

# FROM THE PRESIDENT

CYNTHIA HUIJAR ORR

## The Time Has Come to End the Death Penalty

William Freeman killed Henry Seward's best friend and the friend's family. Having just been released from prison for a crime he did not commit, William was deaf and mad from beatings. Showing no remorse, laughing uncontrollably, and admitting his guilt, he stumbled out of the home with the knives he used. He was arrested and taken to jail just ahead of a murderous neighborhood mob. Frightened by the mob and stricken with grief, Henry's wife told him about the tragedy.

Henry and his wife attended court the next day, observing that no lawyer would take William's case. So Henry stood up, and with strong emotion in his voice, accepted the representation of William, a Black man.

Henry railed against the hatred that drove the case. He condemned the blatant racial animus thick throughout the proceedings. While he was certain that the jury would impose death, he was incensed because his client was insane and would have been institutionalized if he were only white. He told the jurors that he was not only the lawyer for William, but for society. He hoped, aloud, that long after he was buried and passions had cooled, people would be shocked that William had been put on trial for his life. He hoped that one person, no matter how insignificant to others, would recall his attempt to win William's life. When remembering his defense, Henry hoped people would say, "He was faithful."

William Freeman was a slave and Henry Seward was a prominent lawyer, presidential candidate, and a member of President Lincoln's cabinet.<sup>1</sup> "He was faithful" is written on his gravestone. Things have not changed much since then, they are just accomplished differently.

One of my favorite newsmen, Rick Casey,<sup>2</sup> once said of

the high criminal court in Texas that the judges should wear black hoods, not black robes. His harsh words came when the court rejected the writ of an innocent death row inmate. Eventually, the state conceded error in federal court. More recently, the Texas Judicial Conduct Commission initiated a hearing to determine whether the high court's presiding judge closed the court to a condemned man while her colleagues waited in vain for his expected motion for stay. He was executed while every other death row inmate in the nation was granted a stay.<sup>3</sup>

States, in the name of its citizens, are spending a huge amount of money to kill a disproportionate number of African Americans and Latinos. They are killing people who might not be guilty. Further, they are doing so as "retribution," while the truly guilty are free to kill again. Through a short circuiting of the legal process, designed to speed death, courts aim to discourage people from killing, knowing full well that the death penalty does not deter people from killing.

In federal proceedings, military commissions are employed in show trials to speed the executions of despised suspected terrorists in Guantánamo because the passions of the nation are inflamed.

In response, courageous lawyers stand up while bearing the stain and opprobrium of defending the despised. They do so to assure history that our nation will not take lives through barbarous proceedings devoid of due process. They are counsel not only for their clients, but also for society. They are faithful.

Shamefully, there are parts of this nation where one need not "look in a mirror" to see his skin color, but only observe the hateful faces of passersby.<sup>4</sup> This racial animus infects death penalty proceedings throughout the South. Similarly, hatred for the killers of innocent thousands has been insinuated into the formation and operation of military tribunals dispensing the death penalty. Hatred should never be allowed a place in dispassionate justice.

When defending a capital murder case with my friend Gary Bledsoe, then the president of the Texas NAACP, we stopped at a small town gas station while driving one day. I saw the gas station attendant glaring at Gary and could not understand why Gary was so shaken when I returned to the car. I had never seen him frightened before. Gary told me that we had unwittingly stopped in a very active Ku Klux Klan enclave. We had become involved in a racially charged case in which a black teen had been lynched. The murder had been committed, we believed, in response to a shooting in a whites only bar. I will never forget the image of that young man hanging from a tree and never cease grieving that it happened in modern times.

Klan members picketed the case, demanding their idea of "justice." They were protesting the fact that we were getting a pretrial hearing. I saw the judge call the local NAACP president "boy" and saw a grown man cowed. Our expert witness explained that he had changed his testimony regarding our client's death worthiness out of his fear of the

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Klan. And Black churches were threatened with bombings. After the trial, the jurors also stated that they feared for their lives. Hollywood could have filmed a period piece, but unfortunately, this was the present.

