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SPEECH AT THE AMERICAN BAR ASSOCIATION ANNUAL MEETING

An Address by Anthony M. Kennedy
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Mayor Brown, President Carlton, President-elect Archer, and my fellow adherents to the Rule of Law. Thank you for your gracious welcome and for your friendship.

Since we last met in San Francisco, momentous and tragic events have occurred. Some say these events changed the world. Perhaps it is more accurate to say the world is the same, but we now have a clearer understanding of what the world is. It is a world where in every nation many people seek freedom above all, but where new enemies of freedom vow to attack it. In a sense this is nothing new. In the last century free societies were attacked from within, attacked by their own citizens, by men such as Stalin, Hitler, and Mussolini. They attacked free institutions because they did not believe an open society, committed to democracy, could provide for the security and welfare of its citizens. In this century democracy's enemies come from outside the countries they seek to destroy. They, too, see a free and open society as a threat. Once again we face an assault on freedom. Once again we can prevail.

Americans may find the new challenge surprising and disappointing. We tend to think the case has been made that a free society is a stable society, that a free society is the birthright of all people. We do not know why we must make the case all over again when judgment has been given in our favor. History, however, does not acknowledge *res judicata*. History

teaches that freedom must make its case, again and again, from one generation to the next. The work of freedom is never done.

Embedded in democracy is the idea of progress. Democracy addresses injustice and corrects it. The progress is not automatic. It requires a sustained exercise of political will; and political will is shaped by rational public discourse. One of the ABA's missions is to stimulate that discourse.

The impressive, pluralistic assembly of the American Bar Association reflects many groups and interests in our society. That is fortunate, for a disproportionate share of the responsibility for moving toward progress in public affairs falls, in the first instance at least, on those who are trained in the law. The Bar is an essential catalyst for the discourse we must commence to come closer to a more just society.

You have many issues to address. Please permit me to talk with you about two of them. The first concerns the inadequacies – and the injustices – in our prison and correctional systems. The second is the continuing need to teach the principles of freedom to our young people, who soon must become the principal trustees of our constitutional heritage and our most treasured institutions.

The subject of prisons and corrections may tempt some of you to tune out. You may think, "Well, I am not a criminal lawyer. The prison system is not my problem. I might tune in again when he gets to a different subject." In my submission you have the duty to stay tuned in. The subject is the concern and responsibility of every member of our profession and of every citizen. The Gospels' promise of mitigation at judgment if one of your fellow citizens can say, "I was in prison, and ye came unto me," does not contain an exemption for civil practitioners, or transactional lawyers, or for any other citizen. And, as I will suggest, the energies and diverse talents of the entire Bar are needed to address this matter.

Even those of us who have specific professional responsibilities for the criminal justice system can be neglectful when it comes to the subject of corrections. The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest.

When the prisoner is taken way, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.

We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.

Were we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.

We must confront another reality. Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system.

While economic costs, defined in simple dollar terms, are secondary to human costs, they do illustrate the scale of the criminal justice system. The cost of housing, feeding and caring for the inmate population in the United States is over 40 billion dollars per year. In the State of California alone, the cost of maintaining each inmate in the correctional system is about $26,000 per year. And despite the high expenditures in prison, there remain urgent, unmet needs in the prison system.

To compare prison costs with the cost of educating school children is, to some extent, to compare apples with oranges, because the State must assume the full burden of housing, subsistence, and medical care for prisoners. Yet the statistics are troubling. When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long.

It requires one with more expertise in the area than I possess to offer a complete analysis, but it does seem justified to say this: Our resources are misspent, our punishments too severe, our sentences too long.

In the federal system the sentencing guidelines are responsible in part for the increase in prison terms. In my view the guidelines were, and are, necessary. Before they were in place, a wide disparity existed among the sentences given by different judges, and even among sentences given by a single judge. As my colleague Justice Breyer has pointed out, however, the compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward.

By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.

Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington D. C. by United States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.

United States Marshals can recount the experience of leading a young man away from his family to begin serving his term. His mother says, "How long will my boy be gone?" They say "Ten years" or "15 years." Ladies and gentlemen, I submit to you that a 20-year-old does not know how long ten or fifteen years is. Alexander Solzhenitsyn describes just one day in prison in the literary classic "One Day in the Life of Ivan Denisovich." Ivan Denisovich had a ten-year sentence. At one point he multiplies the long days in these long years by ten. Here is his final reflection: "The end of an unclouded day. Almost a happy one. Just one of the three thousand six hundred and fifty-three days of his sentence, from bell to bell. The extra three were for leap years."

Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. The policy gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Professor James Whitman considers some of these matters in his recent book *Harsh Justice*. He argues that one explanation for severe sentences is the coalescence of two views coming from different parts of the political spectrum. One view warns against being soft on crime; the other urges a rigid, egalitarian approach to sentence uniformity. Both views agree on severe sentences, and both agree on mandatory minimum sentences. Whatever the explanation, it is my hope that after those with experience and expertise in the criminal justice system study the matter, this Association will say to the Congress of the United States: "Please do not say in cases like these the offender must serve five or ten years. Please do not use our courts but then say the judge is incapable of judging. Please, Senators and Representatives, repeal federal mandatory minimums."

The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just. Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws.

To help those who are serving under the minimums, the ABA should consider a recommendation to reinvigorate the pardon process at the state and federal levels. The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy. The greatest

of poets reminds us that mercy is "mightiest in the mightiest. It becomes the throned monarch better than his crown." I hope more lawyers involved in the pardon process will say to Chief Executives, "Mr. President," or "Your Excellency, the Governor, this young man has not served his full sentence, but he has served long enough. Give him what only you can give him. Give him another chance. Give him a priceless gift. Give him liberty."

The debate over the goals of sentencing is a difficult one, but we should not cease to conduct it. Prevention and incapacitation are often legitimate goals. Some classes of criminals commit scores of offenses before they are caught, so one conviction may reflect years of criminal activity. There are realistic limits to efforts at rehabilitation. We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach. We should not ignore the efforts of the countless workers and teachers and counselors who are trying to instill some self-respect and self-reliance and self-discipline in convicted offenders. Credit must be given to the dedicated persons who conduct prison education programs. Over 90% of state prisons and 100% of federal prisons offer some kind of educational program. And about one in four state prison inmates attains a GED while in prison.

Professor Whitman concludes that the goal of the American corrections system is to degrade and demean the prisoner. That is a grave and serious charge. A purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people. No public official should echo the sentiments of the Arizona sheriff who once said with great pride that he "runs a very bad jail."

It is no defense if our current prison system is more the product of neglect than of purpose. Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in the United States. To that end, I hope it is not presumptuous of me to suggest that the American Bar Association should ask its President and the President-elect to instruct the appropriate committees to study

these matters, and to help start a new public discussion about the prison system. It is the duty of the American people to begin that discussion at once.

In seeking to improve our corrections system, the Bar can use the full diversity of its talents. Those of you in civil practice who have expertise in coordinating groups, finding evidence, and influencing government policies have great potential to help find more just solutions and more humane policies for those who are the least deserving of our citizens, but citizens nonetheless. A decent and free society, founded in respect for the individual, ought not to run a system with a sign at the entrance for inmates saying, "Abandon Hope, All Ye Who Enter Here."

Let us turn now from the subject of those who have broken the social contract to those who soon will assume the full duty to keep it. I refer to the splendid young people in this nation who will become the next trustees of our legal and constitutional tradition. It is my pleasure to extend formal thanks to this Association for sponsoring the program for high school students, the program called "The Dialogue on Freedom." Past-President Hirshon, President Carlton, and President-elect Archer have all devoted their personal attention to it.

This is an exercise for high school seniors or first-year college students. It could be the foundation of a full semester course, perhaps, but the exercise we suggested took one session of about 90 minutes. Our figures are imprecise, but we estimate that to date over 140,000 students have taken the class.

The students were asked to assume they were stranded in a third-world country with strong suspicions, or active hostility, to America, to its republican principles, and to its commitment to freedom. Our objective was to show young people that our heritage can endure and spread only as a conscious act. An informed understanding of the foundations of freedom is not a genetic, inherited characteristic. It is taught. Each generation must learn and then teach it again.

I spoke with many of the instructors who presented the program. As is so often the case when we work with young people, there is good news and bad news. There is cause for concern; and there is much to inspire confidence and optimism.

The principle that often motivated the students' instinctive reaction to questions about basic principles of government was tolerance. At one level this is reassuring. Tolerance, properly understood, stems from the ideas of the Declaration of Independence and the principles embraced by the founders of the Republic. In our legal tradition, and in our constitutional heritage, tolerance follows from the premise that all persons have inalienable rights, including the right to life, liberty, and pursuit of happiness. The exercise of those rights should be respected. Hence the idea of tolerance.

