VOLUME XVI		TITLE OR GROUP ADDRESSED
#211		"PUBLIC CRITICISM OF THE JUDICIARY -- IS IT CAUSED BY A DEFAULTING EXECUTIVE OR LEGISLATURE?" BEFORE: 14th ANNUAL CONFERENCE NATIONAL ASSOCIATION OF TRIAL COURT ADMINISTRATORS SHERATON SAND CASTLE SARASOTA, FLORIDA TUESDAY, JULY 10, 1979
#212		INVESTITURE OF THE HONORABLE WILLIAM J. CASTAGNA, JUDGE, U. S. DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA U. S. COURTHOUSE AND POST OFFICE BUILDING, TAMPA, FLORIDA FRIDAY, SEPTEBMER 14, 1979
#213		MORRISON LECTURE: "THE OLD LAWYER SAID: " I LOOK OUT FOR MY PAYING CLIENTS" -- THE YOUNG LAWYER RESPONDED: "BUT GOOD LAWYERS MUST ALSO DO SOME FREE PUBLIC SERVICE." Before THE STATE BAR OF CALIFORNIA BONAVENTURE HOTEL, LOS ANGELES, CALIFORNIA, MONDAY, SEPTEMBER 17, 1979
#214	(on mag cards)	ADDRESS BEFORE NOVA UNIVERSITY CENTER FOR THE STUDY OF LAW FORT LAUDERDALE, FLORIDA. TITLE: THE OLD LAWYER SAID: "I LOOK OUT FOR MY PAYING CLIENTS" -- THE YOUNG LAWYER RESPONDED: "BUT GOOD LAWYERS MUST ALSO DO SOME FREE PUBLIC SERVICE." FRIDAY, NOVEMBER 16, 1979
#215		ADDRESS BEFORE NOVA UNIVERSITY CENTER FOR THE STUDY OF LAW FORT LAUDERDALE, FLORIDA. (Same Speech As Above -#214- however, done in lower case and placed on System 6) FRIDAY, NOVEMBER 16, 1979

216

ADDRESS BEFORE EXCHANGE CLUB OF TAMPA, SHERATON HOTEL, TAMPA, FLORIDA, MONDAY, DECEMBER 10, 1979 Noon
TITLE: PUBLIC CRITICISM OF THE JUDICIARY -- IS IT CAUSED BY A DEFAULTING EXECUTIVE OR LEGISLATURE?
TWENTY MINUTES

#217

Address to Mid-Winter Meeting of Young Lawyers' Section of American Bar Association
Hyatt Regency Hotel, Atlanta, Ga.
Saturday, February 10, 1979 Noon

On Mag Cards------ IMPERIAL JUDICIAL -- OR IS IT A DEFAULTING EXECUTIVE OR LEGISLATU
** Revision of speech # 206 **

#218

Address at Corporate Counsel Seminar, Diplomat Resort & Country Club, Hollywood, Florida
Thursday, March 20, 1980
12:00 O'Clock Noon

On Mag Cards--------Title: Random Wanderings Through
(Trish Yates) the Pig-Trails of the Law and the Legal Profession
Time: Thirty Minutes

#219

Remarks before Judicial/Media Seminar, Campus of Northwestern State University, Natchitoches, Louisiana, Friday, April 11, 1980 Noon
Title: Public Criticism of the Judiciary -- Is It Caused By the Default of Other Governmental Institutions?
Time: Twenty Minutes

#220

Remarks at Annual Meeting, Detroi Bar Association, Book Cadillac Hotel, Detroit, Michigan, Thursda May 1, 1980, 7:00 PM
Title: Random Current Thoughts of a Trial Lawyer About the Law - The Courts - And the Responsibili ties of Lawyers
Time: Twenty Minutes

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#221

REMARKS AT BPI ANNUAL LAW LUNCHEON
THE CHICAGO PUBLIC LIBRARY
CULTURAL CENTER
PRESTON BRADLEY HALL
CHICAGO, ILLINOIS
"RANDOM CURRENT THOUGHTS OF A
TRIAL LAWYER ABOUT THE LAW -
THE COURTS - AND THE RESPONSIBILITIES
OF LAWYERS"
MAY 1, 1980

#222

REMARKS AT ANNUAL LAW DAY BANQUET
FACULTY & STUDENTS, COLLEGE OF LAW
FLORIDA STATE UNIVERSITY
SILVER SLIPPER RESTAURANT
TALLAHASSEE, FLORIDA
SATURDAY, MAY 3, 1980
"RANDOM CURRENT THOUGHTS OF A
TRIAL LAWYER ABOUT THE LAW -
THE COURTS - AND THE RESPONSIBILITIES
OF LAWYERS"

#223

HEADLINERS BREAKFAST
DAYTONA BEACH AREA CHAMBER OF COMMERCE
AMERICANO BEACH LODGE
DAYTONA BEACH, FLORIDA
THURSDAY, MAY 8, 1980
"RANDON CURRENT THOUGHTS OF A
TRIAL LAWYER ABOUT THE LAW -
THE COURTS - AND THE RESPONSIBILITIES
OF LAWYERS"

#224

RE: ERA STATEMENT
SUBMITTED TO LEAGUE OF WOMEN VOTERS
DECEMBER 23, 1980
For publication in their newsletter
as the first of a series
(Referenced here for convenience)

#225

STATEMENT OF CHESTERFIELD SMITH
ON BEHALF OF THE ABA
BEFORE THE 1980 DEMOCRATIC
PLATFORM COMMITTEE
WASHINGTON, D.C.
JUNE 13, 1980

Reference only:

Spoke "off the cuff" before
Auburndale, Lake Alfred and
Winter Haven Bar Association
Windows-on-the-Park
Winter Haven, Florida
January 8, 1980 - Noon
"Public Criticism of the Judiciary -
Is it Caused by a Defaulting
Executive or Legislature?"

Reference only:

Spoke "off the cuff" at
Farewell Dinner for
Thomas E. (Red) Holcom
Upon his retirement from the
Florida Phosphate Council
January 16, 1981 - 7:00 p.m.
Lakeland Yacht Club

VOLUME XVI

#226

ADDRESS BEFORE
ORLANDO ROTARY CLUB
FIRST FEDERAL BUILDING
MAGNOLIA & CHURCH STREETS
ORLANDO, FLORIDA
WEDNESDAY, NOVEMBER 5, 1980
"RANDOM CURRENT THOUGHTS OF
A TRIAL LAWYER ABOUT THE LAW -
AND THE UNMET RESPONSIBILITIES
OF LAWYERS AND OTHERS"

#227

ADDRESS BEFORE
CITIZENS' CONFERENCE ON THE
GEORGIA JUDICIAL SYSTEM
FALCON INN
SUWANEE, GEORGIA
FEBRUARY 20, 1981 (Noon)
"A JUDICIAL SYSTEM MUST RESPOND
TO THE PEOPLE'S NEEDS"

#228

REMARKS OF CHESTERFIELD SMITH AT
INVESTITURE OF CLINTON CURTIS
CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT OF FLORIDA, BARTOW, FLORIDA
FRIDAY, MARCH 6, 1981, 4:00 P.M.
Time: Eight Minutes

#229

Baron de Hirsch Meyer Lecture Series
University of Miami School of
Law
Coral Gables, Florida
Friday, April 3, 1981
DO LAWYERS HAVE AN AFFIRMATIVE
DUTY TO THE PUBLIC BY REASON
OF THEIR PROFESSIONAL STATUS
TO DO SOME FREE SERVICE

#230

Remarks of Chesterfield Smith at
RETIREMENT CEREMONIES FOR
JUDGE WINSTON E. ARNOW -
Pensacola, Florida
May 7, 1981

#231

ADDRESS BEFORE
SOUTHEASTERN CLAIMS ASSOCIATION
SEMINAR
Daytona Hilton Hotel
Daytona Beach, Florida
Thursday, June 11, 1981
FUTURE OF TORT LITIGATION

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 211

VOLUME XVI

211 change type here

REMARKS OF: CHESTERFIELD SMITH
LAWYER
TAMPA, FLORIDA

BEFORE: 14TH ANNUAL CONFERENCE
NATIONAL ASSOCIATION OF
TRIAL COURT ADMINISTRATORS
SHERATON SAND CASTLE
1540 BENJAMIN FRANKLIN DRIVE
SARASOTA, FLORIDA

DATE: TUESDAY, JULY 10, 1979
1:00 P.M.

TITLE: PUBLIC CRITICISM OF THE
JUDICIARY -- IS IT CAUSED
BY A DEFAULTING EXECUTIVE
OR LEGISLATURE?

TIME: TWENTY MINUTES

PRESIDENT JIMMY CARTER RECENTLY CALLED UPON THE LEGAL PROFESSION TO "MAKE THE ADVERSARY SYSTEM LESS NECESSARY FOR THE DAILY LIVES OF MOST AMERICANS -- AND MORE EFFICIENT WHEN IT MUST BE USED." THE PRESIDENT ADDED MORE POINTEDLY: "BY RESORTING TO LITIGATION AT THE DROP OF A HAT - BY REGARDING THE ADVERSARY SYSTEM AS AN END IN ITSELF - WE HAVE MADE JUSTICE MORE CUMBERSOME - MORE EXPENSIVE - AND LESS EQUAL THAN IT OUGHT TO BE."

TO AN EXTENT - THAT CRITICISM OF THE EVER-EXPANDING ROLE THAT THE JUDICIAL SYSTEM PLAYS IN AMERICAN SOCIETY IS MERITED. THOSE OF US WHO ARE IN THE JUSTICE BUSINESS KNOW THAT MANY REPEATEDLY COMPLAIN THAT THE COURTS HAVE ARROGATED TO THEMSELVES MATTERS BEYOND THEIR COMPETENCE

SATISFACTORILY TO HANDLE - IN THEIR WORDS - THAT THE COURTS WITHOUT A PUBLIC MANDATE SIMPLY HAVE GROWN TOO BIG FOR THEIR BRITCHES. THEY ASSERT THAT MANY JUDGES - BOTH STATE AND FEDERAL - SANCTIMONIOUSLY AND SELF-RIGHTEOUSLY - VIEW THEMSELVES AS SOCIETY'S WILD CARD - THE ULTIMATE PROBLEM SOLVER WHO ALWAYS MUST ACT WHEN OTHER GOVERNMENT INSTITUTIONS DO NOT.

WHILE I AS A TRIAL LAWYER WELL KNOW THAT BLANKET CRITICISM OF JUDGES IS TOTALLY UNMERITED - I ALSO ACKNOWLEDGE - BECAUSE IT IS SO - THAT SOME JUDGES IN RECENT YEARS REALLY HAVE BEEN ROVING ALL OVER THE LOT -- REALLY HAVE BEEN DOING A GREAT AMOUNT OF JUDICIAL LABOR THAT HAS EXTENDED JUDICIAL TRADITIONS.

IN SMALL DISCUSSIONS - IN CONVERSATIONAL GROUPS - NON-LAWYER CITIZENS - AS WE ALL KNOW - DO GRIPE WITH CONVICTION

THAT THE COURTS OF TODAY ARE - WITHOUT PORTFOLIO OR AUTHORITY - ATTEMPTING - OFTEN UNSUCCESSFULLY - TO RUN SCHOOLS AND PRISON SYSTEMS - AND TO REGULATE ALMOST EVERYTHING - AND AS THOSE CITIZENS SAY - THINGS THAT THEY KNOW LITTLE ABOUT. BUT OF COURSE THAT LAY VERSION OF WHAT COURTS ARE DOING CONCEALS MORE THAN IT REVEALS. ALMOST ALWAYS - IT IS MADE IN VERY GENERAL TERMS WITHOUT SPECIFICITY. IN VIRTUALLY ALL OF THE CASES IN WHICH JUDGES HAVE ENTERED REMEDIAL AREAS THAT - IN THE JUDGMENT OF SOME - MORE PROPERLY AND MORE EFFECTIVELY SHOULD HAVE BEEN DEALT WITH BY OTHER SOCIETAL INSTITUTIONS - THE COURTS HAVE DONE SO BY REASON OF THE DEFAULT OF THOSE OTHER SYSTEMIC BRANCHES - AND USUALLY - IN MY JUDGMENT - BY REASON OF THE SPECIFIC DEFAULT OF THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE STATE AND

FEDERAL GOVERNMENT. THE COURTS BY THE OVERWHELMING CHOICE OF THE PEOPLE SEEMINGLY HAVE BECOME THE FORUM FOR REDRESS OF ALL THINGS UNFAIR IN LIFE - TRULY - THE OPPRESSED CITIZEN'S LAST HOPE - BECAUSE THE PEOPLE HAVE LEARNED THAT THE COURT WILL MAKE THE HARD CHOICES THAT OTHER GOVERNMENT OFFICIALS DUCK.

SOLVING THE VEXING PROBLEM OF WHAT A JUDGE SHOULD DO WHEN MATTERS IGNORED BY OTHERS COME INTO THE COURTS PROBABLY IS THE MOST DIFFICULT SINGLE TASK FACED BY THOSE OF US WHO WISH TO INSURE THE CONTINUING VIABILITY OF THE COURTS - AS WE HAVE KNOWN THEM - AS AN INSTITUTION. I MYSELF DO NOT KNOW WHAT WE SHOULD DO - ALTHOUGH IN MOST CASES I READILY UNDERSTAND WHY THE INVOLVED JUDGE DID WHAT HE DID.

TO ME - JUDGES GET INVOLVED IN DECREEING DRASTIC

REMEDIES AGAINST THE GOVERNMENT IN TOUGH AREAS PRIMARILY BECAUSE IT IS THEIR RESPONSIBILITY TO SEE THAT JUSTICE IS DONE - AND IF THEY DO NOTHING - JUSTICE WILL NOT BE DONE. GENERALLY - THE JUDGE BEGINS BY ONLY HOLDING WHAT THE GOVERNMENT CANNOT DO -- THE JUDGE DOES NOT POINT OUT WHAT GOVERNMENT CAN DO. SOMETIMES THAT IS ENOUGH. BUT MORE OFTEN - THE GOVERNMENT THEN DOES NOTHING - AND THE ONLY JUDICIAL ALTERNATIVE THEN IS FOR A COURT DECREED RESOLUTION. UNDER SUCH CIRCUMSTANCES - THE ANSWER TO SUCH JUDICIAL ACTIVISM MOST CERTAINLY IS NOT TO CLOSE THE COURT HOUSE DOOR. IT IS TO MAKE THOSE OTHER GOVERNMENTAL INSTITUTIONS DO RIGHT.

THE TRUTH IS THAT IN THE MAIN THE COURTS HAVE PERFORMED WELL - PERHAPS TOO WELL. I PERSONALLY BELIEVE

THAT THE MOST SUCCESSFUL GOVERNMENT INSTITUTION OF ALL TIMES HAS BEEN THE SUPREME COURT OF THE UNITED STATES. OUR BLINDFOLDED FIGURE HOLDING THE SCALES OF JUSTICE HAS BEEN WORLDWIDE BOTH A SYMBOL AND A REALITY. THE COURTS HAVE ACHIEVED SUCCESS WHERE THE OTHER INSTITUTIONS HAVE NOT - SUCCESS AS SEEN BY THE NEGLECTED AND IGNORED - AND THE POOR AND THE WEAK - AS BEING A MEANINGFUL VEHICLE FOR ACHIEVING DESIRABLE SOCIAL CHANGE.

THAT VERY SUCCESS HAS CREATED THIS PROBLEM: AS RELIANCE UPON THE COURTS HAS INCREASED - THERE HAS BEEN A CONCOMMITANT DECREASE IN THE INSTITUTIONAL POWER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT.

DEMOCRATIC INSTITUTIONS TODAY SIMPLY ARE NEITHER

AS DEMOCRATIC NOR EFFECTIVE AS THEY ONCE WERE. BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES HAVE BECOME INCAPABLE OF RESOLVING TOUGHER QUESTIONS OF PUBLIC POLICY. GOVERNMENTAL CAREER EMPLOYEES - WHO ACTUALLY SET MOST OFFICIAL ACTION - ARE USUALLY AS INSULATED FROM POPULAR ACCOUNTABILITY AS JUDGES - AND OUR FRAGMENTED AND HIGHLY POLITICAL LEGISLATURES TODAY STILL ARE NOTORIOUSLY SWAYED BY SPECIAL INTEREST GROUPS. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES HAVE NO CHOICE BUT TO ACT.

THAT DEFAULT BY OTHER BRANCHES OF GOVERNMENT - IN MY ESTIMATION - HAS HURT THE JUDICIAL SYSTEM IN TWO WAYS:

<u>QUANTITATIVELY</u> - THE COURTS ARE CARRYING TOO HEAVY A BURDEN --

AND PROBABLY A BURDEN BEYOND THE CAPACITY OF MITIGATION BY MERELY INCREASING THE NUMBER OF JUDGES -- AND QUALITATIVELY - THE COURTS ARE BEING ASKED TO SOLVE PROBLEMS FOR WHICH THEY ARE NOT INSTITUTIONALLY EQUIPPED -- OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF GOVERNMENT.

