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Department of Justice



A PLEA FOR RECOGNITION OF THE SANCTITY OF HUMAN LIFE:

A PLEA FOR THE PENALTY OF DEATH

ADDRESS

OF

THE HONORABLE ARNOLD I. BURNS
DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NEW YORK LAWYERS CHAPTER
OF THE FEDERALIST SOCIETY

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It is a pleasure to be with you today. The Federalist Society signifies a return to health of legal education and practice in this country. For you are the alternative to the non-interpretivists who have come to dominate public discourse about law and legal institutions. You are the hope and the wave of the future by representing the best of the past. You recognize that our written constitution has a meaning, and that it is not an empty vessel into which the passions and prejudices of a particular reader at a particular time are to be poured. As one of our prominent american scholars, professor Walter Berns (regrettably, no relation of mine) put it, the framers' object was not to keep the constitution in tune with the times, but rather to keep the times in tune with the Constitution.

James Madison was one of the great founding fathers, in part because of the zeal with which he argued his positions. He played a leading role at the Constitutional Convention, speaking on seventy-one out of eighty-six days. He got so excited at times that he finally asked a friend to tug at his coattails if he became too wrought up. Once, after talking himself to the point of exhaustion, he reproved his friend: "Why didn't you pull me when you heard me going on like that?" Said the friend: "I would rather have laid a finger on ... lightning."

Similarly today, I hope you will forgive me if I become too wrought up in discussing capital punishment because I believe that it plays a critical role in vindicating society's respect

for innocent human life. In defending the penalty of death today, I do not want to advance the traditional argument that the penalty deters crimes. Of course, our intuition would suggest that the death penalty will give pause to at least some potential murderers and recent sophisticated econometric studies have corroborated our intuition. But set that to one side.

I also want to set aside the traditional moral argument in defense of capital punishment -- that a sentence of death is the only just punishment for the taking of another human life. In my view, capital punishment should be part of an overall grand societal mosaic in which each and every individual is held fully accountable for his or her conduct. With such a mosaic in place, I believe deterrence is ineluctable. But because I realize not everyone agrees with this view, I do not want to rest my defense of capital punishment on it.

Instead, I want to raise a strictly logical argument in defense of the penalty -- that it saves innocent lives through its incapacitative effects. Often opponents of capital punishment suggest that imprisonment is just as effective as the death penalty for preventing additional crimes. They suggest that if we simply "lock 'em up and throw away the key", we have discharged our duty. Far too often, however, the lesser sanction of imprisonment leads to tragic subsequent murders.

Some murderers are brutal, vicious persons that will kill and kill again until permanently incapacitated by society. Often such persons will be found to be "safely rehabilitated" and

paroled back into society. We are all familiar with the tragic case of Jack Henry Abbott, a convicted murderer who was deemed to pose no threat to society and released from prison. Six months after his release, Abbott stabbed to death Richard Adan, an aspiring actor, in New York City.

While Abbott was not sentenced to death, his case suggests that murderers can and often do kill more than once. If some murderers are executed, we will most assuredly save the lives of innocent persons. For instance, one Eddie Simon Wein was sentenced to death in Los Angeles superior court. His capital sentence was set aside and eventually, in 1975, he was released from prison to live in West Los Angeles, without warning to his neighbors. Within months, he began to attack and kill women in the area. Fortunately for other potential victims, his apprehension was swift. He was convicted in 1976 of first degree murder of one woman, attempted murder of another, and numerous sexual offenses. The woman who was killed by Wein and the women who were scarred by him for life would not have been victims if Eddie Wein had been executed as originally decreed.

David Pederson was convicted of murder in New Mexico and sentenced to death. His sentence was later commuted and reduced to less than fifteen years. He was eventually released and within two years murdered two people in San Bernadino, California. Sentenced to death in that state, he was again spared when, in December 1976, the California Supreme Court held

-- for the second time in five years -- that the California death penalty was unconstitutional.