The problem is that all too many young people seem to equate the idea of tolerance with the concept of relativism. This is a grave error. Unbounded relativism as a civic philosophy soon becomes passivity and indifference: No judgments can be made, for it is impossible to place one set of values over another. This is a far cry from toleration derived from a belief in universal rights. If, in the civic sphere, relativism swallows tolerance whole, belief in universal rights turns into no belief at all. According to this view, we cannot judge others because our view of rights has no greater validity than any other. Were this muddled mindset to prevail, America could not teach or transmit the principles of freedom. Some students understand this; others do not. Some teachers understand this; others do not.

Here is an example. We asked students if, when discussing political philosophy in this imaginary place, they have a civic duty to try to persuade other young people not to surrender power to an authoritarian regime. A surprising number of students believed other nations should be allowed to adopt any system and pursue any domestic policy a majority wants. We overreach, they said, if we try to influence the result by offering our views as to what is just. Then we posed a series of problems, leading to the question whether it would be wrong to intervene to prevent genocide or a holocaust. A few students persisted in saying this is not our concern. I was astounded.

This is but callous indifference masquerading as tolerance. This is the distortion of tolerance, not fidelity to the individual dignity from which tolerance springs. By this calculus, the principles espoused by Washington, Hamilton, Madison, and Jefferson mean little.

When a few students persisted in saying those who believe in freedom should just mind their own business as to other countries, even in the case of a holocaust, the rest of the class was deeply troubled. They saw the problem. The legitimacy of a legal order based on universal values and respect for all persons at this point became more apparent. At a conceptual level, many had difficulty trying to escape the relativist grip.

In our profession we can appreciate that answers are not always easy when we seek to resolve concrete problems by general principles. Life generates tough cases. And tough cases require careful, mature deliberation. That is why we can make a contribution to the public discourse. Still, we must remember that the legal order rests on certain fundamental truths. These truths must be taught. We must guard against the easy slide into neglect and passivity. The Rule of Law will mean little in a society too apathetic to know that vigilance is the price of liberty.

Respect for individual dignity is a universal challenge. Trying to illustrate the point by important books the students selected was one technique used in the high school dialogues. Let me describe, though, a real instance when the choice of one book made all the difference. A few years ago, a member of the bar from California named Ed Villmoare volunteered to serve in Kosovo under the auspices of the ABA's successful CEELI program. His wife, Paula Huntley, decided to go with him and teach English to high school students in that impoverished, suffering place. She has written a fine account of the experience in a volume called *The Hemingway Book Club of Kosovo*.

She wanted to teach English but had no book. In the only store in Pristina with any books in English she found one copy of Hemingway's *The Old Man and the Sea*. It is short, and of course is distinguished by its clear and powerful prose. She bought the book and copied it for the class. It was the only game in town. But it proved to be an excellent choice. The students in her class in Kosovo were inspired by the story of the old man, down on his luck. You will recall the story. The old man had not caught a fish for eighty-four days, and the townspeople thought he was finished. Then, when he hooked a huge fish, he had to battle forces far greater than he. The young people in a war-torn nation related to that. They understood, too, what it

means to encounter defeat but remain unbroken and dignified by the struggle.

The children in Kosovo understood that liberty means the right to search for dignity. So they respected the old man's struggle. By their ready acceptance of these universal ideas they taught their teacher, and they teach us, that individuals must always be willing to contend against greater forces to build a better world. Thus, the formal principles of freedom must be taught to preserve our heritage; but we will find that the desire for freedom is the birthright and the natural aspiration of all decent people.

Our own legal tradition has been shaped by persons who know there is injustice but must resort to the law to establish the general principles for righting it. Over 115 years ago, in this city, a man called Yick Wo went to court when local officials denied him a permit for his laundry business. He came to the Supreme Court of the United States. His case generated one of the most important equal protection decisions ever written. It is a tribute to our law and to our profession that a case involving a foreign national gave meaning and scope to the equal protection rights of all Americans. Our case law system is built on the idea that individuals in any era can strive to vindicate personal rights, and that by their effort our law emerges stronger than before.

In this process, lawyers know that every battle does not bring victory. There will be defeats, but the defeats will not break our will. In day-to-day debates on how to relate the law to our civic discourse and our lasting traditions, we must insist on rational, principled judgment. By doing so we advance the mission of a free people.

I hope that during this time in San Francisco you will find new ideas, new insights, and new inspiration for your work. Then our profession can help preserve the role of this nation as the guardian of what Jefferson called the sacred fire of freedom and self-government, keeping it in trust for other nations that wish to share it. Thank you for being united in this historic cause.