IF THE JUDICIAL SYSTEM IS TO FUNCTION AS IT WAS DESIGNED - A REWORKING OF OUR OWN CONCEPTION OF THE JUDICIAL SYSTEM IS NOW TIMELY. LAWYERS - JUDGES - AND JUDICIAL ADMINISTRATORS SHOULD RECOGNIZE THAT JUSTICE NEED NOT NECESSARILY EMANATE PRIMARILY FROM THE COURTS. INDEED - LAWYERS - JUDGES - AND JUDICIAL ADMINISTRATORS MORE THAN OTHERS HAVE AN OBLIGATION TO LOOK ELSEWHERE THAN THE COURTS TO SECURE CONFLICT RESOLUTION. THEY MUST CONVINCE THEIR CONSTITUENTS -

THEIR CUSTOMERS IF YOU WILL - THAT OTHER FORUMS ARE APPROPRIATE ARENAS FOR SEEKING REDRESS. THE AMERICAN PUBLIC TODAY PERCEIVES THE COURTS AS JACKS-OF-ALL-TRADES - AVAILABLE TO FURNISH THE ANSWER TO WHATEVER MAY TROUBLE US: SHALL WE PROSECUTE A WAR - OR MAKE PEACE? WHAT IS LIFE - OR WHEN DOES DEATH BEGIN? SHALL WE ACHIEVE RACIAL INTEGRATION BY CUMBERSOME BUSING OF CHILDREN TO FAR-AWAY SCHOOLS? HOW SHOULD WE OPERATE PRISONS AND MENTAL INSTITUTIONS? SHALL WE BUILD NUCLEAR POWER PLANTS - AND IF SO - WHERE? SHALL THE CONCORDE FLY TO OUR SHORE? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? SHALL THE SNAIL DARTER SURVIVE? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE? A LAWSUIT IS PROBABLY QUICKER

AND CHEAPER THAN LOBBYING OR A REFERENDUM AND MORE AUTHORITATIVE THAN A PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A HIGHLY CONTROVERSIAL LEGAL DECISION ACCOMPLISH? IT IS SIMPLY A JUDICIAL PRONOUNCEMENT AND NOTHING MORE. IT DOES NOT SETTLE THE DIVISIVE MORAL - ETHICAL AND POLITICAL QUESTIONS THAT LIE THEREUNDER. IT SIMPLY IS NOT AN EXPRESSION OF THE POPULAR WILL NOR THE PUBLIC WEAL - BUT ONLY THE JUDGMENT OF A SINGLE JUDGE OR A SINGLE APPELLATE COURT. NOT SURPRISINGLY - MANY WHO CHERISH JUSTICE HAVE NOW REACHED THE CONCLUSION THAT IF THIS DEFAULT BY NON-JUDICIAL AUTHORITIES CONTINUES TO MANDATE THIS SHIFT BY THE PEOPLE TO THE AUTHORITY OF THE COURTS - THE LIVING LAW - IT ULTIMATELY WILL SEVERELY IMPAIR OR DESTROY THE BALANCE BETWEEN THE VARIOUS BRANCHES

OF GOVERNMENT SET FORTH IN OUR NOBLE CONSTITUTION. IF THAT IS SO - AS I TOO PERSONALLY BELIEVE - THEN THE PRINCIPAL TASK FACING THOSE OF US WHO WORK IN THE LAW AND HONOR THE JUSTICE IT APPARENTLY ALONE NOW DISPENSES IN THE DIFFICULT SOCIAL ISSUES OF OUR TIME IS THE RESTORATION OF A PROPER BALANCE BETWEEN ALL THREE OF THE PRINCIPAL BRANCHES OF GOVERNMENT. THE EXECUTIVE AND THE LEGISLATIVE BRANCHES MUST JOIN THE COURTS IN THE RESOLUTION OF HARD SOCIAL PROBLEMS.

PERHAPS OUR EFFORTS TO RESTORE THAT BALANCE SHOULD START WITH A RECOGNITION - AT LEAST BY LAWYERS - JUDGES AND JUDICIAL ADMINISTRATORS - OF THE PRESENTLY UNPOPULAR VIEW THAT OUR COURTS REALLY SHOULD BE ONLY INSTITUTIONS OF LAST RESORT. COURTS SHOULD NEVER BE CONSIDERED TO BE THE FIRST

STOP IN CORRECTING SOCIAL INJUSTICE - EVEN THOUGH MANY MODERN LITIGANTS AND THEIR LAWYERS STEER TO THAT COURSE. WHILE I UNDERSTAND THE COMPULSION OF JUDGES TO ACT TO CORRECT ALL WRONGS BROUGHT BEFORE THEM - THE OVER-REACTION OF SOME JUDGES IN A FEW INSTANCES HAS UNDERSTANDABLY LED THE PUBLIC TO BLAME ALL JUDGES. IT IS INFREQUENT NOW TO SEE OUR COURTS GOING ALL OUT TO CONFINE OR RESTRICT THE IMPACT OF A CONSTITUTIONAL OR STATUTORY DECISION ONLY TO THE CASE AT HAND. JUDGES FACED WITH AN UNCONSTITUTIONAL LAW RARELY SEEM CONTENT WITH SIMPLY DECLARING IT TO BE SO -- INSTEAD THEY OFTEN SEEM TO PREFER SOME SORT OF SALVAGE AT THE PRICE OF FORSAKING THEIR JUDICIAL DISPUTE-RESOLVING ROLE FOR THAT OF THE LEGISLATIVE POLICY MAKER. INDEED - IT SEEMS TO ME THAT MANY JUDGES FREQUENTLY DESIGN THEIR DECISION SO

THAT IT WILL HAVE THE BROADEST POSSIBLE PUBLIC IMPACT - IN EXACTLY THE SAME WAY THEY AS AN INDIVIDUAL WOULD DO IF THAT INDIVIDUAL WAS ACTING IN A LEGISLATIVE CAPACITY.

AS FAR AS POSSIBLE - WE SHOULD PRESERVE OUR JUDICIAL FORUMS FOR DOING ONLY THAT WHICH CANNOT BE DONE ELSEWHERE. THAT IS A SIMPLE TRUTH - PERHAPS INDISPUTALBE - BUT IT IS ONE NOW ACCEPTED AT BEST ONLY BY LIP SERVICE BY MOST JUDGES - LAWYERS - AND LITIGANTS. IT IS MY THESIS TO THIS ANNUAL CONFERENCE OF THE NATIONAL ASSOCIATION OF TRIAL COURT ADMINISTRATORS THAT AN URGENT QUESTION WHICH MUST BE FACED BY THOUGHTFUL PEOPLE IS WHETHER AS A MATTER OF SOCIAL PRINCIPLE OUR COURTS SHALL IN THE FUTURE BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM-SOLVERS - OF OUR SOCIETY. SHOULD NOT

WE NOW DEMAND THAT OTHER GOVERNMENTAL INSTITUTIONS TOO DO WHAT THEY WERE CREATED TO DO?

ADMITTEDLY - JUDGES - BEING HUMAN - ARE NOT ADVERSE TO THEIR ENLARGED ROLE AND EXPANDED RESPONSIBILITY. MANY EVEN CHERISH THEIR ENLARGED OPPORTUNITIES. IT IS EXHILIRATING TO ADMINISTER RELIEF TO A UNIVERSE OF VICTIMS - AND IF SOME ARE UNKNOWN AND UNKNOWABLE - THEN TO DISTRIBUTE LARGESSE TO THE DESERVING. A GIFTED JUDGE OFTEN FINDS IT A REWARDING AND SELF-FULFILLING EXPERIENCE TO WRITE A PRESCRIPTION FOR THE REHABILITATION AND PACIFICATION OF A LARGE STRIFE-TORN COMMUNITY.

BUT IN A DEMOCRATIC SOCIETY THERE HAS TO BE NUMEROUS QUESTIONS ABOUT THOSE ALL ENCOMPASSING IMPERIAL PRONOUNCEMENTS - MADE BY A SINGLE JUDGE ACTING SOMEWHAT AS A

MINI-LEGISLATURE. AT LEAST SUCH JUDGMENTS BOTHER ME AS AN INDEPENDENT LAWYER - EVEN THOUGH I WELL KNOW THAT SOME OF THOSE JUDICIAL PRONOUNCEMENTS HAVE HAD BRILLIANT CONCLUSIONS - HAVE ACHIEVED BENEFICIAL RESULTS WHICH WOULD HAVE PERHAPS BEEN IMPOSSIBLE TO ATTAIN OTHERWISE THROUGH THE POLITICAL PROCESS. THE ONE-MAN ONE-VOTE DECISION OF THE UNITED STATES SUPREME COURT IS PERHAPS THE CLEAREST EXAMPLE.

SO LET US THINK TODAY AGAIN ABOUT THE FUTURE ROLE OF THE COURTS IN CONNECTION WITH THE EVEN BIGGER DEMANDS WHICH INEVITABLY WILL SOON BE PLACED UPON THEM. OUR COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF OUR CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE.

THE RISING CRIME RATE CONTINUES TO HAVE ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF OUR SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE. WE ARE WITNESSING QUITE PROPERLY A SEXUAL REVOLUTION - THERE HAS BEEN AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE TO THE ENVIRONMENT -- I COULD GO ON AND ON. BUT DO WE AS A FREEDOM-LOVING GROUP OF RUGGED INDIVIDUALS REALLY BELIEVE THAT THE ORDINARY - NORMAL PERSON CALLED UPON TO SIT AS A JUDGE HAS ANY SPECIAL APTITUDE WHICH MAKES HER OR HIM ALONE SUITABLE CUSTODIANS OF THE RESPONSIBILITY FOR THE SOLUTION OF THESE VEXING PROBLEMS? IS THERE ANYTHING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF SUCH PROBLEMS?

INDEED NOT. IT IS ONE THING FOR JUDGES TO DECIDE BI-PARTY CONTROVERSIES AND - IN SO DOING - PRONOUNCE PRINCIPALS WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIMES FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS.

AND FOR ALL THEIR POWER - JUDGES ADMITTEDLY REMAIN REMARKABLY UNACCOUNTABLE AND UNKNOWN. TO MOST PEOPLE THEY ARE AS THEY SHOULD BE - FACELESS MEN AND WOMEN IN BLACK ROBES. INDEED - ALL OF THOSE OF US IN THE JUSTICE BUSINESS TEND TO SPEAK A LANGUAGE THAT OFTEN LEAVES THE AVERAGE CITIZEN BEWILDERED. SINCE UNDER OUR SYSTEM TRIAL JUDGES

ARE RESPONSIBLE ONLY TO HIGHER JUDGES - IT IS NOT SURPRISING THAT MANY CITIZENS FEEL THAT SUPREME COURT JUSTICES ARE BEHOLDEN TO NO ONE AT ALL. YET WE ALL KNOW THAT JUDGES - TO BE IMPARTIAL ARBITERS - REALLY CAN HAVE NO RAPPORT WITH THE PEOPLE AS A WHOLE -- IF THEY DO - THEY CANNOT BE IMPARTIAL. THE SYSTEM REQUIRES THAT TO BE SO.

SO UNDERSTANDABLY - THE PUBLIC FEELING OF A SUBSTANTIAL GROUP PERSISTS: OUR AMERICAN JUDGES HAVE BEEN FORCED BY POPULAR DEMAND AND DEFAULT OF GOVERNMENTAL POLICY-MAKERS TO TAKE ON TOO BIG A BURDEN - WE HAVE MADE THEM DO WHAT THEY HAVE DONE - AND AS A RESULT - AT LEAST SOME OF OUR PEOPLE NOW CLAMOR THAT JUDGES BE HELD MUCH MORE ACCOUNTABLE FOR BOTH THEIR JUDGMENTS AND THEIR JUDICIAL REMEDIES. I

BELIEVE THAT THOSE WHO LOVE LAW AND CHERISH FAIRNESS AND JUSTICE - AS A COLLECTIVE ENTITY - HAVE AN OBLIGATION TO INSURE THAT ANY REVISED ACCOUNTABILITY NOT COME AT THE COST OF COMPROMISING JUDICIAL INDEPENDENCE - AND THAT THE JUDGES MUST BE PROTECTED FROM ACCELLERATING PUBLIC CLAMOR BY FORCING OTHERS TO DO THE HARD JOBS THAT THEY SHOULD BE DOING BUT ARE NOT NOW DOING. WE WHO VALUE BOTH MAJORITY RULE AND INDIVIDUAL FREEDOM LONG HAVE REALIZED THAT AN INDEPENDENT JUDICIARY IS THE BULWARK OF OUR WAY OF LIFE. TO SAFEGUARD BOTH PRECIOUS VALUES - PERHAPS IT IS PROPER FOR US NOW TO RELY ON THE JUDGES THEMSELVES TO EXERCISE GREATER SELF-RESTRAINT. EVEN THE STRIDENT FEW WOULD NOT ASK THE JUDGES TO UNDO ALL THE

RIGHTS THEY HAVE ADVANCED THROUGHOUT OUR HISTORY. HAVING DONE SO MUCH TO CHANGE SOCIETY - PERHAPS IT IS TIME THAT THE JUDICIARY - STATE AND FEDERAL - CAN NOW HELP TO REFURBISH OUR DEFAULTING LEGISLATIVE AND EXECUTIVE BRANCHES BY HENCEFORTH DOING AS LITTLE AS POSSIBLE - YET WE KNOW THAT JUDGES MUST CONTINUE TO RENDER JUSTICE TO OUR PEOPLE IF NO OTHER GOVERNMENT AGENCY DOES SO. JUDGES ARE - HAVE BEEN - AND MUST BE THE LAST BULWARK OF A FREE AMERICAN AGAINST THOSE WHO WOULD UNJUSTLY OPPRESS HIM OR HER - AND THOSE WHO UNTHINKINGLY BLAME JUDGES FOR DOING JUSTICE AND CORRECTING OPPRESSIVE GOVERNMENT SHOULD PLACE THE RESPONSIBILITY UPON THOSE WHO BY THEIR DEFAULT HAVE FORCED THE JUDGES TO ACT.

IN CLOSING - I ADVANCE MY UNSHAKEABLE CONCLUSION

THAT THE COURTS OF THE SEVERAL STATES AND THE COURTS OF THIS INDIVISIBLE NATION CANNOT BE THE PRIMARY AGENCY RELIED UPON TO SOLVE ALL OUR SOCIAL PROBLEMS AND ILLS. THE COURTS HERETOFORE HAVE DONE WHAT HAD TO BE DONE. OTHER INSTITUTIONS - OTHER BRANCHES OF GOVERNMENT - AND THOSE FORCES OUTSIDE OF GOVERNMENT HAVE NOT - LEAVING IT TO THE JUDGES TO DO. AND THOSE OTHERS MUST IMMEDIATELY BE REQUIRED TO ASSUME THEIR FAR GREATER AND LEGITIMATE RESPONSIBILITY. WE OF COURSE DO NOT NEED - OR WANT - HERE IN OUR NOBLE REPUBLIC AN IMPERIAL JUDICIARY - BUT WE MUST RECOGNIZE THAT PERHAPS OUR PEOPLE WILL DEMAND ONE IF OTHER AREAS OF GOVERNMENT CONTINUE TO DEFAULT IN THEIR OBLIGATIONS.

THANK YOU.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 212

VOLUME XVI

REMARKS BY:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	INVESTITURE OF THE HONORABLE WILLIAM J. CASTAGNA JUDGE, U. S. DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA
PLACE:	COURTROOM #1 - THIRD FLOOR U. S. COURTHOUSE AND POST OFFICE BUILDING TAMPA, FLORIDA
DATE:	FRIDAY, SEPTEMBER 14, 1979 3:00 P.M.

THE CHARACTER OF ANY COUNTRY'S JUDGES IS ONE TEST OF ITS CIVILIZATION. IN A COUNTRY AS SATURATED IN LAW AS THE UNITED STATES - THE CHOICE OF WHO IS TO SIT ON THE BENCH ASSUMES PARTICULAR IMPORTANCE -- AND IS BOUND TO AROUSE CONTENTION FROM TIME TO TIME. PARTICULARLY IS THAT SO OF THE FEDERAL COURTS.

IN THE FEDERAL SYSTEM THE CONSTITUTION GIVES THE APPOINTING POWER TO THE PRESIDENT - WITH THE CONSENT OF THE SENATE. BOTH THE PRESIDENT AND THE SENATE OF COURSE WELCOME - INDEED SEEK - ASSISTANCE IN THEIR DISCHARGE OF THAT PARTICULAR CONSTITUTIONAL DUTY WHENEVER THERE IS A FEDERAL JUDICIAL VACANCY. IF WE THE PEOPLE ARE THUS TO ASSIST - IT IS PROPER THAT CONSIDERATION OF A PARTICULAR NOMINEE RAISE

IN EVERY INSTANCE BROAD QUESTIONS OF JUDGMENT ON WHAT SHOULD BE THE QUALIFICATIONS FOR THE FEDERAL BENCH - AND THAT SHOULD BE SO AGAIN AND AGAIN.

ONE WAY TO APPROACH THE PROBLEM IS BY COMPARING IT TO THE PRACTICE IN ENGLAND. HIGH COURT JUDGES ARE PICKED BY THE LORD CHANCELLOR ONLY FROM THE LAWYERS WHO ARGUE CASES IN COURT. THERE ARE ONLY ABOUT 2,500 PRACTICING BARRISTERS - AND THUS THE LEADERS OF THE TRIAL BAR ARE ALL KNOWN TO EACH OTHER AND TO THE JUDGES.

THE RESULT OF THE ENGLISH SYSTEM IS TO PRODUCE A JUDICIARY OF HIGH PROFESSIONAL COMPETENCE. YET SUBSTANTIAL DOUBTS ABOUT THAT SYSTEM OF JUDICIAL SELECTION HAVE BEGUN TO BE EXPRESSED IN ENGLAND -- A CONCERN THAT THE JUDGES COME

TOO MUCH FROM THE SAME MOLD - THE SAME CLASS - WITH THE SAME RATHER NARROW OUTLOOK ON SOCIAL ISSUES.