Alfred Ravenell had been sentenced to death for three murders in New Jersey. His sentence was commuted and on October 14, 1972, he was at liberty to murder a Pennsylvania state trooper.

It is also possible for murderers behind bars to escape.

For example, Henry Jarrette -- a double murderer -- was sentenced to a long prison term instead of executed. During an outside-the-prison trip, he eluded his guard and escaped. Two days later he abducted a sixteen-year old girl and raped her. Finally he killed a sixteen-year-old boy who was driving a car Jarrette fancied. Had Jarrette been executed, these crimes would never have occurred.

Even assuming the impossible -- that a convicted killer will remain in prison for the rest of his life --the risk posed to correctional officers and other prisoners must be considered..

For instance, to take an example from this state, one Lemuel Smith had been convicted in Schenectady of a kidnapping and rape, for which he received two 25-years-to-life sentences. He had also already been convicted of murder in Albany, for which he received another 25-years-to-life sentence. While serving these three life sentences in Green Haven prison, Smith strangled to death a female correctional officer, Donna Payant and mutilated her body. Since New York does not have a death penalty, Smith could not receive any additional punishment for

this crime. He received another prison sentence in dutchess county for this murder in 1984.

Another example comes from our federal prison system. On October 22, 1983, inmate Thomas Silverstein was being supervised by three correctional officers outside of his cell in the most secure federal prison --located in Marion, Illinois. With a homemade knife, he repeatedly stabbed and ultimately killed senior correctional officer Merle E. Clutts. Inmate Silverstein had already been sentenced for the murders of three other inmates while in federal custody. At least some of these murders were related to Silverstein's involvement in the Aryan Brotherhood, a racist prison gang involved in brutal attacks.

On the same day, officer Robert L. Hoffman, Sr. was murdered by inmate Clayton Fountain. Hoffman and two other correctional officers were returning Fountain to his cell when he managed to slip off his handcuffs and use a homemade knife to stab one officer. Hoffman and the other staff members rushed to his aid, and Hoffman was stabbed to death. Fountain was serving a life sentence for murder, and had previously committed one prison murder and had been involved in two other prison murders.

These are not merely statistics. This was brought home to me on March 25th when, on a trip to Marion federal penitentiary, I stood on the very spots where these officers were summarily and peremptorily executed.

As these tragic examples make painfully clear, the death penalty saves lives. No one can contest the fact that had Eddie

Wein been executed, as the sentencing court had decreed, at least one woman in Los Angeles would be alive today and several other would have been spared the trauma of a violent rape. No one can argue with the proposition that, had David Pederson's original death sentence been carried out, two innocent persons in San Bernadino would never have been murdered. No one can deny that had Alfred Ravenell's death sentence, imposed for the murders of three persons, been carried out, a Pennsylvania state trooper would still be carrying out his duties. No one can dispute that if Lemuel Smith had been executed upon his first conviction for murder, Donna Payant would be alive today. If inmate Silverstein had been executed after his first murder, his second murder, or even his third murder, the life of officer Clutts would have been saved.

Thus, the question one must ask about the death penalty is not "does it save lives?", But rather "how many lives does it save?" Because of the value that our society places on human life, it becomes obvious that the death penalty must be retained since every innocent life must be saved if at all reasonably possible.

We have every reason to expect that the number of innocent lives saved by capital punishment is substantial, even focusing solely on the incapacitative aspect of the penalty. With respect to repeat homicides, several studies have found that roughly four percent of paroled killers commit a subsequent homicide within just a few years of their release.

Even for the much narrower category of prison homicides, the number of lives involved is significant. According to the Department's Bureau of Justice Statistics, a prisoner or prison guard is killed in this country every three-and-a-half days, for a total of more than one hundred prison murders every year. And it has been estimated that at least forty percent of prison murders are committed by a previously convicted killer.

Despite these examples, I recognize that there may be people in this audience who believe that, regardless of the circumstances, capital punishment should never be imposed. Some persons have strongly and sincerely-held religious, moral, or philosophical beliefs on this subject. To these people I say, "I do not intend to change your mind. I respect your point of view tremendously."

