak to and be heard by the future. In this manner, due process guarantees that legal institutions can be turned into museums of unnecessary, unjust, undeserved pain and death.

The legal hearing provides an opportunity to write and record history by creating narratives of present injustices. By constructing and recording such narratives, death penalty lawyers call on an imagined future to choose justice over the jurispathic tendencies of the moment. They ensure that even when no one (including many judges) seems willing to listen, the voices of the “oppressed” will not be silenced.

The movement from giving testimony to writing history is a movement from the immediacy of the eyewitness report to the mediated narration of a self-consciously constructed story. While the history that is written by these lawyers is framed in the abstract, impersonal idiom of the law, it is neither abstract nor impersonal. It is the biography of a person sentenced to die, a story made relevant by decisions that permit the broadest range of evidence in mitigation. Many death penalty lawyers describe the most crucial

30. “Even when I was writing legal briefs and petitions and stay applications, when the main audience was the judges and their law clerks, I remained fairly conscious of the fact that our litigation work products were also making a record for future students of state-sanctioned killings. We litigate for the historians, the anthropologists, and the sociologists... [L]itigation not as a means of leaving footprints in the historical sand.” Mello, supra note 6, at 80.

31. See Pierre Nora, Between Memory and History: Les Lieux de Memoire, 26 REPRESENTATIONS 7, 15 (1989) (“Modern memory is, above all, archival. It relies entirely on the materiality of the trace, the immediacy of the recording, the visibility of the image.”).

32. As Martha Minow suggests, legal rights matter not just because they provide dignity to law’s victims, or because they help to mobilize them to undertake political action, but because they provide an opportunity to tell a story that might not otherwise be told. See Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 YALE L.J. 1860 (1987).

33. The work of lawyers in a losing cause is to construct narratives since “history is... the establishment of the facts of the past through their narrativization.” FELMAN & LAUB, supra note 25, at 93; see also HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (1987). For a fuller elaboration of this argument in the context of death penalty lawyering, see Austin Sarat, Narrative Strategy and Death Penalty Advocacy, 31 HARV. C.R.-C.L. L. REV. (forthcoming 1996).

34. See Cover, supra note 18, at 34.


part of their work as coming after direct appeals have been exhausted, in the process of relitigating the case in habeas review. For them, the process of making a convincing argument for habeas relief is not unlike trying a case, with its attention to the vivid details of lives lived and choices made. Making such an argument may also involve telling a story of incompetent defense counsel, corrupt prosecutors, and inattentive judges.

As they write histories of the present, death penalty lawyers may frame the injustices they seek to record in one of the three narrative styles that Robert Gordon has identified. Gordon calls the first of these styles "legalist." This narrative treats the injustices of the present as wrongs "done by specific perpetrators to specific victims." For example, legalist narratives in the death penalty context would focus on police or prosecutorial misconduct in a particular case and against a particular defendant without raising any systemic issues. Legalist narratives describe present injustice in terms of individual cases and individual defendants, and seek remedies that law could easily supply.

The second narrative style stays within the legalist mode but expands to involve what Gordon calls "broad agency." In these narratives the history of injustice is a history of collective action taken by one group against another. Here, the focus in death penalty cases shifts to claims of discrimination of the type raised in McCleskey v. Kemp.

The third narrative entails what Gordon describes as "bad structures rather than bad agents. . . . This historical enterprise takes the form of a search for explanations rather than a search for villainous agents and attribution of blame." In this third narrative style, death penalty lawyers broaden the scope of inquiry by linking particular injustices with broader patterns of injustice and institutional practice, with poverty and its effects, and with societal decay and its consequences. In such narratives, as Stephen Carter has written, the criminal himself is often portrayed as a victim:

38. Id.
39. Id.
40. Id. at 2.
41. 481 U.S. 279 (1987). Patricia Ewick and Susan Silbey argue that McCleskey was a case in which the Supreme Court resisted a broad agency interpretation in favor of a "legalist" approach. Patricia Ewick & Susan Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 LAW & SOC'Y REV. 197, 215-17 (1995).
42. Gordon, supra note 37, at 2-3.
43. See Sarat, supra note 3, at 40.
Now victimhood becomes a matter of the sweep of history, not the actions of individual transgressors, and the government's role is not to punish transgressors but to alleviate the suffering of the victims. . . . On this view, black people are victims not because any individual has done harm to any other individual, but because the society's history and structure have combined to make of them an apparently permanent underclass, deprived of their fair share of wealth, education, health care, and the like.