I SUGGEST THAT PICKING FEDERAL JUDGES FROM SO THIN A PROFESSIONAL SLICE WOULD BE TOTALLY UNACCEPTABLE IN THIS ROBUST COUNTRY WHERE - UNLIKE BRITAIN - JUDGES CONTINUALLY PASS ON THE MOST PROFOUND QUESTIONS. THE DUTY TO ENFORCE THE CONSTITUTION AFFECTS THE WHOLE ROLE OF AMERICAN JUDGES - ESPECIALLY THOSE ON FEDERAL COURTS - AND IT SUGGESTS TO ME THAT THEY SHOULD COME FROM A DIVERSITY OF BACKGROUNDS.

JUDICIAL COMPETENCE HAS NOTHING TO DO WITH RACE - SEX - OR ETHNIC STRAIN - BUT IN A PLURALISTIC SOCIETY SUCH AS OURS - A DIVERSE JUDICIARY IS MUCH MORE LIKELY TO WIN THE FULL CONFIDENCE OF A DIVERSE CITIZENRY. ON THE OTHER HAND - A

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ONLY DIVERSITY OF BACKGROUNDS IS LIKELY TO PRODUCE SOME DIVERSITY OF VIEWS AND PERSPECTIVES - AND SUCH DIVERSITY SHOULD BE WELCOMED ON THE FEDERAL BENCH - PARTICULARLY WHEN OUR COURTS ARE BEING CALLED UPON TO RESPOND TO DIFFICULT ISSUES THAT AT BEST CAN BE DEALT WITH BY JUDICIAL ART AND NOT SCIENCE.

LEARNED HAND - ONE OF THE MORE REVERED FEDERAL JUDGES - MADE A MOST RINGING STATEMENT OF THE LARGE VIEW THAT A JUDGE OUGHT TO BRING TO INTERPRETING THE LAW. JUDGE HAND SAID

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THAT GLORIOUS STATEMENT - VISIONARY EVEN AS TO APPELLATE COURT APPOINTMENTS - HAS TO BE READ AGAINST OTHER REALITIES SO FAR AS TRIAL COURTS ARE CONCERNED. TODAY - WITH EVER BURGEONING CASE LOADS - FEDERAL TRIAL JUDGES SIMPLY MUST HAVE THE TECHNICAL TRAINING - THE LEGAL INTEREST AND EXPERIENCE - RAPIDLY TO GET THROUGH ENORMOUS VOLUMES OF OFTEN HIGHLY COMPLICATED WORK.

FEDERAL TRIAL JUDGES MUST - FOR EXAMPLE - GRAPPLE WITH THE INTRICACIES OF THE INTERNAL REVENUE CODE - AND THE SHADOWY DIVIDING-LINES OF THE ANTITRUST LAWS - AND PATENTS - AND SECURITIES AND THE VARIOUS ADMINISTRATIVE STATUTES. THEY MUST ENFORCE THE CRIMINAL LAW - WITH ALL ITS RECENT ENCRUSTATION OF CONSTITUTIONAL CONSIDERATIONS. JUDGE LEARNED HAND NOTHWITHSTANDING - WE CERTAINLY NOW KNOW THAT THE LIFE OF A FEDERAL TRIAL JUDGE DOES NOT CONSIST OF THINKING IN THE ABSTRACT ABOUT GREAT PHILOSOPHICAL ISSUES. A FEDERAL JUDGE MUST WORK - AND WORK VERY HARD. INDEED - A FEDERAL JUDGE'S REPUTATION TODAY RESTS IN LARGE PART ON HIS OR HER ABILITY TO DO TECHNICAL LEGAL WORK - TO ANALYZE A RECORD OR TO DISSECT A STATUTE - TO MOVE HER OR HIS DOCKET - EXPEDITIOUSLY BUT FAIRLY.

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BY EDUCATION - BY EXPERIENCE - BY APTITUDE - BY DEMONSTRATED CHARACTER - BY THE VERY NATURE OF THE MAN - WILLIAM CASTAGNA APPEARS TO ME TO POSSESS IN A UNIQUE WAY THE POTENTIAL TO SERVE THIS COURT IN SUCH A WAY THAT HE WILL IN TIME BE RECORDED AS A PEER OF THE GREAT JUDGES WHO OVER THE YEARS HAVE GRACED THIS BENCH. AS A MEMBER OF THE

BAR OF THIS COURT WHO HONORS JUSTICE AND WHO CHERISHES THE FRIENDSHIP OF CAROLYN AND BILL CASTAGNA - I AM PERSONALLY PLEASED TO BE A PARTICIPANT IN THIS INVESTITURE.

REMARKS BY:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	INVESTITURE OF THE HONORABLE WILLIAM J. CASTAGNA JUDGE, U. S. DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA
PLACE:	COURTROOM #1 - THIRD FLOOR U. S. COURTHOUSE AND POST OFFICE BUILDING TAMPA, FLORIDA (611 N. Florida Ave.)
DATE:	FRIDAY, SEPTEMBER 14, 1979

THE CHARACTER OF ANY COUNTRY'S JUDGES IS ONE TEST OF ITS CIVILIZATION. IN A COUNTRY AS SATURATED IN LAW AS THE UNITED STATES - THE CHOICE OF WHO IS TO SIT ON THE BENCH ASSUMES PARTICULAR IMPORTANCE -- AND IS BOUND TO AROUSE CONTENTION FROM TIME TO TIME. PARTICULARLY IS THAT SO OF THE FEDERAL COURTS.

IN THE FEDERAL SYSTEM THE CONSTITUTION GIVES THE APPOINTING POWER TO THE PRESIDENT - WITH THE CONSENT OF THE SENATE. BOTH THE PRESIDENT AND THE SENATE OF COURSE WELCOME - INDEED SEEK - ASSISTANCE IN THEIR DISCHARGE OF THAT PARTICULAR CONSTITUTIONAL DUTY WHENEVER THERE IS A FEDERAL JUDICIAL VACANCY. IF WE THE PEOPLE ARE THUS TO ASSIST - IT IS PROPER THAT CONSIDERATION OF A PARTICULAR NOMINEE RAISE

IN EVERY INSTANCE BROAD QUESTIONS OF JUDGMENT ON WHAT SHOULD BE THE QUALIFICATIONS FOR THE FEDERAL BENCH - AND THAT SHOULD BE SO AGAIN AND AGAIN.

ONE WAY TO APPROACH THE PROBLEM IS BY COMPARING IT TO THE PRACTICE IN ENGLAND. HIGH COURT JUDGES ARE PICKED BY THE LORD CHANCELLOR ONLY FROM THE LAWYERS WHO ARGUE CASES IN COURT. THERE ARE ONLY ABOUT 2,500 PRACTICING BARRISTERS - AND THUS THE LEADERS OF THE TRIAL BAR ARE ALL KNOWN TO EACH OTHER AND TO THE JUDGES.

THE RESULT OF THE ENGLISH SYSTEM IS TO PRODUCE A JUDICIARY OF HIGH PROFESSIONAL COMPETENCE. YET SUBSTANTIAL DOUBTS ABOUT THAT SYSTEM OF JUDICIAL SELECTION HAVE BEGUN TO BE EXPRESSED IN ENGLAND -- A CONCERN THAT THE JUDGES COME

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SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 213

VOLUME XVI

MORRISON LECTURE BY: CHESTERFIELD SMITH
LAWYER
TAMPA, FLORIDA

BEFORE: STATE BAR OF CALIFORNIA
BONAVENTURE HOTEL
LOS ANGELES, CALIFORNIA
MONDAY, SEPTEMBER 17, 1979
12:00 NOON

TITLE: THE OLD LAWYER SAID: "I LOOK OUT FOR MY PAYING CLIENTS" -- THE YOUNG LAWYER RESPONDED: "BUT GOOD LAWYERS MUST ALSO DO SOME FREE PUBLIC SERVICE."

TIME: THIRTY MINUTES

IS THERE AN ETHICAL RESPONSIBILITY ON A LAWYER FOR FREE PUBLIC SERVICE? DOES A GOOD LAWYER HAVE AN OBLIGATION TO GIVE SOME PORTION OF PROFESSIONAL TIME FOR FREE PUBLIC SERVICE? IS A GOOD LAWYER REQUIRED TO RENDER FREE PROFESSIONAL SERVICE WITH THE SAME PROFESSIONAL DEDICATION AS IS OWED TO A LAWYER'S PAYING CLIENTS? IS IT TIME FOR AN EVOLUTIONARY PROGRESS IN LAWYER ETHICS BY NOW IMPOSING PEER PRESSURE ON THOSE WHO UNREASONABLY IGNORE THAT LOFTY OBLIGATION OF LAWYERS? SHOULD THOSE LAWYERS WHO AFTER NOTICE AND HEARING REPEATEDLY REFUSE TO ASSUME THEIR PART OF THAT PROFESSIONAL OBLIGATION HENCEFORTH BE CHASTISED BY THE ORGANIZED BAR? I WOULD ANSWER EACH QUESTION WITH A QUALIFIED "YES".

MANY INDIVIDUAL LAWYERS DO NOT DISCHARGE

IN ANY SUBSTANTIAL WAY WHAT I PERSONALLY PERCEIVE

TO BE AN EXISTING PROFESSIONAL OBLIGATION TO IMPROVE THE LAW -

TO ENHANCE THE ADMINISTRATION OF JUSTICE - AND TO MAKE BETTER

THE SERVICES OF THE LEGAL PROFESSION. THE GRANDIOSE LEGEND

OFTEN VOICED AT BAR MEETINGS THAT LOCAL LAWYERS AS NEEDED

WILL ROLL UP THEIR SLEEVES AND GIVE UNSELFISHLY OF THEIR

TIME TO DO THAT WHICH LAWYERS OUGHT TO DO _ UNFORTUNATELY -

IS A MERE FANTASY. WHILE MORE YOUNG LAWYERS

BY THEIR GOOD DEEDS ADD LUSTER TO THE LAW THAN DO OLDER LAWYERS -

LAMENTABLY AMONG THOSE LAWYERS LEAST CONCERNED WITH JUSTICE AS

A MAJESTIC PART OF LIFE - AND LEAST CONCERNED WITH THE PRACTICE

OF LAW AS A GRAND AND EXALTED CALLING - ARE MORE THAN A FEW OF THOSE

WHO IN THE PAST SEVERAL YEARS HAVE JOINED THE BAR.

ESPECIALLY DOES THAT SEEM SO TO ME AMONG THOSE WHO PRESENTLY ARE BECOMING LAWYERS. IF INDEED THAT IS A TREND - IT IS ONE WHICH MUST BE REVERSED IF THE LEGAL PROFESSION IS EVER TO RECEIVE WIDER PUBLIC SUPPORT.

A GOOD LAWYER - AS A MEMBER OF A LEARNED PROFESSION - QUITE CLEARLY SHOULD CULTIVATE KNOWLEDGE OF THE LAW BEYOND ITS USE FOR PAYING CLIENTS - AND A GOOD LAWYER SHOULD EMPLOY THAT ADDED KNOWLEDGE IN THE BETTERMENT OF THE LAW. INDUBITABLY THAT TRUISM LONG HAS BEEN A PART OF LAWYERING. A GOOD LAWYER ALMOST BY DEFINITION MUST BE CONTINUALLY MINDFUL OF CURRENT DEFICIENCIES IN THE ADMINISTRATION OF JUSTICE AND WITHOUT PERSONAL REWARD CONTINUALLY WORK FOR BETTER COURTS - MORE QUALIFIED JUDGES - AND FAIRER AND MORE EXPEDITIOUS

LEGAL PROCEDURE. A GOOD LAWYER MUST TOO BE COGNIZANT THAT THERE ARE MANY PEOPLE WHO CANNOT AFFORD ADEQUATE LEGAL ASSISTANCE - AND THE GOOD LAWYER SHOULD NOW AS IN THE PAST DEVOTE TIME AND INFLUENCE IN THEIR BEHALF. BUT TODAY A GOOD LAWYER MUST BE EQUALLY AWARE THAT THERE ARE MANY OTHER AREAS WHICH CRY OUT IN EQUALLY LOUD VOICES FOR THE LAWYER'S DISTINCTIVE TALENTS - PLACES WHERE SOCIETAL LEGAL REQUIREMENTS PRESENTLY ARE NOT FULLY MET.

THE FACT THAT SOME GOOD LAWYERS HAVE PROVIDED LEGAL SERVICES TO THE POOR AT NO COMPENSATION - AS IN LEGAL AID - OR FOR REDUCED COMPENSATION - AS IN GOVERNMENT SPONSORED LEGAL SERVICE PROGRAMS - CANNOT VALIDLY BE LONGER USED BY THE MASS OF LAWYERS NOT SO PARTICIPATING AS A SHIELD AGAINST THE RENDERING OF FREE PUBLIC SERVICE THEMSELVES. THE

INDIGENT CLIENT - WHILE SIGNIFICANT - IS ONLY A PART OF THE PROBLEM - AND A PART IN WHICH THE GOVERNMENT QUITE PROPERLY HAS ASSUMED A FAR GREATER RESPONSIBILITY THAN THE LEGAL PROFESSION.

WORKING FREE PART-TIME IS NOT A GOOD WAY TO ACHIEVE LASTING ECONOMIC SUCCESS - EVEN IF SUCH FREE WORK BE LABELED "PUBLIC SERVICE". ADMITTEDLY - MANY MAGNIFICENT LAWYERS OVER THE YEARS WILLINGLY HAVE RENDERED TO THE PUBLIC SUBSTANTIAL SERVICE WITHOUT RECEIVING PECUNIARY COMPENSATION. BUT NOT ALL - OR EVEN MOST - HAVE. THUS - IT SEEMS TO ME SUITABLE - PROPER - SEEMLY - AND TIMELY - THAT THE ORGANIZED LEGAL PROFESSION FORMALLY RECOGNIZE THAT EACH LAWYER HAS AN OBLIGATION FOR SOME FREE PUBLIC SERVICE WHICH IF UNREASONABLY IGNORED WARRANTS

PROFESSIONAL SANCTIONS.

HERETOFORE IT HAS PERHAPS BEEN PROFESSIONALLY ACCEPTABLE FOR SOME GOOD LAWYERS TO SERVE ONLY PAYING CLIENTS. IF SO - A NEW PROFESSIONAL STANDARD IS ABORNING. THE SUBSTANTIAL RECOGNITION WHICH HAS BEEN AFFORDED IN YEARS PAST TO THOSE LAWYERS WHO HAVE GROUND AWAY AT THEIR CLIENTS' DEMANDS DAY AFTER DAY AND YEAR AFTER YEAR - TENDING TO THE STORE - NEVER LEAVING THE OFFICE - MINDING WHAT HAS BEEN TRADITIONALLY STYLED "THEIR OWN BUSINESS" - IS UNDERGOING SUBSTANTIAL CHANGE. NO LONGER CAN THE OLD LAWYER - OR THE YOUNG - LOOK OUT ONLY FOR PAYING CLIENTS. NO LONGER CAN THE LEGAL PROFESSION MERIT PUBLIC APPROBATION UNDER A RANDOM AND HAPHAZARD STANDARD THAT LETS SOME LAWYERS DO GOOD AND SOME DO NOT SO GOOD.

BECAUSE SOME LAWYERS STILL MAJESTICALLY DO WHAT GOOD LAWYERS OF A DIFFERENT DAY AND TIME DID AS A DISCHARGE OF THEIR THEN MORE RESTRICTED PROFESSIONAL ENGAGEMENTS CANNOT EXONERATE OTHER LAWYERS FROM FREE PUBLIC SERVICE. LAWYERS WHO WORK WITH NO COMPENSATION OR WITH SUBSTANTIALLY REDUCED COMPENSATION TO MITIGATE THE PROBLEMS OF THE INDIGENT IN OUR JUSTICE SYSTEM ARE - AND ALWAYS WILL BE - RENDERING VALUABLE PUBLIC SERVICE - BUT THE ENTIRE PROFESSION NEVERTHELESS STILL HAS A DUTY TO DO WITHOUT PECUNIARY BENEFIT THOSE OTHER EVEN MORE ESSENTIAL SOCIETAL

ACTIVITIES BEST DONE BY LAWYERS. THE PRIME ONUS OF LAWYERS NOW MUST BE TO MAKE SOCIETY BETTER BY UTILIZING THE LAWYERS' SPECIAL AND UNIQUE SKILLS IN THE PUBLIC INTEREST. THROUGHOUT HISTORY - JUSTICE - ALTHOUGH ALWAYS ELUSIVE - HAS BEEN THE GRANDEST ASPIRATION OF HUMANKIND. LAWYERS - THE PRIME ENVOY OF THE JUSTICE SYSTEM TO THE PEOPLE IT SERVES - HAVE IN MY MIND ALWAYS HAD AN EXALTED AND UNIQUE STATUS WHICH DEMANDED MORE FROM THEM THAN OTHERS. THUS UNDERSTANDABLY THE CIRCUMSTANCES OF SUCH FREE PUBLIC SERVICE ACTIVITY BY A LAWYER IN THE COMPLEXITY OF TODAY'S LEGAL SOCIETY NEVER AGAIN CAN BE SO EXCLUSIONARY AS SIMPLY LEGAL AID FOR THE POOR.

THE PARAMETERS OF LAWYER FREE PUBLIC SERVICE HENCEFORTH MUST BE AS BROAD AND FLEXIBLE AS THE

MINDS OF THOSE WHO WILL DISCHARGE THAT RESPONSIBILITY.

