



PROFILES IN JUSTICE

LAWYERS WORKING TO DEFEAT THE DEATH PENALTY

Leslie A. Gordon

Whether through law school programs such as the Northern California Innocence Project and the Death Penalty Clinic or through activities such as the Death Penalty Project of the ACLU of Northern California and BASF's efforts to promote the ABA guidelines or through groups such as the Center on Wrongful Convictions, the attorneys profiled here back up their passionate stands on the death penalty with energetic hard work.

KATHLEEN RIDOLFI

The Northern California Innocence Project, a Santa Clara University School of Law clinical course in which law students work with attorneys and other professionals to investigate claims of wrongful conviction, is "like a teaching hospital," says Executive Director Kathleen ("Cookie") Ridolfi. The team specializes in claims of innocence made in Northern California courts, and "the students get cases." The project, which comprises attorney research assistants, fellows, and as many as thirty law students, works on some death penalty cases, especially those with a DNA angle. "We're familiar with the DNA world and forensic science. We have expertise in investigating old cases, which is

different from cases where the paint is still wet," Ridolfi explains. Procedurally, death penalty cases drag on for decades; as a result, they are a good match for the project because "it takes a long time to successfully prove innocence."

Even the project's non-death penalty cases can influence public opinion on the issue, given the numbers of innocent people in prison. In 2002, for example, the project filed a petition for writ of habeas corpus on behalf of John Stoll, who had been convicted in the 1980s of child molestation and sentenced to forty years. The Innocence Project proved that Stoll's conviction was based on unreliable testimony procured from children subjected to coercive interviewing techniques by county employees and that no physical evidence corroborated the testimony. The district attorney's office admitted it could not retry him and dropped all charges. Subsequently, the state awarded Stoll more than \$700,000 in compensation for his wrongful conviction.

Cases like this "have really influenced people's views of the death penalty," Ridolfi says. "No one wants to convict an innocent person. They're there [in prison]. It's a needle in a haystack, but the odds of finding someone [innocent] are real."

In addition to exonerating the innocent and working on policy reforms, the project's mission includes educating law students and the community. In March, the project hosted its first awards dinner featuring former inmates who'd been exonerated. More than six hundred people attended, raising \$1 million for the project.

“The death penalty involves human judgment calls, which risks killing innocent people,” Ridolfi says. “There’s no doubt that we have executed innocent people in this country. I know that with every cell in my body. You can deny it all you want. But [the death penalty is] also just wrong. We shouldn’t live in a society where that’s what we do. I don’t know what that’s teaching the community.”

NATASHA MINSKER



Natasha Minsker

As a second-year law student, Natasha Minsker worked in a public defender’s office where, on her first day, she got to watch a death penalty trial. When the defense attorney examined the defendant’s mother, he asked, “How would you feel if the state of California were to kill your son?”

Minsker recalls thinking, “This is insane. How can twelve people come up with the answer to this question? It distorts our whole criminal justice process.”

That sparked Minsker’s passionate opposition to the death penalty. After graduation, she clerked for a New Mexico judge with a major death penalty case, and she later served as a public defender in Alameda, where her first year as a research attorney was in the death penalty defense unit. Minsker also worked for the Judicial Council rewriting criminal jury instructions. For the last three years, she’s led the Death Penalty Project for the ACLU of Northern California. As director, she works to educate California’s public so the state moves closer to permanent incarceration as a replacement for the death penalty.

“Most people don’t know we have an alternative: for convicts to die in prison. The death penalty is so much more expensive. Because we can’t go back, we have so, so many more safeguards. At the trial level, we have to have two trials. It’s incredibly expensive. We have to hire psychologists, experts in forensic science, and make mandatory appeals,” Minsker says. In addition, housing criminals on death row is far more expensive because of the single cells, additional guards, and heightened precautions. “The chief justice has said [the death penalty system] will fall of its own weight,” Minsker says. “The available money is getting smaller. We’re reaching a crisis point.”

TY ALPER

As associate director of the Death Penalty Clinic at UC Berkeley School of Law, Ty Alper manages twelve to sixteen students, mostly in their third year, who pledge to learn what it means to represent clients on death row by actually doing it. It involves research, writing pleadings, and interviewing witnesses, experts, and clients. Students also enroll in an accompanying seminar, in which they learn the substantive constitutional law governing capital cases as well as practical skills such as how to investigate ineffective assistance of counsel, how to draft pleadings, and how to comprehend the subtleties of mental health cases.



Photo by Jim Block

Ty Alper

Despite the fact that “it’s a ton of work, a ton of hours,” Alper says, the clinic gets twice as many applicants as it can accept. “It’s high stakes representation, and we give real responsibility to students. They are exposed to a lot of different skills, legal issues, and medical-social issues.”

The clinic opened six years ago. A clinic like this was necessary, Alper says, because many pro bono attorneys shy away from death penalty cases. Handling them “is not politically popular, and it’s very expensive to do it right,” he explains. Still, Alper adds, “there are hundreds more people who need representation than we have lawyers.”