During trial the judge overruled our objections, quashed our subpoenas, and stuck his tongue out and made moose ears at the defense team. To show he was fair, however, he shared a piece of his birthday cake with our client during a lunch break. When he sentenced my client to death, it appeared that the judge was in rapture. His head tilted back on the bench and his eyes rolled up into his head. Adding to the ghastly display, one prosecutor was "pinned" in the courtroom in honor of one more notch on her belt, as the condemned man's family fainted to the floor.

After the trial, one prosecutor became a judge and the other became the elected district attorney. That is what death is in the South, cheap political currency.

Administration of the death penalty has, for the most part, replaced lynching. A lynching today is a railroad trial to the death chamber with incompetent counsel, unfair proceedings, and streamlined procedural law. In the face of our shameful legacy of slavery and racial prejudice, defense lawyers continue to be faithful. They stand up against daunting odds and

defend people about whom nobody cares. They stand up and call attention to the inequities in our system of justice. They continue to call for abolition of the death penalty.

Steve Bright called Texas' high court the fastest assembly line to death in our country. Incompetent attorneys are appointed to death cases, and many death cases in Texas receive no review because lawyers miss deadlines or raise noncognizable habeas claims. Federal Judge Orlando Garcia called the Texas court's appointment of incompetent counsel "a cynical and reprehensible attempt to expedite execution at the expense of all semblance of fairness and integrity." In other states, the courts emasculate counsel by providing inadequate resources or by direct actions that render them ineffectual. A judge in South Carolina recently prohibited a death penalty defense counsel from speaking in the courtroom.

In addition, habeas corpus procedure in the federal system can also be called a "cynical" attempt to speed executions "at the expense of all semblance of fairness and integrity." Federal courts accept incorrect state court findings, thereby dispensing with merits review of state death penalty cases.<sup>5</sup> The time has come to end this "failed experiment." The death penalty neither achieves jus-

tice nor promotes public safety. It is a stain on our criminal justice system. The quality of justice that we afford death penalty defendants stains all of us.<sup>6</sup>

Death is irrevocable. There is no place for such punishment in our fallible system. The human and moral costs of executing an innocent person and the monetary expense<sup>7</sup> of the death penalty form too high a price. Whether states abolish the death penalty for economic reasons or for the right reasons, the time has come to abolish the death penalty and restore faith in justice.

## Notes

1. DORIS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 86 (2006).

2. Rick Casey is now at the *Houston Chronicle*.

3. The U.S. Supreme Court had granted certiorari to decide whether the lethal injection cocktail used in Kentucky, Texas, and elsewhere constituted cruel and unusual punishment.

4. An observation made by late Supreme Court Justice Thurgood Marshall.

5. 28 U.S.C. § 2254(d).

6. A former elected district attorney and death penalty advocate, Sam Milsap, said: "My migration from being a full-throated supporter of the death penalty to being an opponent of the death penalty today, and just as outspoken in opposition today as I was when I was a supporter, is based on the fact that, the undeniable fact, that in any system that is driven by decisions that are made by human beings mistakes will be made. And for those, for some people it is good enough to have a legal system that produces the right result most of the time. But for me that sets the bar too low. I think that particularly in death penalty cases, because the sanction is final, it can't be undone, that what we have to be sure of is that the innocent are protected. And the system can't make that guarantee. So that's the reason that I am an opponent of the death penalty today." Milsap had discovered that an innocent man had been executed on his watch. He is not alone in this experience. J. Fry, *'I Put Away an Innocent Man,' Dallas Morning News*, May 14, 2009. See [http://www.youtube.com/watch?v=\\_7WcapLymiw&feature=related](http://www.youtube.com/watch?v=_7WcapLymiw&feature=related).

7. Costs above the ordinary criminal case have ranged from \$3.2 million per execution in Florida, to \$2.3 million extra per case in Texas, up to \$15 million extra per case in California. These factors, the irremediable nature of death, our fallible system, and the staggering economic costs have lead to abolition of the death penalty in New Jersey and New Mexico. ■



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