THAT OBLIGATION EXTENDS TO PROVIDING ESSENTIAL LEGAL NEEDS TO ALL AMERICANS - RICH OR POOR - YOUNG OR OLD - MALE OR FEMALE - BLACK OR WHITE - HAPPY OR SAD - GRACIOUS OR SURLY - INDIVIDUALS OR GROUPS - ALL PEOPLE WHOEVER AND FOR WHATEVER REASONS. THAT IS THE LAWYER'S OBLIGATION - AND IF IT IS TO BE MET - EACH LAWYER MUST HELP.

A LAWYER'S CONTRIBUTION TO THE PUBLIC INTEREST THROUGH FREE PUBLIC SERVICE CAN NEVER BE JUDGED BY WHAT WAS ACHIEVED - OR BY THE MONETARY VALUE OF THE SERVICE CONTRIBUTED. IN ALL EVENTS - THAT PRICELESS AND UNIQUE MEASURE OF PROFESSIONAL DEVOTION - CONTRIBUTED TIME - MUST BE A PRIME

FACTOR IN THE DETERMINATION OF WHETHER A LAWYER FULLY HAS DISCHARGED THOSE OBLIGATIONS OF FREE PUBLIC SERVICE. EACH LAWYER MUST PERFORM HER OR HIS OWN DUTY - NO ONE ELSE CAN. FINANCIAL CONTRIBUTIONS - NO MATTER HOW EXTENSIVE - CANNOT DISCHARGE THE INDIVIDUAL LAWYER'S PROFESSIONAL OBLIGATION FOR FREE PUBLIC SERVICE. THE LEGAL PROFESSION IS NOT AN ELITIST ONE IN WHICH THE ECONOMICALLY SUCCESSFUL CAN BUY AMNESTY FOR NOT DOING WHAT ALL LAWYERS ARE OBLIGATED TO DO. INDEED IF THE LAW TRULY IS A VERY SPECIAL LEARNED PROFESSION - THOSE OBLIGATIONS MUST BE NON-TRANSFERABLE.

A MAJOR DIFFICULTY IN LAWYERS CONTRIBUTING TO THE PUBLIC FREE PROFESSIONAL SERVICE IS IN STRIKING THE PROPER

BALANCE BETWEEN THAT PROFESSIONAL TIME DEVOTED FOR PUBLIC SERVICE AND THAT PROFESSIONAL TIME NEEDED FOR THE ECONOMIC NECESSITIES WHICH FACE ALL PROFESSIONAL PEOPLE. EVEN THOSE MANY LAWYERS WHO LONG HAVE ACKNOWLEDGED SOME RESPONSIBILITY FOR FREE PUBLIC SERVICE - BOTH INDIVIDUALLY AND COLLECTIVELY - HAVE NO GUIDANCE AS TO THE TYPE OR EXTENT OF ACTIVITIES THAT WILL DISCHARGE THAT OBLIGATION.

THAT LACK OF AFFIRMATIVE DEMARCATION HAS TO BE ONE REASON WHY MANY OF OUR MORE ECONOMICALLY SUCCESSFUL LAWYERS HAVE DONE LITTLE FREE PUBLIC SERVICE - LEAVING PRIMARILY THE FEW TO DISCHARGE THE LEGAL PROFESSION'S ENTIRE OBLIGATION.

THE COLLECTIVE RESPONSIBILITY OF LAWYERS MUST BE TRANSLATED INTO A DEFINED PROFESSIONAL DUTY THAT EACH LAWYER INDIVIDUALLY RENDER A SHARE OF FREE PUBLIC SERVICE. IF THAT ETHICAL DEMAND IS PLAINLY ENUNCIATED - WITHOUT EQUIVOCATION OR AMBIVALENCE - THE DECISIONAL PROCESS NOW UNIVERSALLY UTILIZED BY THE ORGANIZED BAR IN ESTABLISHING ETHICAL BOUNDARIES WILL IN TIME EVOLVE DEFINITIVE GUIDELINES FOR ITS APPLICATION. THROUGH TRIAL AND ERROR - THROUGH EXPERIMENTATION - LAWYERS ULTIMATELY CAN INCORPORATE INTO DECISIONS INTERPRETING A REVISED CODE OF PROFESSIONAL RESPONSIBILITY THE WHO - HOW - WHAT AND WHEN OF THE FREE PUBLIC SERVICE THAT SOCIETY SHOULD RECEIVE IN EXCHANGE FOR ITS GRANT OF THE EXCLUSIVE PRIVILEGE TO PRACTICE LAW.

THERE ARE OF COURSE INHERENT DIFFICULTIES IN AN ADJUDICATION OF PROFESSIONAL PERFORMANCE INVOLVING SUCH SUBJECTIVE CONSIDERATIONS AS WORK HABITS - JOB REQUIREMENTS - ORGANIZATION AND SELF DISCIPLINE - INTELLIGENCE - EMPLOYMENT RESTRAINTS - PUBLIC RESPONSIBILITIES - INTEGRITY - PERSONAL CHARACTER - AND PROFESSIONAL KNOW-HOW. HOWEVER - PERPLEXITY IN ENFORCEMENT HAS NEVER PREVENTED THE ORGANIZED BAR FROM ADOPTING EVER STRICTER STANDARDS.

CERTAINLY - LAWYERS HAVE INDIVIDUAL CHARACTERISTICS AND PRACTICE DEMANDS WHICH WILL PREVENT THEM FROM BEING

"EQUAL" IN ALL PROFESSIONAL CONTRIBUTIONS. LAWYERS OF NECESSITY UNDER GENERAL ASPIRATIONAL GOALS TO BE OUTLINED BY THE ORGANIZED BAR MUST BE JUDGED ON THEIR SUBSCRIPTIONS TO FREE PUBLIC SERVICE WITH A FULL RECOGNITION OF THEIR DIFFERING CIRCUMSTANCES. IN SOME CASES - THOSE FREE PUBLIC SERVICE ACTIVITIES MIGHT EMBRACE EXTENSIVE WORK WITHIN THE ORGANIZED BAR ITSELF - SUCH AS DISCIPLINARY ACTIVITIES OR LAW REFORM. IN OTHERS - IT MIGHT MEAN WORKING WITH A PUBLIC INTEREST LAW FIRM - RENDERING LEGAL SERVICES TO THOSE WHO ARE UNABLE TO OBTAIN THOSE SERVICES THROUGH THE NORMAL MEANS OF DELIVERY - OR REPRESENTING CHARITABLE ORGANIZATIONS. TO SOME LAWYERS - PERHAPS FREE PUBLIC SERVICE MIGHT WELL INVOLVE

MAINTAINING AND ENHANCING THE LEGAL COMPETENCE OF OTHER LAWYERS - WORKING TO IMPROVE THE AVAILABILITY AND DELIVERY OF LEGAL SERVICES - HELPING WITH CIVIL RIGHTS LAW OR POVERTY LAW - WORKING AS A DEFENDER OF THOSE CHARGED WITH CRIME WHO ARE UNABLE TO SECURE COMPETENT COUNSEL - OR REPRESENTING DIFFUSED INTERESTS IN ADVERSARY PROCEEDINGS INVOLVING THE PUBLIC AT LARGE. ALMOST CERTAINLY - ETHICAL RECOGNITION OF PUBLIC SERVICE MUST ENCOMPASS AT LEAST A MODICUM OF ACTIVITY DESIGNED TO IMPROVE THROUGH CONSTITUTIONAL OR STATUTORY REVISION THE JUSTICE SYSTEM AS A UNIT. MANY

INTERESTS IN FIELDS SUCH AS THE ENVIRONMENT - WELFARE - CONSUMER PROTECTION - CIVIL LIBERTIES - PRIVACY - AND THE POOR EITHER ARE NOT REPRESENTED OR ARE UNDER-REPRESENTED BEFORE LEGISLATURES - EXECUTIVE AGENCIES - AND COURTS.

THE BEST WAY TO MEASURE THE INDIVIDUAL FREE PUBLIC SERVICE REQUIRED OF A LAWYER WILL VARY FROM AREA TO AREA AND PERHAPS FROM BRANCH OF THE LAW TO BRANCH OF THE LAW. ADDITIONALLY - THERE WILL BE MULTIPLE AREAS OF FREE PUBLIC SERVICE OTHER THAN THOSE FEW THAT I HAVE SUGGESTED - WHICH AS ALTERNATIVES OR SUPPLEMENTS - ARE BETTER SUITED TO BOTH SOCIETY AND THE LEGAL PROFESSION. ONLY A LAWYERS' PEER

GROUP SHOULD DETERMINE WHETHER VARIOUS ACTIVITIES PERFORMED ON A RECURRING AND SUBSTANTIAL BASIS ARE AMONG THOSE THINGS WHICH A PARTICULAR LAWYER FREELY SHOULD CONTRIBUTE TO THE PUBLIC WEAL. IN ALL SUCH DETERMINATIONS - DIVERSITY AND EXPERIMENTATION MUST BE FOSTERED AND SUPPORTED. THERE IS NO SINGLE APPROACH. THROUGH VARIETY - THROUGH TRIAL AND ERROR - THROUGH EVOLUTION - THE ORGANIZED BAR BEST CAN GAIN A PROPER UNDERSTANDING OF THE WAYS IN WHICH INDIVIDUAL LAWYERS MOST MEANINGFULLY MAY RENDER GENEROUS PUBLIC SERVICE.

IT IS OF COURSE CLEAR BY NOW THAT I PERSONALLY BELIEVE THAT THE LEGAL PROFESSION OWES TO SOCIETY A GREATER RETURN FOR ITS GRANT OF A PERSONAL SERVICE MONOPOLY THAN HAS EVER BEEN MADE. THERE

ARE MANY DEDICATED AND RESPONSIBLE LAWYERS WHO DISAGREE - WHO SINCERELY CONTEND THAT THE LEGAL PROFESSION HAS LITTLE FAULT - AND THAT CHANGES ARE NOT NEEDED. THEY EARNESTLY PROCLAIM THAT LAWYERS WHO SEEK PROFESSIONAL RESTRUCTURING ARE AGITATORS CREATING MORE PROBLEMS THAN THEY SOLVE. THEY SOMETIMES ASSERT THAT ALL WHO DO NOT CHERISH THE LEGAL PROFESSION AS IT HAS BEEN SHOULD DO SOMETHING ELSE FOR A LIVELIHOOD.

I TOTALLY REJECT THAT CONCEPT. NO LAWYER SHOULD ACCEPT THE LEGAL PROFESSION AS IT IS. LAWYERS

MUST ASPIRE FOR THE ELIMINATION OF IMPERFECTIONS IN THEIR CHOSEN PROFESSION AND IN THE LAW ITSELF. THOSE LAWYERS WHO CANNOT OVERLOOK THE SOCIAL ILLS OF THE JUSTICE SYSTEM - THOSE LAWYERS WHO CANNOT OVERLOOK THE LEGAL PROFESSION'S DEFICIENCIES - THOSE LAWYERS WHO CANNOT OVERLOOK ITS FAILURE TO MAKE ADEQUATE LEGAL SERVICES AVAILABLE TO ALL - THOSE LAWYERS WHO CANNOT OVERLOOK THE INABILITY OF LAW TO RENDER JUSTICE AND FAIRNESS ALIKE TO RICH AND POOR - THOSE LAWYERS WHO REFUSE TO OVERLOOK THE WARTS EASILY FOUND IN THE COURTS - SEEM TO ME TO BE THE ONES WHO CHERISH THE LEGAL PROFESSION AS A SUBLIME CALLING. IT IS THOSE LAWYERS WHO PLACIDLY ACCEPT THE INEQUITIES - THE

PERVERSIONS - THE INJUSTICES - THE CORRUPTIONS - THE INEFFICIENCIES - AND THE UNFAIRNESSES IN THE LAW WHO SEEM TO ME NOT TO HONOR THEIR CHOSEN CAREER.

SOCIETY LONG AGO MADE A DETERMINATION THAT A FIERCELY INDEPENDENT AND UNSHACKLED LEGAL PROFESSION IS ESSENTIAL TO OUR SYSTEM OF GOVERNMENT AND TO THE INDIVIDUAL RIGHTS OF ITS CITIZENS. IT PLACED LAWYERS IN A POSTURE TO BE BOTH FREE AND INDEPENDENT BY ESTABLISHING A MONOPOLY FOR THOSE WHO PRACTICE LAW. IN GRANTING TO LAWYERS THAT PRIVILEGE - THE NURTURING OF CERTAIN SKILLS UTILIZED EXTENSIVELY IN THE PRACTICE OF LAW - SUCH AS ADVOCACY - COUNSELING - NEGOTIATING

AND DRAFTING - WERE CHILLED AND PERHAPS DENIED TO NON-LAWYER MEMBERS OF SOCIETY. THE GRANT OF MONOPOLISTIC PRIVILEGES BY SOCIETY TO A LIMITED NUMBER OF PEOPLE TO RENDER SPECIALIZED PROFESSIONAL SERVICES ALWAYS CREATES AN OBLIGATION TO MAKE AVAILABLE TO SOCIETY THOSE SPECIAL SKILLS NURTURED BY THAT MONOPOLY. IF THAT OBLIGATION IS NOT MET - THE PUBLIC AS A WHOLE INEVITABLY WILL HAVE NO CHOICE BUT TO PERMIT ENCROACHMENT BY OTHERS.

THE LEGAL PROFESSION CAN BEST PERFORM IF ITS MORES - CUSTOMS - STANDARDS AND OFFICES ARE SELF-DETERMINED. IF A LEGAL MONOPOLY IS A VIABLE SOCIETAL INSTITUTION - LAWYERS IN ORDER TO SUPPORT THAT MONOPOLY - AND TO PRESERVE

SELF-REGULATION - MUST FILL THOSE ESSENTIAL PUBLIC NEEDS WHICH WILL NOT OTHERWISE BE MET UNLESS LAWYERS MEET THEM - INCLUDING THE RENDERING OF THOSE DISTINCT SERVICES WHICH THE MONOPOLY ITSELF MAKES LAWYERS PECULIARLY QUALIFIED TO PERFORM.

SOME ETHICAL RESTRUCTURING SHOULD OCCUR SOON - OR THE MULTIPLE WAYS IN WHICH LAWYERS PRESENTLY RENDER PROFESSIONAL SERVICES WILL PERHAPS BE CURTAILED. LAWYERS' PATRONS - THE POPULACE AS A WHOLE - MAY ALREADY BE NEAR A CONCLUSION THAT THEIR INTEREST WILL BE BEST SERVED IF OTHER PROFESSIONALS - OR PARA-PROFESSIONALS - SHARE IN AT LEAST SOME OF THE WORK WHICH TRADITIONALLY HAS BEEN PERFORMED

ONLY BY LAWYERS. I CONCEDE THAT FURTHER EXAMINATION OF ALL ALTERNATIVES IS WARRANTED BEFORE SUBSTANTIAL REVISIONS OF THE ETHICAL CANONS OF THE LEGAL PROFESSION SHOULD FORMALLY BE UNDERTAKEN - BUT CLEARLY THE TIME FOR RE-ANALYSIS AND RE-EXAMINATION BY THE ORGANIZED BAR IS HERE.

WHILE LAWYERS DO OWE OTHER INDIVIDUAL LAWYERS COURTESY - AVOIDANCE OF SHARP PRACTICE - AND INTEGRITY IN THEIR DEALINGS - LAWYERS OWE INDIVIDUAL LAWYERS WHO ARE UNWORTHY ABSOLUTELY NOTHING. THE ORGANIZED BAR IS NOT AN EXCLUSIVE CLUB - AND ITS MEMBERS CANNOT BE MUTUALLY PROTECTIVE. THOSE WHO DO THEIR

PROFESSIONAL PART CANNOT LONGER PRESERVE THOSE WHO DO NOT. THE ORGANIZED LEGAL PROFESSION IS NOT AND CANNOT BE MERELY A TRADE GUILD - IT MUST BE AN ORGANIZATION OF LEARNED PROFESSIONALS BANDED TOGETHER MORE EFFECTIVELY TO SERVE THE PUBLIC AS A WHOLE.

BUT THE INDIVIDUAL LAWYER DOES OWE A GREAT DEAL TO THE BAR AS AN ENTITY. EACH LAWYER SHOULD SO CONDUCT HERSELF OR HIMSELF AS CONTINUALLY TO ENHANCE THE REGARD IN WHICH THE LEGAL PROFESSION AS AN ENTITY IS HELD BY OTHERS. THAT - OF COURSE - PRESUPPOSES A PERSONAL STANDARD OF CONDUCT OF IMPECCABLE RECTITUDE.

BUT IT GOES FURTHER - IT INCLUDES THE AFFIRMATIVE DUTY OF

CLEANSING THE BAR OF ITS SHYSTERS - ITS CROOKS - ITS EMBEZZLERS - ITS LIARS AND CHEATS - ITS INCOMPETENTS - ITS LAGGARDS - AND FROM NOW ON - THOSE WHO UNREASONABLY IGNORE THEIR PROFESSIONAL OBLIGATIONS AS LAWYERS - OF PURGING PROMPTLY AND EXPEDITIOUSLY FROM ITS RANKS ALL OF THOSE LEGAL PRACTITIONERS WHO DO NOT ADD GLORY TO THE LAW BY BEING OF A HIGHER PROFESSIONAL CALIBER THAN ALL OF THOSE WHO FOLLOW OTHER PROFESSIONS. THOSE WHO DO NOT DO AS LAWYERS WHAT THEY OUGHT TO DO HARM THOSE LAWYERS WHO DO WHAT THEY OUGHT TO DO - AND THEY SHOULD NOT BE TOLERATED.