In this vision of victimhood, the criminal behavior of so many black males is itself a mark of victimhood, a victimhood virtually determined from birth. . . . Violence—especially violence directed externally, at white people and property . . . but also violence that is, in the argot, "black-on-black"—is a statement of frustration. Remove the sources of frustration—the racism, the "structural" unemployment, the inadequate education—and you eliminate much of the violence.44

The ability of death penalty lawyers to speak to the future and memorialize the present, both to bear witness and write history, has been ignored by those who have worried too much about the impact of politically engaged lawyering on the possibilities of the present.45 For them, the value of political lawyering resides exclusively in its most immediate effects. But, as Cornell reminds us, law is as much about the future as the present, and as much about the possibilities of memory as the current prospects of political success. Thus when death penalty lawyers persist in their use of law, they posit the very ideal . . . [they] purportedly find "there" in the legal text, and as [they] posit the ideal or the ethical [they] promise to remain true to it. [Their] promise of fidelity to the ethical or to the ideal is precisely what breathes life into the dead letter of the law and provides a barrier against the violence of the word. . . . To heed the call to responsibility within law is to remind [ourselves] of the disjuncture between law and the ideal and to affirm our responsibility to make the promise to the ideal, to aspire to counter the violence of our world in the name of universal justice.46

Death penalty lawyering is one way of "remembering the future" and of ensuring that the future remembers. It is both a kind of

testimony and a way of recording a history of present injustice. It seeks to put the death penalty in a narrative context which juxtaposes it to the Good. It turns courthouses into memorials of injustice and uses the legal process to create memory in the face of an obliterating violence.47

III

By paying attention to how such lawyering ensures that the future will be remembered, and that the future itself remembers, we gain a crucial perspective on the way many death penalty lawyers sustain their legal work when the prospects of success seem so remote. Extensive interviews conducted with death penalty practitioners confirm that today’s death penalty bar conceives of itself in part as fulfilling a future-oriented function.48

The work of bearing witness and writing history is referred to among death penalty lawyers as “making a record.” This phrase describes something more than just the legal work of building a case on appeal. One experienced death penalty lawyer explained,

as a lawyer every single act or omission that I am doing is calculated to make a record, but not just the record on appeal. It is bigger than that. I think you are making a record above and beyond the immediate case. You are making a record that even after you ultimately fail to save your client’s life that he was a worthy human being, that there was an explanation for what he did which the legal system could not, or would not, hear. I know that because I know him in ways no one else does. And that there are other young men and women out there who can be helped if we learn from this case. You see, what we do is we tell a story that would otherwise not be told or remembered. There are lessons in the stories we tell, lessons about poverty, abuse, and injustice. Maybe they can’t be heard just yet, but maybe they will be heard sometime.

This lawyer speaks first as a witness whose work testifies to the humanity of those condemned to die. He speaks as someone who has first hand knowledge: “I know that,” he says, “because I know him in ways no one else does.” But this lawyer also insists that his work is

47. For discussion of the linkage between the creation of memory and particular sites, see Wilkinson, supra note 35, at 87. As Wilkinson puts it, “[W]hile the site (defined in the broadest sense) remains constant, memory does not.” Id.
48. The quotations in this section are derived from in-person interviews I conducted with 40 death penalty lawyers in ten states from all regions of the country. The interviews took place between 1993 and 1995. Some of the lawyers I interviewed practiced in private firms or in public interest settings, but most were employed by federally funded Capital Defense Resource Centers. Interviews were from one to three hours in length. In order to protect the confidentiality of my respondents I provide only minimal descriptive information about them.
“bigger than that.” “Making a record” involves recording the history of the present and placing a particular instance of injustice into a narrative that ties his case to a larger picture of “poverty, abuse and injustice.” This process of generalization involves telling a story about “other young men and women out there.” Such a story addresses those in the future who may (and should) remember, but whose recollection can only be spoken about as the possibility of an indeterminate “sometime.”

By making a record, these lawyers believe that they can surmount, if they cannot stop, the injustice of capital punishment and keep alive the possibility of a more just future. They remember the future and insist that the future, if it is to be more just, must remember.

Yet without assurance that that “sometime” will ever arrive, some death penalty lawyers who conceive of their role as creating a record for the future seem more frustrated than hopeful. “Sometimes we talk like we are making a record for posterity,” one longtime practitioner told me. “I hate that. I hate the idea that we are making a record for history. You know people say that all the time. But who the hell is going to read it? Who are we making a record for, God?”

Despite such frustration, the belief among death penalty lawyers in the importance of making a record remains pervasive. This belief is grounded in remembering the future and hearing its call to justice. It is also the task of making the future remember that shapes the work of making a record. As one new death penalty lawyer said,

I think of what I do as sort of making a narrative. I’m telling a story with page after page of facts which are put together to show the richness and complexity of my client’s life, of the crime, and of the injustices of his trial. I am trying to put it together in a way that people can understand, that pulls heartstrings by getting at what is really going on. This is the best way to win in court, and it is the best way to make sure that the story is not just pushed aside and forgotten. And if enough of these narratives get produced then maybe they won’t be ignored when, say fifty years from now, people try to figure out why we were executing the people we were executing in the way we were doing it.