But under our system of government, the majority rules, at least for most issues. Through their elected representatives, the people have the right to consider all of the arguments concerning capital punishment -- for and against, pragmatic and religious, economic and philosophical -- and to determine whether to impose the penalty. In our country, that decision has been made, and made overwhelmingly, in favor of protecting innocent lives through capital punishment. The United States Congress overwhelmingly supports the death penalty. Last year, 296 congressmen voted to impose capital punishment for certain drug related murders. In 1984, 63 senators voted to adopt procedures for implementing the federal death penalty for serious federal

offenses. And in 1985, Congress passed and the President signed into law a statute providing for the death penalty for serious cases of military espionage.

In the last fifteen years, 37 of our 50 states have reenacted or reaffirmed capital punishment statutes. In the world, according to figures compiled by independent observers, 147 countries retain the death penalty for some crimes, while only 28 have abolished it completely. In the latest national public opinion poll, taken by the Associated Press, 85% of all Americans supported the death penalty for murder, while only 11% opposed it. The poll found that support for the death penalty crossed all religious, educational, economic, racial, and regional differences.

Over the years, Congress has adopted numerous statutes that provide capital sanctions for particularly aggravated federal offenses. They cover such grave offenses as assassination of the President, treason or espionage, murder of a member of Congress or a Supreme Court justice, or destruction of means of mass transportation.

I recognize that ours is not a completely majoritarian society. The Constitution protects minority rights from infringement, particularly in the Bill of Rights. But we also know that "the right to be free from the death penalty" -- if such a right can be conceived -- does not exist in our Constitution. We know this because the Constitution by its terms explicitly recognizes the possibility of a death penalty. In the

fifth and fourteenth amendments, the Constitution provides that "life, liberty, or property" may not be taken without due process of law. To those uneducated in the nuances of modern day constitutional interpretation, the obvious implication of this provision would be that life can be taken so long as due process of law is followed. We lawyers, however, recognize that nothing is so simple. Instead, we have to ask the Supreme Court for an answer on this subject. And, after a convoluted series of opinions in the mid-1970's, that court gave the unsurprising answer that the death penalty is indeed constitutionally permissible, with only two members of the court contending otherwise.

At the same time, the Supreme Court concluded that the Constitution requires an array of procedural safeguards in the administration of capital sentencing. For instance, in Gregg v. Georgia, the court upheld a capital sentencing scheme which insured that a capital sentence would not be arbitrarily or capriciously imposed. Georgia provided a bifurcated sentencing proceeding to determine whether an "aggravating circumstance", such as torture or the commission of another serious felony, was involved in the case and whether all the mitigating factors outweighed the aggravating factors. Georgia also provided close appellate scrutiny of capital cases to ensure that each capital sentence was not imposed under the influence of passion or prejudice nor disproportionate compared to sentences imposed in other similar cases.

Some opponents of capital punishment are not content to let the pros and cons of the death penalty be considered by political institutions that represent the American public. Instead, these opponents have taken to waging guerrilla warfare against the institution of capital punishment in our nation's courts. They have a simple mission -- to thwart the will of the people and stop the imposition of capital punishment in this country in every case, regardless of the fairness of the trial, irrespective of the brutality of the crime. Their weapons in this struggle are seemingly endless legal arguments, often raised on the eve of the imposition of the sentence.

In this context, it is interesting to consider a recent Supreme Court case -- Heckler v. Chaney -- wherein opponents of the death penalty raised a rather "innovative" argument. Representing murderer Larry Chaney, these lawyers argued that the drugs used in Texas for lethal injections had to be certified "safe and effective" for their intended purpose by the Food and Drug Administration. During oral argument, Justice O'Connor asked dryly whether the electric chair also had to be certified "safe and effective." Justice Rehnquist interjected, explaining that jurisdiction over the chair belonged not to the FDA but to the Consumer Product Safety Commission. The court ultimately rejected Mr. Chaney's claim nine to zero, with not even Justices Brennan and Marshall able to follow the logic of the argument.