THE CURRENT EPOCH OF EXTRAORDINARILY RAPID CHANGE IN ALMOST EVERY ASPECT OF LEGAL LIFE NOW DEMANDS

A SOLEMN RECOGNITION BY THE ORGANIZED BAR THAT EVERY LAWYER WHO UNREASONABLY IGNORES THE PROFESSIONAL OBLIGATION FOR AT LEAST SOME FREE PUBLIC SERVICE WARRANTS PROFESSIONAL SANCTIONS. I REITERATE - "UNREASONABLY IGNORES" - BECAUSE THAT DUTY OF GENEROUS PUBLIC SERVICE BY EACH LAWYER OF NECESSITY MUST HAVE DIFFERING AND CHANGING DIMENSIONS - DIMENSIONS WHICH CAN ONLY BE DETERMINED ON A CASE-BY-CASE BASIS BY THAT LAWYER'S PEER GROUP.

THE ETHICAL PROGRESSION BY THE ORGANIZED BAR WHICH I HERE SUGGEST IS OBTAINABLE. IN MY OWN TIME - I HAVE SEEN DISCIPLINARY MEASURES FOR PARTICULAR ETHICAL VIOLATIONS EVOLVE FROM CLUCKING DISAPPROVAL TO DISBARMENT. INITIALLY -

IN MY EXPERIENCES AS A BAR OFFICIAL - I JOINED WITH OTHERS IN REFUSING TO DISCIPLINE LAWYERS FOR NEGLIGENCE. THE PROFESSIONAL INCOMPETENCE OF A MEMBER OF THE BAR WAS NOT EVEN DISCUSSED THEN AS GROUNDS FOR DISCIPLINARY SANCTIONS. INDEED - IT WAS RATIONALIZED THAT TO DO SO WOULD BE CONTRARY TO THE SUPREME COURT ORDER CERTIFYING THAT LAWYER AS COMPETENT. ALL OF THAT HAS CHANGED - FOR ME AND FOR THE ORGANIZED BAR. IN MOST JURISDICTIONS - REPEATED OR GROSS NEGLIGENCE BY A LAWYER NOW WARRANTS THE SEVEREST CENSURE. NO LONGER DOES THE PROFESSION ALLOW MARGINAL LAWYERS REPEATEDLY TO ACCEPT LEGAL

MATTERS WHICH THEY CANNOT COMPETENTLY AND PROFICIENTLY HANDLE.

I BELIEVE THAT WHAT IS NOW NEEDED IS IN ESSENCE A REQUIRED CONTRIBUTION OF FREE PUBLIC SERVICE BY EACH LAWYER IN A DEFINITE - PRESCRIBED - AND RECURRING AMOUNT - AS FIXED FROM TIME TO TIME BY THE LAWYERS' PEERS - IN THE NATURE OF TITHING PROFESSIONAL TIME BUT NOT TO EXCEED ONE-TENTH. SUCH A COMMITMENT BY THE LEGAL PROFESSION - WHILE SUBSTANTIAL - INEVITABLY WILL RESULT IN DISTRIBUTING THE EVER-BURGEONING BURDEN OF FREE PUBLIC LEGAL SERVICE MORE EQUITABLY AMONG ALL MEMBERS OF THE PROFESSION. THAT REQUIRED FREE PUBLIC SERVICE CAN BE PROVIDED BY THE HIGHLY DIVERSIFIED LEGAL

PROFESSION IN THE MULTIPLE FORMS REFERRED TO ABOVE - BUT QUITE OBVIOUSLY THE OVERALL OBLIGATION MUST BE SHARED BY EACH INDIVIDUAL LAWYER IF THE JOB IS TO BE WELL DONE.

MY THESIS THUS IS A SIMPLE ONE: IF THE LEGITIMATE ASPIRATIONS OF SOCIETY IN CREATING THE PROFESSION OF LAWYER ARE TO BE REALIZED - THE TITLE "LAWYER" MUST DENOTE TO ALL PEOPLE INTEGRITY - UNITY - COURAGE - SPECIALIZED COMPETENCE - AND UNSELFISH INVOLVEMENT IN ESSENTIAL PUBLIC SERVICE. IT DOES NOT NOW.

THE PUBLIC SHOULD KNOW THAT EACH LAWYER IS INTERESTED IN MORE THAN MAKING MONEY - IN MORE THAN PERSONAL AGGRANDIZEMENT - IN MORE THAN ACHIEVING PUBLIC

RECOGNITION. THEY SHOULD KNOW THAT THE LEAST OF LAWYERS IS INTERESTED IN SERVING WELL THE PUBLIC GOOD - IN FILLING THE PARTIAL VOID IN SPECIAL SKILLS CREATED IN SOCIETY LONG AGO WHEN THE LAWYER BY GOVERNMENTAL EDICT WAS GIVEN THE MONOPOLY FOR LEGAL SERVICES. THEY SHOULD KNOW THAT THE BAR -AS A QUASI-PUBLIC INSTITUTION - IS STALWART AND NOT SUPINE - THAT IT IS WILLING TO ELIMINATE FROM ITS RANKS THOSE LAWYERS WHO DO NOT DO THEIR PART.

THE ETHICAL CODES OF LAWYERS - BEING ASPIRATIONAL STANDARDS OF PROFESSIONAL PERFORMANCE AT THE TOP AND BEING DISCIPLINARY RULES GOVERNING LAWYER CONDUCT AT THE BOTTOM - HAVE DEVELOPED BY USAGE TO REQUIRE EVER MORE OF THOSE

PERSONS WHO WEAR THE LEGAL MANTLE -- AND SO THEY SHOULD.

LAWYERS ALWAYS SHOULD - INDEED THEY MUST - AS THEY TRADITIONALLY HAVE - LIVE NOBLY IN THE LAW.

THANK YOU.

LIST OF MORRISON LECTURERS

1930	Roscoe Pound - United States (Professor, lecturer and writer, distinguished legal scholar)
1931	Hon. James Grafton Rogers - United States (Lawyer and educator; Assistant United States Secretary of State, 1931-34)
1932	Henry M. Bates - United States (Professor of Law and Dean, University of Michigan)
1933	Chester H. Rowell - United States (Editor and educator)
1934	Will Shafroth - United States (Lawyer; Secretary, National Conference of Bar Examiners, 1931-40)
1935	Dr. Robert A. Milliken - United States (Scientist; Nobel prize winner in physics, 1923)
1936	George Wharton Pepper - United States (Lawyer, professor, United States Senator)
1937	Hon. Merrill E. Otis - United States (Judge, United States District Court; Assistant to Solicitor General of the United States)
1938	Col. O. R. McGuire - United States (Lawyer and author)
1939	Hon. Henry Hague Davis - Canada (Justice of the Supreme Court of Canada)
1940	Lloyd Paul Stryker - United States (Distinguished New York lawyer)
1941	Hon. Walter P. Armstrong - United States (Lawyer; President, American Bar Association, 1941)
1942) 1943) 1944) 1945)	No meetings held.
1946	Hon. Joseph C. Hutcheson, Jr. - United States (Judge, United States Court of Appeals)
1947	Hon. Charles E. Wyzanski, Jr. - United States (Judge, United States District Court)
1948	Dr. T. V. Smith - United States (University of Chicago; Editor, International Journal of Ethics)

1949	Austin W. Scott - United States (Professor, writer, distinguished authority in the law of trusts)
1950	Hon. Arthur T. Vanderbilt - United States (Chief Justice, Supreme Court of New Jersey)
1951	Hon. Robert H. Jackson - United States (Associate Justice, Supreme Court of the United States)
1952	Albert J. Harno - United States (Dean of the College of Law, University of Illinois)
1953	HOn. James William Fulbright - United States (United States Senator)
1954	Frank H. Bartholomew - United States (President of United Press)
1955	Hon. Lewis W. Douglas - United States (United States Ambassador to Great Britain)
1956	Hon. Harold R. Medina - United States (Judge, United States Court of Appeals)
1957	Hon. Stanley F. Reed - United States (Associate Justice, Supreme Court of the United States)
1958	Erwin N. Griswold - United States (Dean of School of Law, Harvard University; Solicitor General of the United States)
1959	Catherine Drinker Bowen - United States (Legal biographer)
1960	General Mark Clark - United States Army (United States High Commissioner of Austria)
1961	Eugene V. Rostow - United States (Dean, Yale Law School)
1962	Hon. Archibald Cox - United States (Solicitor General of the United States)
1963	Arthur H. Dean - United States (Lawyer; Special United States Ambassador to Korea, 1953-54)
1964	George F. Kennan - United States (United States Ambassador to Russia and Yugoslavia)
1965	Hon. Henry J. Friendly - United States (Judge, United States Court of Appeals)
1966	Dr. Harlan Henthorne Hatcher - United States (President of the University of Michigan)
1967	Hon. John Jay McCloy - United States (Lawyer; United States Military Governor and High Commissioner for Germany; President of the World Bank)

1968	Albert E. Jenner, Jr. - United States (Distinguished Chicago lawyer)
1969	The Right Honourable Lord Denning Master of the Rolls, London, England
1970	Edward Bennett Williams, Esq. Williams & Connolly, Washington, D. C.
1971	The Honorable Sam J. Ervin, Jr. United States Senate, Washington, D. C.
1972	Alexander M. Bickel Professor of Law, Yale Law School New Haven, Connecticut
1973	The Honorable Edward T. Gignoux District Judge, United States District Court, Portland, Maine
1974	The Honorable William H. Rehnquist Associate Justice, Supreme Court of the United States, Washington, D. C.
1975	Dean Roger C. Cramton Cornell Law School Ithaca, New York 14853
1976	Senator Frank Church Senate Office Building Washington, D. C. 20510
1977	Francis T. P. Plimpton, Esq. New York, NY
1978	Hon. Eleanor Holmes Norton, Chair U. S. Equal Employment Opportunity Commission Washington, D. C.
1979	Chesterfield Smith Lawyer Tampa, Florida

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 214

VOLUME XVI

ADDRESS BY: CHESTERFIELD SMITH
LAWYER
TAMPA, FLORIDA

BEFORE: NOVA UNIVERSITY CENTER
FOR THE STUDY OF LAW
FT. LAUDERDALE, FLORIDA
FRIDAY, NOVEMBER 16, 1979

TITLE: THE OLD LAWYER SAID: "I LOOK OUT FOR MY PAYING CLIENTS" -- THE YOUNG LAWYER RESPONDED: "BUT GOOD LAWYERS MUST ALSO DO SOME FREE PUBLIC SERVICE."

TIME: TWENTY-FIVE MINUTES

DOES AN ETHICAL LAWYER HAVE AN OBLIGATION TO GIVE SOME PORTION OF PROFESSIONAL TIME FOR FREE PUBLIC SERVICE? IS A LAWYER REQUIRED TO RENDER FREE PROFESSIONAL SERVICE WITH THE SAME PROFESSIONAL DEDICATION AS IS OWED TO A LAWYER'S PAYING CLIENTS? IS IT TIME FOR AN EVOLUTIONARY PROGRESS IN LAWYER ETHICS BY NOW IMPOSING PEER PRESSURE ON THOSE WHO UNREASONABLY IGNORE THAT LOFTY OBLIGATION OF LAWYERS? SHOULD THOSE LAWYERS WHO AFTER NOTICE AND HEARING REPEATEDLY REFUSE TO ASSUME THEIR PART OF THAT PROFESSIONAL OBLIGATION HENCEFORTH BE CHASTISED BY THE ORGANIZED BAR? I WOULD ANSWER EACH QUESTIONS WITH A QUALIFIED "YES".

MANY INDIVIDUAL LAWYERS DO NOT DISCHARGE IN

ANY SUBSTANTIAL WAY WHAT I PERCEIVE TO BE AN EXISTING PROFESSIONAL OBLIGATION TO IMPROVE THE LAW - TO ENHANCE THE ADMINISTRATION OF JUSTICE - AND TO MAKE BETTER THE SERVICES OF THE LEGAL PROFESSION. THE GRANDIOSE LEGEND OFTEN VOICED AT BAR MEETINGS THAT LOCAL LAWYERS AS NEEDED WILL ROLL UP THEIR SLEEVES AND GIVE UNSELFISHLY OF THEIR TIME TO DO THAT WHICH LAWYERS OUGHT TO DO - UNFORTUNATELY - IS A MERE FANTASY.

A GOOD LAWYER - AS A MEMBER OF A LEARNED PROFESSION - QUITE CLEARLY SHOULD CULTIVATE KNOWLEDGE OF THE LAW BEYOND ITS USE FOR PAYING CLIENTS - AND A GOOD LAWYER SHOULD EMPLOY THAT ADDED KNOWLEDGE IN THE BETTERMENT OF THE LAW. INDUBITABLY THAT TRUISM LONG HAS BEEN A PART OF LAWYERING. INDEED - A GOOD LAWYER ALMOST BY DEFINITION

MUST BE CONTINUALLY MINDFUL OF CURRENT DEFICIENCIES IN THE ADMINISTRATION OF JUSTICE AND WITHOUT PERSONAL REWARD CONTINUALLY WORK FOR BETTER COURTS - MORE QUALIFIED JUDGES - AND FAIRER AND MORE EXPEDITIOUS LEGAL PROCEDURE. A GOOD LAWYER MUST TOO BE COGNIZANT THAT MANY PEOPLE STILL CANNOT AFFORD ADEQUATE LEGAL ASSISTANCE AND THAT THE GOOD LAWYER SHOULD NOW AS IN THE PAST DEVOTE PROFESSIONAL TIME IN THEIR BEHALF. BUT TODAY A GOOD LAWYER MUST BE EQUALLY AWARE THAT THERE ARE MANY OTHER AREAS WHICH CRY OUT IN EQUALLY LOUD VOICES FOR THE LAWYER'S DISTINCTIVE TALENTS - PLACES WHERE SOCIETAL LEGAL REQUIREMENTS PRESENTLY ARE NOT FULLY MET.

THE FACT THAT SOME GOOD LAWYERS HAVE PROVIDED

LEGAL SERVICES TO THE POOR AT NO COMPENSATION - AS IN LEGAL AID - OR FOR REDUCED COMPENSATION - AS IN GOVERNMENT SPONSORED LEGAL SERVICE PROGRAMS - CANNOT VALIDLY BE LONGER USED BY THE MASS OF LAWYERS NOT SO PARTICIPATING AS A SHIELD AGAINST THE RENDERING OF FREE PUBLIC SERVICE THEMSELVES. THE INDIGENT CLIENT - WHILE SIGNIFICANT - IS ONLY A PART OF THE PROBLEM - A PART IN WHICH THE GOVERNMENT RECENTLY QUITE PROPERLY HAS ASSUMED A FAR GREATER RESPONSIBILITY THAN THE LEGAL PROFESSION.

WORKING FREE PART-TIME IS ADMITTEDLY NOT THE BEST WAY TO ACHIEVE LASTING ECONOMIC SUCCESS - EVEN IF SUCH FREE WORK BE LABELED "PUBLIC SERVICE". MANY MAGNIFICANT LAWYERS OVER THE YEARS HAVE RENDERED TO THE PUBLIC SUBSTANTIAL SERVICE WITHOUT

RECEIVING PECUNIARY COMPENSATION - BUT WE MUST ACKNOWLEDGE THAT NOT ALL - OR EVEN MOST - HAVE. THUS - IT SEEMS TO ME SUITABLE - PROPER - SEEMLY - AND TIMELY - THAT THE ORGANIZED LEGAL PROFESSION FORMALLY RECOGNIZE THAT EACH LAWYER PRESENTLY HAS AN OBLIGATION FOR SOME FREE PUBLIC SERVICE WHICH IF UNREASONABLY IGNORED WARRANTS PROFESSIONAL SANCTIONS.

HERETOFORE IT PERHAPS HAS BEEN PROFESSIONALLY ACCEPTABLE FOR SOME LAWYERS TO SERVE ONLY PAYING CLIENTS - BUT IF THAT IS SO - A NEW PROFESSIONAL STANDARD IS ABORNING. THE SUBSTANTIAL RECOGNITION WHICH HAS BEEN AFFORDED IN YEARS PAST TO THOSE LAWYERS WHO HAVE GROUND AWAY AT THEIR CLIENTS' DEMANDS DAY AFTER DAY AND YEAR AFTER YEAR - TENDING THE STORE - NEVER LEAVING THE OFFICE - MINDING WHAT HAS BEEN TRADITIONALLY STYLED "THEIR OWN BUSINESS" - IS UNDERGOING

SUBSTANTIAL CHANGE. NO LONGER CAN THE OLD LAWYER - OR THE YOUNG - LOOK OUT ONLY FOR PAYING CLIENTS. NO LONGER CAN THE LEGAL PROFESSION MERIT PUBLIC APPROBATION UNDER A RANDOM AND HAPHAZARD STANDARD THAT LETS SOME LAWYERS DO GOOD AND SOME DO NOT SO GOOD. THE FACT THAT SOME LAWYERS STILL MAJESTICALLY DO WHAT GOOD LAWYERS OF A DIFFERENT DAY AND TIME DID AS A COMPLETE DISCHARGE OF THEIR THEN MORE RESTRICTED PROFESSIONAL ENGAGEMENTS CANNOT EXONERATE TODAY OTHER LAWYERS FROM FREE PUBLIC SERVICE. LAWYERS WHO WORK - WITH NO COMPENSATION OR WITH SUBSTANTIALLY REDUCED COMPENSATION -TO MITIGATE THE PROBLEMS OF THE INDIGENT ARE - AND ALWAYS WILL BE - RENDERING VALUABLE PUBLIC SERVICE - BUT EVEN SO -THE ENTIRE LEGAL PROFESSION HAS A DUTY TO DO WITHOUT PECUNIARY

BENEFIT THOSE OTHER EVEN MORE ESSENTIAL BUT NOW OFTEN NEGLECTED SOCIETAL ACTIVITIES BEST PERFORMED BY LAWYERS.