In his words, the work of trying to win in court and build a record that will compel the future to remember go hand-in-hand. The accumulation of such narrative accounts links lawyering for an individual client with the broader political goal of ending capital punishment in an imagined future.

Another death penalty lawyer talked about this work in similar terms:
The story you are trying to construct has a number of parts. As a narrative it could be told from any of several perspectives. There is the life story of the client. Where did he come from, who was he as a child, and that includes what are the influences on him. Then there is the story of the crime. And retelling the story of the crime is really important because once an inept defense lawyer and a malicious prosecutor are done, the story of the crime is always of a cold, calculating, deliberate person, delighting in people's suffering, while the truth is that the crime is a culmination of neglect and abuse which the client himself has suffered. . . . [These are stories] of social injustice. The third part of the story is what happened at trial. Did his lawyer even bother to interview any witnesses? Was the family contacted to find out about his background? Was the judge a racist who referred to all the black jurors as "coloreds"? . . . [T]his is a story of legal injustice.

Such multiple-stranded narratives take on special significance because "they become part of the public record." Becoming part of the public record means that they have "staying power"; they "won't go away." Making such a record, this lawyer explained,

is our way of acting in the world, our way of struggling against the system. We create these papers that we write. They are not going anywhere. They will be in government document warehouses forever. And I think that someday somebody will look at this, maybe 100 years from now, but someone will look and say "Oh my God, it was true that the death penalty was really just an engine of discrimination." Even if it seems fruitless now, it is worth doing because we are making a record of who is getting the death penalty, and it is just the people who were mentally ill and too poor for treatment and who come from unhappy, broken families. And we did nothing to help these people, until they did something horrible so we could then get rid of them. . . . I've talked with enough other people [and we] describe this work as a witnessing sort of function.

What seems "fruitless" takes on meaning when viewed in the long term. A society now unwilling to see the links between poverty, neglect, and the death penalty, may, "100 years from now" be more receptive. Lawyering in what is today a losing cause is like trying to put a crucial piece of evidence in a time-capsule. And, while the language of "witnessing" is explicit in this account, it is nevertheless as much an account of the writing of history as of giving testimony. This lawyer does not merely say what happened, he constructs an explanation that will focus the attention of the future on mental illness and poverty, on social neglect and the desire to "get rid of" people with problems rather than fix those problems. He, and others
like him, do history by claiming that they can give at least partial explanations of past events, and "that in some sense we may understand a particular event by locating it correctly in a narrative sequence . . . ."\(^49\)

IV

As witnesses giving testimony and historians creating a narrative of the present, death penalty lawyers find meaning in their work even as they find it increasingly difficult to end capital punishment or, failing that, to save the lives of their clients. Their struggle against the present reality of law's violence is carried out in the name of a justice deferred.\(^50\) By bearing witness and writing history they give content to justice even as they acknowledge that it is attainable, if at all, in an uncertain future. As witnesses and historians they remember the future and insist that the future remember.\(^51\) In so doing, they establish a continuing political claim for their work.

Their political claim and their address to the future is based on what I would call a "democratic optimism," a belief that present support for the death penalty is rooted in ignorance rather than venality, misunderstanding rather than clear-headed commitment.\(^52\) As one lawyer earnestly explained, "I do not think that the death penalty will exist X years from now. While I don't know what X is, I think at some point people are going to look back and think 'Holey, moley, look at what was going on back then.'" "Look at Blackmun," another death penalty lawyer said. "He is not so very different from the rest of the country. His evolution is very representative of what eventually this country will come to if we continue to do our work. We have to look a little longer down the road, beyond the present moment."\(^53\)


\(^50\) See Balkin, *supra* note 17, at 398.

\(^51\) Concerning the work of death penalty lawyers, David Bruck suggests that "this phase in our history will not last forever. We will regain faith in our ability to address our problems as a society, and our sense of shared responsibility and of a shared destiny as a people. And as we do, our country's enthusiasm for the death penalty willcrest, subside, and disappear." David Bruck, *Does the Death Penalty Matter?*, 1 RECONSTRUCTION 35, 39 (1991).

\(^52\) Here, they take instruction from the late Justice Thurgood Marshall, who, when confronted with evidence of widespread public endorsement of capital punishment, argued that "whether a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptably." Furman v. Georgia, 408 U.S. 238, 361 (1972) (Marshall, J., concurring). If they were given such information, Marshall believed, "the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional." Id. at 363.

Such sentiments connect law to the future and establish a different understanding of the work of lawyers for beleaguered causes like the death penalty. The history-writing and witness-bearing functions of death penalty lawyering give law a life in and through time and describe the multiple audiences to which law speaks. These functions expand the political dimensions of lawyering: Indeed, they suggest that one of the tasks of lawyering in a losing cause is to find legal devices that address the future while continuing, however fruitlessly, the struggle against the present reality of law’s violence.