Before going any further, let me emphasize that I am not objecting in any fashion to attorneys who vigorously advance the

interests of their clients in capital cases. Of course, persuasive advocacy is part of our adversarial system. But advocacy can cross the line into illegitimate delaying tactics. Perhaps it was this sort of thing that Chief Justice Burger had in mind in the recent case of Darden v. Wainwright. There he observed:

"In the twelve years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this court four times, and have been litigated before no fewer than 95 federal and state court judges."

In another case, in Florida, the district judge found that attorneys for prisoners under capital sentence would wait, sometimes for several years, until a few days prior to a scheduled execution. At that time, they would rush to the courthouse with a sheaf of complicated arguments, seeking a stay of execution because of "unresolved" legal issues.

When one such petition reached the Supreme Court, Justice Powell wrote an opinion, joined by the Chief Justice, which censured attorneys for filing this type of motion. Said Justice Powell: "No explanation has been offered by [the petitioner for waiting more than a month, and until the eve of the execution date, to assert the present claims in any court, state or federal [Thus] making it difficult both for the courts below and for this court to make the carefully considered judgments so essential in capital cases." Powell then warned: "If there has been deliberate or inexcusable delay, the appropriate committee of the Florida bar will be advised."

I am confident that such delaying tactics will be rebuffed by our courts and that the death penalty in this country will be carried out in accordance with the careful procedures specified by our laws and our Constitution.

The holdings in, for example, Mccleskey v. Georgia and Tyson v. Arizona as well as other recent cases demonstrate that the death penalty will remain a vital part of the criminal justice system. And this is all for the best. Because in America, we have a respect for life that is unsurpassed. We celebrate and venerate life. We are concerned about the life of a single hostage; we will send legions of rescuers into the mountains to find even a lone lost hiker; we will spend great sums of money to arrange an organ transplant that will save the life of a young infant; our physicians expend a great amount of time and energy to save a prematurely-born fetus from death. In such a society, it is entirely appropriate that we maintain a death penalty -- to vindicate and protect the lives of innocent persons who would otherwise become the tragic victims of cruel and calculating murderers.

FEDERAL STATUTES PROVIDING FOR THE DEATH PENALTY

10 U.S.C. §906a (espionage by member of Armed Forces involving nuclear weapons, communications intelligence, or other important military matters)

10 U.S.C. §918 (murder by member of Armed Forces).

18 U.S.C. §§32, 33 and 34 (destruction of aircraft, motor vehicles, or related facilities resulting in death).

18 U.S.C. §115(b)(3) (Supp. III 1985) (retaliatory murder of member of immediate family of law enforcement officials) (by cross reference to 18 U.S.C. §1111).

18 U.S.C. §351 (murder of member of Congress, important executive official, or Supreme Court justice) (by cross reference to 18 U.S.C. §1111).

18 U.S.C. §794 (espionage).

18 U.S.C. §844(f) (destruction of government property resulting in death)

18 U.S.C. §1111 (first degree murder within federal jurisdiction).

18 U.S.C. §1114 (murder of officer or employee of the United States) (by cross reference of 18 U.S.C. §1111).

18 U.S.C. §1716 (mailing of injurious articles with intent to kill resulting in death).

18 U.S.C. §1751 (assassination or kidnapping resulting in death of President or Vice President) (by cross reference to 18 U.S.C. §1111).

18 U.S.C. §1992 (willful wrecking of train* resulting in death).

18 U.S.C. §2113 (bank robbery-related murder or kidnapping).*

* Possibly constitutionally infirm, even with additional procedural safeguards, in light of United States v. Jackson, 390 U.S. 570 (1968).

18 U.S.C. §2381 (treason).

49 U.S.C. §§1472 & 1473 (death resulting from
aircraft hijacking).