THE PARAMETERS OF LAWYER FREE PUBLIC SERVICE HENCEFORTH MUST BE AS BROAD AND FLEXIBLE AS THE MINDS OF THOSE WHO WILL DISCHARGE THAT RESPONSIBILITY. THAT OBLIGATION EXTENDS TO FULFILLING THE ESSENTIAL LEGAL NEEDS OF ALL AMERICANS - RICH OR POOR - YOUNG OR OLD - MALE OR FEMALE - BLACK OR WHITE - HAPPY OR SAD - GRACIOUS OR SURLY - INDIVIDUALS OR GROUPS - ALL PEOPLE WHOEVER AND FOR WHATEVER REASONS. IF THAT OBLIGATION IS TO BE MET - EACH LAWYER MUST HELP.

A LAWYER'S CONTRIBUTION TO THE PUBLIC INTEREST THROUGH FREE PUBLIC SERVICE CAN NEVER BE JUDGED BY WHAT

WAS ACHIEVED - OR BY THE MONETARY VALUE OF THE SERVICE CONTRIBUTED. IN ALL EVENTS - THAT PRICELESS AND UNIQUE MEASURE OF PROFESSIONAL DEVOTION - CONTRIBUTED TIME - MUST BE A PRIME FACTOR IN THE DETERMINATION OF WHETHER A LAWYER FULLY HAS DISCHARGED THOSE OBLIGATIONS OF FREE PUBLIC SERVICE. EACH LAWYER MUST PERFORM THAT INDIVIDUAL DUTY - NO ONE ELSE CAN. FINANCIAL CONTRIBUTIONS - NO MATTER HOW EXTENSIVE - CANNOT DISCHARGE THE INDIVIDUAL LAWYER'S PROFESSIONAL OBLIGATION FOR FREE PUBLIC SERVICE. THE LEGAL PROFESSION IS NOT AN ELITIST ONE IN WHICH THE ECONOMICALLY SUCCESSFUL CAN BUY AMNESTY FOR NOT DOING WHAT ALL LAWYERS ARE OBLIGATED TO DO. INDEED - IF THE LAW TRULY IS TO REMAIN THE VERY SPECIAL AND UNIQUE LEARNED PROFESSION THAT IS HISTORICALLY HAS BEEN - THOSE OBLIGATIONS MUST BE NON-TRANSFERABLE.

A MAJOR DIFFICULTY IN LAWYERS CONTRIBUTING TO THE PUBLIC FREE PROFESSIONAL SERVICE IS IN STRIKING THE PROPER BALANCE BETWEEN THAT PROFESSIONAL TIME DEVOTED FOR PUBLIC SERVICE AND THAT PROFESSIONAL TIME NEEDED FOR THE ECONOMIC NECESSITIES WHICH FACE ALL PROFESSIONAL PEOPLE. UP TO NOW - THOSE MANY LAWYERS WHO LONG HAVE ACKNOWLEDGED SOME RESPONSIBILITY FOR FREE PUBLIC SERVICE - BOTH INDIVIDUALLY AND COLLECTIVELY - HAVE HAD NO ORGANIZATIONAL GUIDANCE AS TO THE TYPE OR EXTENT OF ACTIVITIES THAT WILL DISCHARGE THAT OBLIGATION. THE COLLECTIVE RESPONSIBILITY OF LAWERS MUST BE TRANSLATED INTO A DEFINED PROFESSIONAL DUTY THAT EACH LAWYER INDIVIDUALLY RENDER A SHARE OF THE NEEDED FREE PUBLIC SERVICE. IF THAT ETHICAL DEMAND IS PLAINLY ENUNCIATED -

WITHOUT EQUIVOCATION OR AMBIVALENCE - THE DECISIONAL PROCESS NOW UNIVERSALLY UTILIZED BY THE ORGANIZED BAR IN ESTABLISHING ETHICAL BOUNDARIES WILL IN TIME EVOLVE DEFINITIVE GUIDELINES FOR ITS APPLICATION. THROUGH TRIAL AND ERROR - THROUGH EXPERIMENTATION - LAWYERS ULTIMATELY CAN INCORPORATE INTO DECISIONS INTERPRETING A REVISED CODE OF PROFESSIONAL RESPONSIBILITY THE WHO - HOW - WHAT AND WHEN OF THE FREE PUBLIC SERVICE THAT SOCIETY SHOULD RECEIVE IN EXCHANGE FOR ITS GRANT OF THE EXCLUSIVE PRIVILEGE TO PRACTICE LAW.

THERE ARE OF COURSE INHERENT DIFFICULTIES IN AN ADJUDICATION OF PROFESSIONAL PERFORMANCE INVOLVING SUCH SUBJECTIVE CONSIDERATIONS AS WORK HABITS - JOB REQUIREMENTS - ORGANIZATION AND SELF DISCIPLINE - INTELLIGENCE - EMPLOYMENT

RESTRAINTS - PUBLIC RESPONSIBILITIES - INTEGRITY - PERSONAL CHARACTER - AND PROFESSIONAL KNOW-HOW. HOWEVER - PERPLEXITY IN ENFORCEMENT HAS NEVER PREVENTED THE ORGANIZED BAR FROM ADOPTING EVER STRICTER STANDARDS.

CERTAINLY - LAWYERS HAVE INDIVIDUAL CHARACTERISTICS AND PRACTICE DEMANDS WHICH WILL PREVENT THEM FROM BEING "EQUAL" IN ALL PROFESSIONAL CONTRIBUTIONS. LAWYERS OF NECESSITY UNDER GENERAL ASPIRATIONAL GOALS TO BE OUTLINED BY THE ORGANIZED BAR MUST BE JUDGED ON THEIR SUBSCRIPTIONS TO FREE PUBLIC SERVICE WITH A FULL RECOGNITION OF THEIR DIFFERING CIRCUMSTANCES. IN SOME CASES - THOSE FREE PUBLIC SERVICE ACTIVITIES MIGHT EMBRACE EXTENSIVE WORK WITHIN THE ORGANIZED BAR ITSELF - SUCH AS DISCIPLINARY ACTIVITIES OR LAW REFORM.

IN OTHERS - IT MIGHT MEAN WORKING WITH A PUBLIC INTEREST LAW FIRM - RENDERING LEGAL SERVICES TO THOSE WHO ARE UNABLE TO OBTAIN THOSE SERVICES THROUGH THE NORMAL MEANS OF DELIVERY - OR REPRESENTING CHARITABLE ORGANIZATIONS. TO SOME LAWYERS - PERHAPS FREE PUBLIC SERVICE MIGHT WELL INVOLVE MAINTAINING AND ENHANCING THE LEGAL COMPETENCE OF OTHER LAWYERS - WORKING TO IMPROVE THE AVAILABILITY AND DELIVERY OF LEGAL SERVICES - HELPING WITH CIVIL RIGHTS LAW OR POVERTY LAW - WORKING AS A DEFENDER OF THOSE CHARGED WITH CRIME WHO ARE UNABLE TO SECURE COMPETENT COUNSEL - OR REPRESENTING DIFFUSED INTERESTS IN ADVERSARY PROCEEDINGS INVOLVING THE PUBLIC AT LARGE. ALMOST CERTAINLY - ETHICAL RECOGNITION OF PUBLIC SERVICE MUST ENCOMPASS AT LEAST A MODICUM OF ACTIVITY DESIGNED TO IMPROVE THROUGH CONSTITUTIONAL OR STATUTORY REVISION THE

JUSTICE SYSTEM AS A UNIT. MANY LEGITIMATE LEGAL INTERESTS IN FIELDS SUCH AS THE ENVIRONMENT - WELFARE - CONSUMER PROTECTION - CIVIL LIBERTIES - PRIVACY - AND THE POOR REMAIN EITHER NOT REPRESENTED OR UNDER-REPRESENTED BEFORE LEGISLATURES - EXECUTIVE AGENCIES - AND COURTS.

THE BEST WAY TO MEASURE THE INDIVIDUAL FREE PUBLIC SERVICE REQUIRED FOR A LAWYER WILL VARY FROM AREA TO AREA AND PERHAPS FROM BRANCH OF THE LAW TO BRANCH OF THE LAW. ADDITIONALLY - THERE WILL BE MULTIPLE AREAS OF FREE PUBLIC SERVICE OTHER THAN THOSE FEW THAT I HAVE SUGGESTED - WHICH AS ALTERNATIVES OR SUPPLEMENTS - ARE BETTER SUITED TO BOTH SOCIETY AND THE LEGAL PROFESSION. ONLY A LAWYERS' PEER GROUP SHOULD DETERMINE WHETHER VARIOUS ACTIVITIES REPORTED

TO THE ORGANIZED BAR AS HAVING BEEN PERFORMED BY THAT PARTICULAR LAWYER ON A RECURRING AND SUBSTANTIAL BASIS ARE AMONG THOSE THINGS WHICH FREELY SHOULD HAVE BEEN CONTRIBUTED TO THE PUBLIC WEAL. IN ALL SUCH DETERMINATIONS -DIVERSITY AND EXPERIMENTATION MUST BE FOSTERED AND SUPPORTED. THERE IS NO SINGLE APPROACH. THROUGH VARIETY - THROUGH TRIAL AND ERROR - THROUGH EVOLUTION - THE ORGANIZED BAR BEST CAN GAIN A PROPER UNDERSTANDING OF THE WAYS IN WHICH INDIVIDUAL LAWYERS MOST MEANINGFULLY MAY RENDER GENEROUS PUBLIC SERVICE.

SOCIETY LONG AGO MADE A DETERMINATION THAT A FIERCELY INDEPENDENT AND UNSHACKLED LEGAL PROFESSION IS ESSENTIAL TO OUR SYSTEM OF GOVERNMENT AND TO THE INDIVIDUAL RIGHTS OF ITS CITIZENS. IT PLACED LAWYERS IN A POSTURE TO

TO BE BOTH FREE AND INDEPENDENT BY ESTABLISHING A MONOPOLY FOR THOSE WHO PRACTICE LAW. IN GRANTING TO LAWYERS THAT PRIVILEGE - THE NURTURING OF CERTAIN SKILLS UTILIZED EXTENSIVELY IN THE PRACTICE OF LAW - SUCH AS ADVOCACY - COUNSELING - NEGOTIATING AND DRAFTING - WERE CHILLED AND PERHAPS DENIED TO NON-LAWYER MEMBERS OF SOCIETY. THE GRANT OF MONOPOLISTIC PRIVILEGES BY SOCIETY TO A LIMITED NUMBER OF PEOPLE TO RENDER SPECIALIZED PROFESSIONAL SERVICES ALWAYS CREATES AN OBLIGATION TO MAKE AVAILABLE TO SOCIETY THOSE SPECIAL SKILLS NURTURED BY THAT MONOPOLY.

THE LEGAL PROFESSION CAN BEST PERFORM IF ITS MORES - CUSTOMS - STANDARDS AND OFFICES ARE SELF-DETERMINED. IF A LEGAL MONOPOLY IS A VIABLE SOCIETAL INSTITUTION -

LAWYERS IN ORDER TO SUPPORT THAT MONOPOLY - AND TO PRESERVE SELF-REGULATION - MUST FILL THOSE ESSENTIAL PUBLIC NEEDS WHICH WILL NOT OTHERWISE BE MET UNLESS LAWYERS MEET THEM - INCLUDING THE RENDERING OF THOSE DISTINCT SERVICES WHICH THE MONOPOLY ITSELF MAKES LAWYERS PECULIARLY QUALIFIED TO PERFORM.

SOME ETHICAL RESTRUCTURING SHOULD OCCUR SOON - OR THE MULTIPLE WAYS IN WHICH LAWYERS PRESENTLY RENDER PROFESSIONAL SERVICES WILL PERHAPS BE CURTAILED. LAWYERS' PATRONS - THE POPULACE AS A WHOLE - MAY ALREADY BE NEAR A CONCLUSION THAT THEIR INTEREST WILL BE BEST SERVED IF OTHER PROFESSIONALS - OR PARA-PROFESSIONALS - SHARE IN AT LEAST SOME OF THE WORK WHICH TRADITIONALLY HAS BEEN PERFORMED ONLY BY LAWYERS.

WHILE LAWYERS DO OWE OTHER INDIVIDUAL LAWYERS

COURTESY AND INTEGRITY IN THEIR DEALINGS - LAWYERS OWE INDIVIDUAL LAWYERS WHO ARE PROFESSIONALLY UNWORTHY ABSOLUTELY NOTHING. THE ORGANIZED BAR IS NOT AN EXCLUSIVE CLUB - AND ITS MEMBERS CANNOT BE MUTUALLY PROTECTIVE. THOSE WHO DO THEIR PROFESSIONAL PART CANNOT LONGER PRESERVE THOSE WHO DO NOT. THE ORGANIZED LEGAL PROFESSION IS NOT AND CANNOT BE MERELY A TRADE GUILD - IT MUST BE AN ORGANIZATION OF LEARNED PROFESSIONALS BANDED TOGETHER MORE EFFECTIVELY TO SERVE THE PUBLIC AS A WHOLE. THOSE WHO DO NOT DO AS LAWYERS WHAT THEY OUGHT TO DO HARM THOSE LAWYERS WHO DO WHAT THEY OUGHT TO DO - AND THEY SHOULD NO LONGER BE TOLERATED.

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SO - I BELIEVE THAT WHAT IS NOW NEEDED IS IN ESSENCE A CONTRIBUTION OF FREE PUBLIC SERVICE BY EACH LAWYER REQUIRED FOR THE FIRST TIME IN A DEFINITE - PRESCRIBED - AND RECURRING AMOUNT - AS FIXED FROM TIME TO TIME BY THE LAWYERS' PEERS - AN AMOUNT SOMEWHAT IN THE NATURE OF TITHING PROFESSIONAL TIME BUT NOT TO EXCEED ONE-TENTH. SUCH A COMMITMENT BY THE LEGAL PROFESSION - WHILE SUBSTANTIAL - INEVITABLY WOULD RESULT IN DISTRIBUTING THE EVER-BURGEONING BURDEN OF FREE PUBLIC LEGAL SERVICE MORE EQUITABLE AMONG ALL THE MEMBERS OF THE PROFESSION. THAT REQUIRED FREE PUBLIC SERVICE CAN BE PROVIDED BY THE HIGHLY DIVERSIFIED LEGAL PROFESSION IN THE MULTIPLE FORMS REFERRED TO ABOVE - BUT QUITE OBVIOUSLY THE OVERALL OBLIGATION MUST BE SHARED BY EACH INDIVIDUAL LAWYER IF THE JOB IS TO BE WELL DONE.

MY THESIS IS A SIMPLE ONE: IF THE LEGITIMATE ASPIRATIONS OF SOCIETY IN CREATING THE PROFESSION OF LAWYER ARE TO BE REALIZED - THE TITLE "LAWYER" MUST DENOTE TO ALL PEOPLE INTEGRITY - UNITY - COURAGE - SPECIALIZED COMPETENCE - AND UNSELFISH INVOLVEMENT IN ESSENTIAL PUBLIC SERVICE.

IT DOES NOT NOW.

THE PUBLIC SHOULD KNOW THAT EACH LAWYER IS INTERESTED IN MORE THAN MAKING MONEY - IN MORE THAN PERSONAL AGGRANDIZEMENT - IN MORE THAN ACHIEVING PUBLIC RECOGNITION. THEY SHOULD KNOW THAT THE LEAST OF LAWYERS IS INTERESTED IN SERVING WELL THE PUBLIC GOOD - IN FILLING THE PARTIAL VOID IN SPECIAL SKILLS CREATED IN SOCIETY LONG AGO WHEN THE LAWYER BY GOVERNMENTAL EDICT WAS GIVEN THE MONOPOLY FOR LEGAL SERVICES.

THEY SHOULD KNOW THAT THE BAR - AS A QUASI-PUBLIC INSTITUTION - IS STALWART AND NOT SUPINE - THAT IT IS WILLING TO ELIMINATE FROM ITS RANKS THOSE LAWYERS WHO DO NOT DO THEIR PART.

THE ETHICAL CODES OF LAWYERS - BEING ASPIRATIONAL STANDARDS OF PROFESSIONAL PERFORMANCE AT THE TOP AND BEING DISCIPLINARY RULES GOVERNING LAWYER CONDUCT AT THE BOTTOM - HAVE DEVELOPED BY USAGE TO REQUIRE EVER MORE OF THOSE PERSONS WHO WEAR THE LEGAL MANTLE -- AND SO THEY SHOULD. LAWYERS ALWAYS SHOULD - INDEED THEY MUST - AS THEY TRADITIONALLY HAVE - LIVE NOBLY IN THE LAW.

THANK YOU.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 215

VOLUME XVI

Address By:	Chesterfield Smith Lawyer Tampa, Florida
Place:	Nova University Center For the Study of Law Ft. Lauderdale, Florida Friday, November 16, 1979 10:00 A.M.
Title:	The old lawyer said: "I look out for my paying clients." -- The young lawyer responded: "But good lawyers must also do some free public service."
Time:	Twenty-five Minutes

Does an ethical lawyer have an obligation to give some portion of professional time for free public service? Is a lawyer required to render free professional service with the same professional dedication as is owed to a lawyer's paying clients? Is it time for an evolutionary progress in lawyer ethics by now imposing peer pressure on those who unreasonably ignore that lofty obligation of lawyers? Should those lawyers who after notice and hearing repeatedly refuse to assume their part of that professional obligation henceforth be chastised by the organized Bar? I would answer each question with a qualified "Yes".