The clinic tends to take cases in which it has developed expertise—innocence or DNA evidence are not criteria for acceptance—and handles between five and ten cases at any one time. Right now the clinic has one California case and several in the South, primarily Alabama. The clinic also writes amicus briefs in some death penalty cases.

Alper has been at the clinic since 2004; before that he worked at the Southern Center for Human Rights representing inmates on legal issues related to prison conditions. “I got hooked on how rewarding it is to represent people who never had an advocate for anything,” he recalls. It’s really inspirational to do it with students, who are energetic—it’s motivating.”

Some alumni of the clinic go on to practice death penalty law, either at public defender offices or on pro bono cases handled by corporate firms. That, according to Alper, is good news for a system that is too arbitrary. In addition to the race of the defendant and of the victim, attorneys can affect the outcome of death penalty cases. “There’s a wide disparity in the quality of lawyers who represent people at trial, and there are inadequate resources to attract good lawyers to represent people” on death row.

JAMES DONATO

A key element of BASF’s mission is ensuring fair access to justice, says President James Donato. That is why The Bar Association of San Francisco was the first bar association in California to urge statewide adoption of revised ABA standards on the appointment of death penalty counsel.

“Texas, the state with the highest execution rate in the country, has adopted the ABA standards. California should not



Photo by Jim Block

James Donato

have a lower standard of care,” insists Donato, a litigation partner at San Francisco’s Cooley Godward Kronish. (His wife Rhonda is an attorney for the Innocence Project at Santa Clara University School of Law.)

Specifically, in March BASF voted to support a resolution calling for every California jurisdiction seeking a death sentence to comply with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The U.S.

Supreme Court has used the same guidelines to establish the appropriate standard of care in defending death penalty cases; if the guidelines aren’t followed, the case could be reversed. The provisions provide, for instance, that each death penalty case must be staffed by two experienced and qualified attorneys, an investigator, and a trained mitigation specialist. They also require that jurisdictions pay lawyers hourly for the work they actually do rather than use flat fees or capped payment systems.

“Even among observers with disparate viewpoints on the legitimacy of capital punishment, deficiencies in the representation provided to defendants in death penalty cases are widely acknowledged,” Donato adds. “The fact is that capital defendants often do not get adequate representation when their lives are at stake.”

In May, BASF’s Barristers Club hosted a seminar on capital punishment, featuring legal experts, religious leaders, journalists, and filmmakers. The Independent Film Channel’s *At the Death House Door*, a documentary focused on a death house pastor as well as the investigative efforts of reporters turning up evidence supporting a death row inmate’s claims of innocence, framed the discussion.

BASF will continue to be engaged in death penalty issues, Donato says. He referenced June's *Kennedy v. Louisiana* decision, in which the U.S. Supreme Court invalidated the death penalty for child rape, and in particular Justice Kennedy's words: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."

Those are powerful statements to Donato—and to BASF. He explains, "The validity and administration of capital punishment are important to our members and reach to the heart of our interests in the fair administration of justice."

LARRY MARSHALL



Photo by Joe Nieto

Larry Marshall

Larry Marshall became interested in the death penalty while clerking for Justice John Paul Stevens of the U.S. Supreme Court. In particular, *McCleskey v. Kemp* (1987), in which, as described by Marshall, the Court held that a racially influenced death penalty was better than no death penalty, triggered his opposition to capital punishment. (Justice Stevens dissented in that decision.)

Later, as a law professor at Northwestern University, Marshall worked for five years on a death penalty case that led to the exoneration and release of an innocent man as well as the indictment of the prosecutor and law enforcement officers. Since 2000, Marshall has worked on thirteen cases in which inmates were later found innocent. Those experiences led him to cofound the Center on Wrongful Convictions and or-

ganize the first National Conference for Wrongful Convictions and the Death Penalty.

But his passion extends "way beyond the innocence issue," he says. "Even within the pool of guilty people, the prevalence of mental illness and unspeakable stories of abuse is staggering. Not to mention the poor lawyering and the impact of race on the death penalty. These are pathetic souls, tragic victims, people who get no help and no intervention. Once you're educated about who is on death row, there's less and less support for killing them."

Marshall, who joined Stanford Law School's faculty in 2004, believes that support for the death penalty is going to erode. "In several decades, there won't be a death penalty in the United States," he says. "I've talked to countless people who tell me, 'The more I learn, the more I oppose the death penalty.' It's never the opposite. Once people learn about the injustice, the arbitrariness, the racism, and the propensity for error, the direction of change is all one direction. The measure of any public policy is how it does when light is shined upon it. Therefore, it's only a matter of time [before the death penalty is abolished]."

The issue, Marshall adds, has stark parallels to the abolition of slavery. He explains, "In all the rest of the civilized world, the death penalty is considered barbaric. This debate is part of the progress of humanity. It's a slow erosion, but it happens. Who'd have thought ten years ago we would have gay marriage?"