Many individual lawyers do not discharge, in any substantial way, what I perceive to be an existing professional obligation to improve the law, to enhance the administration of justice, and to make better the services of the legal profession. The grandiose legend often voiced at Bar meetings that local lawyers as needed will roll up their sleeves and give unselfishly of their time to do that which lawyers ought to do, unfortunately, is a mere fantasy.

A good lawyer, as a member of a learned profession, quite clearly should cultivate knowledge of the law beyond its use for paying clients, and a good lawyer should employ

that added knowledge in the betterment of the law. Indubitably, that truism long has been a part of lawyering. Indeed, a good lawyer almost by definition must be continually mindful of current deficiencies in the administration of justice and without personal reward continually work for better courts, more qualified judges, and fairer and more expeditious legal procedure. a good lawyer must, too, be cognizant that many people still cannot afford adequate legal assistance and that the good lawyer should now, as in the past, devote professional time in their behalf. But today a good lawyer must be equally aware that there are many other areas which cry out in equally loud voices for the lawyer's distinctive talents, places where societal legal requirements presently are not fully met.

The fact that some good lawyers have provided legal services to the poor at no compensation, as in legal aid, or for reduced compensation, as in government sponsored legal service programs, cannot validly be longer used by the mass of lawyers not so participating as a shield against the rendering of free public service themselves. The indigent client, while significant, is only a part of the problem, a part in which the government recently quite properly has assumed a far greater responsibility than the legal profession.

Working free part-time is admittedly not the best way to achieve lasting economic success, even if such free work be labeled "public service". Many magnificent lawyers over the years have rendered to the public substantial service without receiving pecuniary compensation. But we must acknowledge not all, or even most, have. Thus, it seems to me suitable, proper, seemly, and timely, that the organized legal profession formally recognize that each lawyer presently has an obligation for some free public service which if unreasonably ignored warrants professional sanctions.

Heretofore it perhaps has been professionally acceptable for some lawyers to serve only paying clients. But if that is so, a new professional standard is aborning. The substantial recognition which has been afforded in years past to those lawyers who have ground away at their clients' demands day after day and year after year, tending to the store, never leaving the office, minding what has been traditionally styled "their own business" is undergoing substantial change. No longer can the old lawyer, or the yound, look out only for paying clients. No longer can the legal profession merit public approbation under a random and haphazard standard that lets some lawyers do good and some do not so good. The fact that some lawyers still majestically do what good lawyers of a different day and time did as a complete discharge of

their then more restricted professional engagements cannot exonerate today other lawyers from free public service. Lawyers who work with no compensation or with substantially reduced compensation to mitigate the problems of the indigent are and always will be, rendering valuable public service, but even so the entire legal profession has a duty to do without pecuniary benefit those other even more essential but now often neglected societal activities best performed by lawyers.

The parameters of lawyer free public service henceforth must be as broad and flexible as the minds of those who will discharge that responsibility. That obligation extends to fulfilling essential legal needs of all Americans, rich or poor, young or old, male or female, black or white, happy or sad, gracious or surly, individuals or groups, all people whoever and for whatever reasons. If that obligation is to be met, each lawyer must help.

A lawyer's contribution to the public interest through free public service can never be judged by what was achieved or by the monetary value of the service contributed. In all events, that priceless and unique measure of professional devotion, contributed time, must be a prime factor in the determination of whether a lawyer fully has discharged those obligations of free public service. Each lawyer must perform that individual duty, no one else can. Financial

contributions, no matter how extensive, cannot discharge the individual lawyer's professional obligation for free public service. The legal profession is not an elitist one in which the economically successful can buy amnesty for not doing what all lawyers are obligated to do. Indeed, if the law truly is to remain the very special and unique learned profession that it historically has been, those obligations must be non-transferable.

A major difficulty in lawyers contributing to the public free professional service is in striking the proper balance between that professional time devoted for public service and that professional time needed for the economic necessities which face all professional people. Up to now those many lawyers who long have acknowledged some responsibility for free public service, both individually and collectively, have had no organizational guidance as to the type or extent of activities that will discharge that obligation.

The collective responsibility of lawyers must be, translated into a defined professional duty that each lawyer individually render a share of the needed free public service. If that ethical demand is plainly enunciated, without equivocation or ambivalence, the decisional process now universally utilized by the organized Bar in establishing ethical

boundaries will in time evolve definite guidelines for its application. Through trial and error, through experimentation, lawyers ultimately can incorporate into decisions interpreting a revised code of professional responsibility the who, how, what, and when of the free public service that society should receive in exchange for its grant of the exclusive privilege to practice law.

There are, of course, inherent difficulties in an adjudication of professional performance involving such subjective considerations as work habits, job requirements, organization and self-discipline, intelligence, employment restraints, public responsibilities, integrity, personal character, and professional know-how. However, perplexity in enforcement has never prevented the organized Bar from adopting ever stricter standards.

Certainly, lawyers have individual characteristics and practice demands which will prevent them from being "equal" in all professional contributions. Lawyers of necessity under general aspirational goals to be outlined by the organized Bar must be judged on their subscriptions to free public service with a full recognition of their differing circumstances. In some cases, those free public service activities might embrace extensive work within the organized Bar itself, such as disciplinary activities or law reform.

In others, it might mean working with a public interest law firm, rendering legal services to those who are unable to obtain those services through the normal means of delivery, or representing charitable organizations. To some lawyers, perhaps free public service might well involve maintaining and enhancing the legal competence of other lawyers, working to improve the availability and delivery of legal services, helping with civil rights law or poverty law, working as a defender of those charged with crime who are unable to secure competent counsel, or representing diffused interests in adversary proceedings involving the public at large. Almost certainly, ethical recognition of public service must encompass at least a modicum of activity designed to improve through constitutional or statutory revision the justice system as a unit. Many legitimate legal interests in fields such as the environment, welfare, consumer protection, civil liberties, privacy, and the poor remain either not represented or under-represented before legislatures, executive agencies, and courts.

The best way to measure the individual free public service required of a lawyer will vary from area to area and perhaps from branch of the law to branch of the law. Additionally, there will be multiple areas of free public service other than those few that I have suggested, which as alterna-

tives or supplements, are better suited to both society and the legal profession. Only a lawyer's peer group should determine whether various activities reported to the organized bar as having been performed by that particular lawyer on a recurring and substantial basis are among those things which freely should have been contributed to the public weal. In all such determinations, diversity and experimentation must be fostered and supported. There is no single approach. Through variety, through trial and error, through evolution, the organized Bar best can gain a proper understanding of the ways in which individual lawyers most meaningfully may render generous public service.

Society long ago made a determination that a fiercely independent and unshackled legal profession is essential to our system of government and to the individual rights of its citizens. It placed lawyers in a posture to be both free and independent by establishing a monopoly for those who practice law. In granting to lawyers that privilege, the nurturing of certain skills utilized extensively in the practice of law--such as advocacy, counseling, negotiating and drafting--were chilled and perhaps denied to non-lawyer members of society. The grant of monopolistic privileges by society to a limited number of people to render specialized professional services always creates an

obligation to make available to society those special skills nurtured by that monopoly.

The legal profession can best perform if its mores, customes, standards and offices are self-determined. If a legal monopoly is a viable societal institution, lawyers in order to support that monopoly, and to preserve self-regulation, must fill those essential public needs which will not otherwise be met unless lawyers meet them, including the rendering of those distinct services which the monopoly itself makes lawyers peculiarly qualified to perform.

Some ethical restructuring should occur soon--or the multiple ways in which lawyers presently render professional services will perhaps be curtailed. Lawyers' patrons--the populace as a whole--may already be near a conclusion that their interest will be best served if other professionals, or para-professionals, share in at least some of the work which traditionally has been performed only by lawyers.

While lawyers do owe other individual lawyers courtesy and integrity in their dealings, lawyers owe individual lawyers who are professionally unworthy absolutely nothing. The organized Bar is not an exclusive club, and its members cannot be mutually protective. Those who do their professional part cannot longer preserve those who do

not. The organized legal profession is not and cannot be merely a trade guild--it must be an organization of learned professionals banded together more effectively to serve the public as a whole. Those who do not do as lawyers what they ought to do harm those lawyers who do what they ought to do, and they should no longer be tolerated.

The ethical progression by the organized Bar which I here suggest is obtainable. In my own time, I have seen disciplinary measures for particular ethical violations evolve from clucking disapproval to disbarment. Initially, in my experiences as a Bar official, I joined with others in refusing to discipline lawyers for negligence. The professional incompetence of a member of the Bar was not even discussed then as grounds for disciplinary sanctions. Indeed, it was rationalized that to do so would be contrary to the Supreme Court order certifying that lawyer as competent. All of that has changed, for me and for the organized Bar. In most jurisdictions, repeated or gross negligence by a lawyer now warrants the severest censure. No longer does the profession allow marginal lawyers repeatedly to accept legal matters which they cannot competently and proficiently handle.

So, I believe that what is now needed is in essence a contribution of free public service by each lawyer required

for the first time in a definite, prescribed, and recurring amount, as fixed from time to time by the lawyer's peers, somewhat in the nature of tithing professional time but not to exceed one-tenth. Such a commitment by the legal profession, while substantial, inevitably will result in distributing the ever-burgeoning burden of free public legal service more equitably among all members of the profession. That required free public service can be provided by the highly diversified legal profession in the multiple forms referred to above, but quite obviously, the overall obligation must be shared by each individual lawyer if the job is to be well done.

My thesis is a simple one: If the legitimate aspirations of society in creating the profession of lawyer are to be realized, the title "lawyer" must denote to all people integrity, unity, courage, specialized competence, and unselfish involvement in essential public service. It does not now.

The public should know that each lawyer is interested in more than making money, in more than personal aggrandizement, in more than achieving public recognition. They should know that the least of lawyers is interested in serving well the public good, in filling the partial void in special skills created in society long ago when the lawyer by governmental edict was given the monopoly for legal

services. They should know that the Bar, as a quasi-public institution is stalwart and not supine, that it is willing to eliminate from its ranks those lawyers who do not do their part.

The ethical codes of lawyers, being aspirational standards of professional performance at the top and being disciplinary rules governing lawyer conduct at the bottom, have developed by usage to require ever more of those persons who wear the legal mantle--and so they should. Lawyers always should, indeed they must, as they traditionally have, live nobly in the law.

Thank you.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 216

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	EXCHANGE CLUB OF TAMPA SHERATON HOTEL TAMPA, FLORIDA
DATE:	MONDAY, DECEMBER 10, 1979 NOON
TITLE:	PUBLIC CRITICISM OF THE JUDICIARY -- IS IT CAUSED BY A DEFAULTING EXECUTIVE OR LEGISLATURE?
TIME:	TWENTY MINUTES

PRESIDENT JIMMY CARTER LAST YEAR CALLED UPON THE LEGAL PROFESSION TO "MAKE THE ADVERSARY SYSTEM LESS NECESSARY FOR THE DAILY LIVES OF MOST AMERICANS -- AND MORE EFFICIENT WHEN IT MUST BE USED." THE PRESIDENT ADDED MORE POINTEDLY: "BY RESORTING TO LITIGATION AT THE DROP OF A HAT - BY REGARDING THE ADVERSARY SYSTEM AS AN END IN ITSELF - WE HAVE MADE JUSTICE MORE CUMBERSOME - MORE EXPENSIVE - AND LESS EQUAL THAN IT OUGHT TO BE."

THAT CRITICISM OF THE EVER-EXPANDING ROLE THAT THE JUDICIAL SYSTEM PLAYS IN AMERICAN SOCIETY IS TO AN EXTENT MERITED. THOSE OF US WHO ARE IN THE JUSTICE BUSINESS KNOW THAT MANY PEOPLE REPEATEDLY COMPLAIN THAT THE COURTS HAVE ARROGATED TO THEMSELVES MATTERS BEYOND THEIR

COMPETENCE SATISFACTORILY TO HANDLE - THAT THE COURTS WITHOUT A PUBLIC MANDATE HAVE GROWN TOO BIG FOR THEIR BRITCHES. THEY ASSERT THAT MANY JUDGES - BOTH STATE AND FEDERAL - PERHAPS SANCTIMONIOUSLY AND SELF-RIGHTEOUSLY - VIEW THEMSELVES AS SOCIETY'S WILD CARD - THE ULTIMATE PROBLEM SOLVER WHO ALWAYS MUST ACT WHEN OTHER GOVERNMENT INSTITUTIONS DO NOT. WHILE I AS A TRIAL LAWYER WELL KNOW THAT SUCH A BLANKET CRITICISM OF JUDGES IS TOTALLY UNMERITED - I ALSO ACKNOWLEDGE THAT SOME JUDGES IN RECENT YEARS REALLY HAVE BEEN ROVING ALL OVER THE LOT -- REALLY HAVE BEEN DOING A GREAT AMOUNT OF JUDICIAL LABOR THAT HAS EXTENDED JUDICIAL TRADITIONS.

IN SMALL DISCUSSIONS- IN CONVERSATIONAL GROUPS - NON-LAWYER CITIZENS DO GRIPE WITH CONVICTION THAT THE COURTS

OF TODAY ARE - WITHOUT PORTFOLIO OR AUTHORITY - ATTEMPTING - OFTEN UNSUCCESSFULLY - TO RUN SCHOOLS AND PRISON SYSTEMS - AND TO REGULATE ALMOST EVERYTHING - AND AS THOSE CITIZENS SAY - THINGS THAT THEY KNOW LITTLE ABOUT. BUT OF COURSE THAT LAY VERSION OF WHAT COURTS ARE DOING CONCEALS MORE THAN IT REVEALS. ALMOST ALWAYS - IT IS MADE IN VERY GENERAL TERMS WITHOUT SPECIFICITY. IN VIRTUALLY ALL OF THE CASES IN WHICH JUDGES HAVE ENTERED REMEDIAL AREAS THAT - IN THE JUDGMENT OF SOME - MORE PROPERLY AND MORE EFFECTIVELY SHOULD HAVE BEEN DEALT WITH BY OTHER SOCIETAL INSTITUTIONS - THE COURTS HAVE DONE SO BY REASON OF THE DEFAULT OF THOSE OTHER SYSTEMIC BRANCHES - AND USUALLY - IN MY JUDGMENT - BY REASON OF THE SPECIFIC DEFAULT OF THE LEGISLATIVE AND EXECUTIVE BRANCHES

OF GOVERNMENT. THE COURTS BY THE OVERWHELMING CHOICE OF THE PEOPLE SEEMINGLY HAVE BECOME THE FORUM FOR REDRESS OF ALL THINGS UNFAIR IN LIFE - TRULY - THE OPPRESSED CITIZEN'S LAST HOPE - SIMPLY BECAUSE THE PEOPLE HAVE LEARNED THAT THE COURT WILL MAKE THE HARD CHOICES THAT OTHER GOVERNMENT OFFICIALS DUCK.

JUDGES GET INVOLVED IN DECREEING DRASTIC REMEDIES AGAINST THE GOVERNMENT IN TOUGH AREAS PRIMARILY BECAUSE IT IS THEIR RESPONSIBILITY TO SEE THAT JUSTICE IS DONE - AND IF THEY DO NOTHING - JUSTICE WILL NOT BE DONE. GENERALLY - THE JUDGE BEGINS BY ONLY HOLDING WHAT THE GOVERNMENT CANNOT DO -- THE JUDGE DOES NOT POINT OUT WHAT GOVERNMENT CAN DO. SOMETIMES THAT IS ENOUGH. BUT MORE OFTEN - THE GOVERNMENT

THEN DOES NOTHING - AND THE ONLY JUDICIAL ALTERNATIVE THEN IS FOR A COURT DECREED RESOLUTION. UNDER SUCH CIRCUMSTANCES - THE ANSWER TO SUCH JUDICIAL ACTIVISM MOST CERTAINLY IS NOT TO CLOSE THE COURTHOUSE DOOR. IT IS TO MAKE THOSE OTHER GOVERNMENTAL INSTITUTIONS DO RIGHT.

THE TRUTH IS THAT IN THE MAIN THE COURTS HAVE PERFORMED WELL - PERHAPS TOO WELL. OUR BLINDFOLDED FIGURE HOLDING THE SCALES OF JUSTICE HAS BEEN WORLDWIDE BOTH A SYMBOL AND A REALITY. THE COURTS HAVE ACHIEVED SUCCESS WHERE THE OTHER INSTITUTIONS HAVE NOT - SUCCESS AS SEEN BY THE NEGLECTED AND IGNORED - AND THE POOR AND THE WEAK - AS BEING A MEANINGFUL VEHICLE FOR ACHIEVING DESIRABLE SOCIAL CHANGE.

THAT VERY SUCCESS HAS CREATED THIS PROBLEM:

AS RELIANCE UPON THE COURTS HAS INCREASED - THERE HAS BEEN A CONCOMMITANT DECREASE IN THE INSTITUTIONAL POWER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT. DEMOCRATIC INSTITUTIONS TODAY SIMPLY ARE NEITHER AS DEMOCRATIC NOR EFFECTIVE AS THEY ONCE WERE. BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES HAVE BECOME INCAPABLE OF RESOLVING TOUGHER QUESTIONS OF PUBLIC POLICY. GOVERNMENTAL CAREER EMPLOYEES - WHO ACTUALLY SET MOST OFFICIAL ACTION - ARE USUALLY AS INSULATED FROM POPULAR ACCOUNTABILITY AS JUDGES - AND OUR FRAGMENTED AND HIGHLY POLITICAL LEGISLATURES TODAY STILL ARE NOTORIOUSLY SWAYED BY SPECIAL INTEREST GROUPS. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL GOVERNMENT EXCEPT THE COURTS DEFAULT -

AND RESPONSIBLE JUDGES HAVE NO CHOICE BUT TO ACT. THE COURTS ARE JUST BEING ASKED TO SOLVE PROBLEMS FOR WHICH THEY ARE NOT INSTITUTIONALLY EQUIPPED -- OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF GOVERNMENT. IF THE JUDICIAL SYSTEM IS TO FUNCTION AS IT WAS DESIGNED - A RE-WORKING IS TIMELY. JUSTICE NEED NOT NECESSARILY EMANATE PRIMARILY FROM THE COURTS. INDEED - LAWYERS AND JUDGES HAVE AN OBLIGATION TO SECURE CONFLICT RESOLUTION IN OTHER FORUMS. THE AMERICAN PUBLIC TODAY PERCEIVES THE COURTS AS JACKS-OF-ALL-TRADES - AVAILABLE TO FURNISH THE ANSWER TO WHATEVER MAY TROUBLE US: SHALL WE PROSECUTE A WAR - OR MAKE PEACE? WHAT IS LIFE - OR WHEN DOES DEATH BEGIN? SHALL WE ACHIEVE RACIAL INTEGRATION BY CUMBERSOME BUSING OF

CHILDREN TO FAR-AWAY SCHOOLS? HOW SHALL WE OPERATE PRISONS AND MENTAL INSTITUTIONS? SHALL WE BUILD NUCLEAR POWER PLANTS - AND IF SO - WHERE? SHALL THE CONCORDE FLY TO OUR SHORE? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? SHALL THE SNAIL DARTER SURVIVE? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE? A LAWSUIT IS PROBABLY QUICKER AND CHEAPER THAN LOBBYING OR A REFERENDUM AND MORE AUTHORITATIVE THAN A PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A HIGHLY CONTROVERSIAL LEGAL DECISION ACCOMPLISH? IT IS SIMPLY A JUDICIAL PRONOUNCEMENT AND NOTHING MORE. IT DOES NOT SETTLE THE DIVISIVE MORAL - ETHICAL AND POLITICAL QUESTIONS THAT LIE THEREUNDER. IT SIMPLY IS NOT AN EXPRESSION OF THE

POPULAR WILL NOR THE PUBLIC WEAL - BUT ONLY THE JUDGMENT OF A SINGLE JUDGE OR A SINGLE APPELLATE COURT. NOT SURPRISINGLY - MANY WHO CHERISH JUSTICE HAVE NOW REACHED THE CONCLUSION THAT IF THIS DEFAULT BY NON-JUDICIAL AUTHORITIES CONTINUES TO MANDATE THIS SHIFT BY THE PEOPLE TO THE AUTHORITY OF THE COURTS - IT ULTIMATELY WILL SEVERELY IMPAIR OR DESTROY THE BALANCE BETWEEN THE VARIOUS BRANCHES OF GOVERNMENT. IF THAT IS SO - THEN THE PRINCIPAL TASK FACING THOSE OF US WHO WORK IN THE LAW AND HONOR THE JUSTICE IT APPARENTLY ALMOST ALONE NOW DISPENSES IS THE RESTORATION OF A PROPER BALANCE BETWEEN ALL THREE OF THE PRINCIPAL BRANCHES OF GOVERNMENT. THE EXECUTIVE AND THE LEGISLATIVE BRANCHES MUST JOIN THE COURTS IN THE RESOLUTION OF HARD SOCIAL PROBLEMS.

PERHAPS OUR EFFORTS TO RESTORE THAT BALANCE SHOULD START WITH A RECOGNITION - AT LEAST BY LAWYERS AND JUDGES - OF THE PRESENTLY UNPOPULAR VIEW THAT OUR COURTS REALLY SHOULD BE ONLY INSTITUTIONS OF LAST RESORT. COURTS SHOULD NEVER BE CONSIDERED TO BE THE FIRST STOP IN CORRECTING SOCIAL INJUSTICE - EVEN THOUGH MANY MODERN LITIGANTS AND THEIR LAWYERS STEER TO THAT COURSE. WHILE I UNDERSTAND THE COMPULSION OF JUDGES TO ACT TO CORRECT ALL WRONGS BROUGHT BEFORE THEM - THE OVER-REACTION OF SOME JUDGES IN A FEW INSTANCES HAS UNDERSTANDABLY LED THE PUBLIC TO BLAME ALL JUDGES. IT IS INFREQUENT NOW TO SEE OUR COURTS GOING ALL OUT TO CONFINE OR RESTRICT THE IMPACT OF A CONSTITUTIONAL OR STATUTORY DECISION ONLY TO THE CASE AT HAND. JUDGES FACED WITH AN

UNCONSTITUTIONAL LAW RARELY SEEM CONTENT WITH SIMPLY DECLARING IT TO BE SO -- INSTEAD THEY OFTEN SEEM TO PREFER SOME SORT OF SALVAGE AT THE PRICE OF FORSAKING THEIR JUDICIAL DISPUTE-RESOLVING ROLE FOR THAT OF THE LEGISLATIVE POLICYMAKER.

INDEED - IT SEEMS TO ME THAT MANY JUDGES FREQUENTLY DESIGN THEIR DECISION SO THAT IT WILL HAVE THE BROADEST POSSIBLE PUBLIC IMPACT - IN EXACTLY THE SAME WAY THEY AS AN INDIVIDUAL WOULD DO IF THAT INDIVIDUAL WAS ACTING IN A LEGISLATIVE CAPACITY.

AS FAR AS POSSIBLE - WE SHOULD PRESERVE OUR JUDICIAL FORUMS FOR DOING ONLY THAT WHICH CANNOT BE DONE ELSEWHERE. THAT IS A SIMPLE TRUTH - PERHAPS INDISPUTABLE - BUT IT IS ONE NOW ACCEPTED AT BEST ONLY BY LIP SERVICE BY MOST JUDGES - LAWYERS - AND LITIGANTS.

THOUGHTFUL PEOPLE AS A MATTER OF SOCIAL PRINCIPLE MUST FACE UP TO THE ISSUE OF WHETHER OUR COURTS SHALL IN THE FUTURE BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM-SOLVERS - OF OUR SOCIETY. SHOULD NOT WE NOW DEMAND THAT OTHER GOVERNMENTAL INSTITUTIONS TOO DO WHAT THEY WERE CREATED TO DO?

ADMITTEDLY - JUDGES - BEING HUMAN - ARE NOT ADVERSE TO THEIR ENLARGED ROLE AND EXPANDED RESPONSIBILITY. MANY EVEN CHERISH THEIR ENLARGED OPPORTUNITIES. IT IS EXHILIRATING TO ADMINISTER RELIEF TO A UNIVERSE OF VICTIMS - AND IF SOME ARE UNKNOWN AND UNKNOWABLE - THEN TO DISTRIBUTE LARGESSE TO THE DESERVING. A GIFTED JUDGE OFTEN FINDS IT A REWARDING AND SELF-FULFILLING EXPERIENCE TO WRITE A PRESCRIPTION FOR THE

REHABILITATION AND PACIFICATION OF A LARGE STRIFE-TORN COMMUNITY.

BUT IN A DEMOCRATIC SOCIETY THERE HAS TO BE NUMEROUS QUESTIONS ABOUT THOSE ALL ENCOMPASSING IMPERIAL PRONOUNCEMENTS - MADE BY A SINGLE JUDGE ACTING SOMEWHAT AS A MINI-LEGISLATURE. AT LEAST SUCH JUDGMENTS BOTHER ME AS AN INDEPENDENT TRIAL LAWYER - EVEN THOUGH I WELL KNOW THAT SOME OF THOSE JUDICIAL PRONOUNCEMENTS HAVE HAD BRILLIANT CONCLUSIONS - HAVE ACHIEVED BENEFICIAL RESULTS WHICH WOULD HAVE PERHAPS BEEN IMPOSSIBLE TO ATTAIN OTHERWISE THROUGH THE POLITICAL PROCESS. THE ONE-MAN ONE-VOTE DECISION OF THE UNITED STATES SUPREME COURT IS PERHAPS THE CLEAREST EXAMPLE.

SO LET US THINK TODAY AGAIN ABOUT THE FUTURE ROLE OF THE COURTS IN CONNECTION WITH THE EVEN BIGGER DEMANDS WHICH

INEVITABLY WILL SOON BE PLACED UPON THEM. OUR COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF OUR CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE. THE RISING CRIME RATE CONTINUES TO HAVE ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF OUR SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE. WE ARE WITNESSING QUITE PROPERLY A SEXUAL REVOLUTION - THERE HAS BEEN AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE TO THE ENVIRONMENT -- I COULD GO ON AND ON. BUT DO WE AS A FREEDOM-LOVING GROUP OF RUGGED INDIVIDUALS REALLY BELIEVE THAT THE ORDINARY - NORMAL LAWYER CALLED UPON TO SIT AS A JUDGE HAS ANY SPECIAL APTITUDE

WHICH MAKES HER OR HIM ALONE SUITABLE CUSTODIANS OF THE RESPONSIBILITY FOR THE SOLUTION OF THESE VEXING PROBLEMS? IS THERE ANYTHING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF SUCH PROBLEMS?

INDEED NOT. IT IS ONE THING FOR JUDGES TO DECIDE BI-PARTY CONTROVERSIES AND - IN SO DOING - PRONOUNCE PRINCIPALS WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIMES FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS.

UNDERSTANDABLY - THE PUBLIC FEELING PERSISTS:

JUDGES HAVE BEEN FORCED BY DEFAULT OF GOVERNMENTAL POLICY-MAKERS TO TAKE ON TOO BIG A BURDEN - YET - WE THE PEOPLE HAVE MADE THEM DO WHAT THEY HAVE DONE. IT SEEMS TO ME THAT THOSE WHO LOVE LAW AND CHERISH FAIRNESS AND JUSTICE HAVE AN OBLIGATION TO PROTECT THE JUDGES FROM THAT ACCELLERATING PUBLIC CLAMOR BY FORCING OTHERS TO DO THE HARD JOBS THAT THEY SHOULD BE DOING BUT ARE NOT NOW DOING. WE WHO VALUE BOTH MAJORITY RULE AND INDIVIDUAL FREEDOM LONG HAVE REALIZED THAT AN INDEPENDENT JUDICIARY IS THE BULWARK OF OUR WAY OF LIFE. TO SAFEGUARD BOTH PRECIOUS VALUES - PERHAPS IT IS PROPER FOR US NOW TO RELY ON THE JUDGES THEMSELVES TO EXERCISE GREATER SELF-RESTRAINT. EVEN THE STRIDENT FEW WOULD NOT ASK THE JUDGES TO UNDO ALL THE RIGHTS THEY HAVE ADVANCED THROUGHOUT

OUR HISTORY. HAVING DONE SO MUCH TO CHANGE SOCIETY - PERHAPS IT IS TIME THAT THE JUDICIARY - STATE AND FEDERAL - CAN NOW HELP TO REFURBISH OUR DEFAULTING LEGISLATIVE AND EXECUTIVE BRANCHES BY HENCEFORTH DOING AS LITTLE AS POSSIBLE - YET - EVEN SO - WE KNOW THAT JUDGES MUST CONTINUE TO RENDER JUSTICE TO OUR PEOPLE IF NO OTHER GOVERNMENT AGENCY DOES SO. JUDGES ARE - HAVE BEEN - AND MUST BE THE LAST BULWARK OF A FREE AMERICAN AGAINST THOSE WHO WOULD UNJUSTLY OPPRESS HIM OR HER. THOSE WHO UNTHINKINGLY BLAME JUDGES FOR CORRECTING OPPRESSIVE GOVERNMENT SHOULD PLACE THE RESPONSIBILITY UPON THOSE WHO BY THEIR DEFAULT HAVE FORCED THOSE JUDGES TO ACT.

THE COURTS CANNOT BE THE PRIMARY AGENCY RELIED UPON TO SOLVE ALL OUR SOCIAL PROBLEMS AND ILLS. THE COURTS

HERETOFORE HAVE DONE WHAT HAD TO BE DONE. OTHER INSTITUTIONS - OTHER BRANCHES OF GOVERNMENT - AND THOSE FORCES OUTSIDE OF GOVERNMENT HAVE NOT - LEAVING IT TO THE JUDGES TO DO. WE OF COURSE DO NOT NEED - OR WANT - HERE IN OUR NOBLE REPUBLIC AN IMPERIAL JUDICIARY - BUT WE WHO ARE NOT JUDGES MUST RECOGNIZE THAT OUR PEOPLE MAY DEMAND AN IMPERIAL JUDICIARY IF OTHER AREAS OF GOVERNMENT CONTINUE TO DEFAULT IN THEIR OBLIGATIONS.

THANK YOU.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 217

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	MID-WINTER MEETING OF YOUNG LAWYERS' SECTION AMERICAN BAR ASSOCIATION
PLACE:	HYATT REGENCY HOTEL ATLANTA, GEORGIA
DATE:	SATURDAY, FEBRUARY 10, 1979 12:00 NOON
TITLE:	IMPERIAL JUDICIARY -- OR IS IT A DEFAULTING EXECUTIVE OR LEGISLATURE?
TIME:	FIFTEEN MINUTES

PRESIDENT JIMMY CARTER RECENTLY CALLED UPON THE LEGAL PROFESSION TO "MAKE THE ADVERSARY SYSTEM LESS NECESSARY FOR THE DAILY LIVES OF MOST AMERICANS -- AND MORE EFFICIENT WHEN IT MUST BE USED." THE PRESIDENT ADDED MORE POINTEDLY: "BY RESORTING TO LITIGATION AT THE DROP OF A HAT - BY REGARDING THE ADVERSARY SYSTEM AS AN END TO ITSELF - WE HAVE MADE JUSTICE MORE CUMBERSOME - MORE EXPENSIVE - AND LESS EQUAL THAN IT OUGHT TO BE."

TO AN EXTENT - THAT CRITICISM OF THE EVER-EXPANDING ROLE THAT THE JUDICIAL SYSTEM PLAYS IN AMERICAN SOCIETY IS PERHAPS MERITED. MANY COMPLAIN REPEATEDLY THAT THE COURTS HAVE ARROGRATED TO THEMSELVES MATTERS BEYOND THEIR COMPETENCE

SATISFACTORILY TO HANDLE - IN OTHER WORDS - THAT THE COURTS BY THEIR OWN MANDATE HAVE GROWN TOO BIG FOR THEIR SYSTEMIC BRITCHES. THEY ASSERT THAT MANY JUDGES - BOTH STATE AND FEDERAL - VIEW THEMSELVES AS SOCIETY'S WILD CARD - THE ULTIMATE PROBLEM SOLVER WHO MUST ALWAYS ACT WHEN OTHER GOVERNMENTAL INSTITUTIONS DO NOT. WHILE I PERSONALLY DO NOT AGREE WITH THAT CRITICISM - CERTAINLY IT IS TRUE THAT SOME JUDGES IN RECENT YEARS HAVE BEEN ROVING ALL OVER THE LOT.

IN BAR ROOM DISCUSSION GROUPS - NON-LAWYER CITIZENS GRIPE THAT THE COURTS OF TODAY ARE - WITHOUT PORTFOLIO OR AUTHORITY - ATTEMPTING - OFTEN UNSUCCESSFULLY - TO RUN SCHOOLS AND PRISON SYSTEMS - AND TO REGULATE ALMOST EVERYTHING THAT THEY KNOW LITTLE ABOUT. BUT OF COURSE THAT LAY

VERSION OF WHAT COURTS ARE DOING CONCEALS MORE THAN IT REVEALS. IN VIRTUALLY ALL OF THE CASES IN WHICH JUDGES HAVE ENTERED REMEDIAL AREAS THAT MORE PROPERLY AND MORE EFFECTIVELY SHOULD BE DEALT WITH BY THE OTHER BRANCHES OF GOVERNMENT - THE COURTS HAVE DONE SO BY REASON OF THE DEFAULT OF THE LEGISLATIVE AND EXECUTIVE BRANCHES OF OUR GOVERNMENT. INDEED - THE COURTS BY THE OVERWHELMING CHOICE OF THE PEOPLE SEEMINGLY HAVE BECOME THE FORUM FOR REDRESS OF ALL THINGS UNFAIR IN LIFE.

YET - SOLVING THE PROBLEM OF WHAT A JUDGE SHOULD DO WHEN THOSE PROBLEMS IGNORED BY OTHERS COME INTO THE COURTS PROBABLY IS THE MOST DIFFICULT SINGLE TASK FACED BY THOSE WHO WISH TO INSURE THE CONTINUING VIABILITY OF COURTS AS A GOVERNMENTAL INSTITUTION.

JUDGES GET INVOLVED IN DECREEING DRASTIC REMEDIES AGAINST THE GOVERNMENT IN TOUGH AREAS BECAUSE IT IS THEIR PRIME RESPONSIBILITY TO SEE THAT JUSTICE IS DONE. GENERALLY - THE JUDGE BEGINS BY ONLY HOLDING WHAT THE GOVERNMENT CANNOT DO; IT DOES NOT POINT OUT WHAT IT CAN DO. SOMETIMES THAT IS ENOUGH. BUT MORE OFTEN - THE GOVERNMENT THEN DOES NOTHING - AND THE ONLY JUDICIAL ALTERNATIVE IS FOR A COURT DECREED RESOLUTION. THE ANSWER TO SUCH JUDICIAL ACTIVISM MOST CERTAINLY IS NOT TO CLOSE THE COURTHOUSE DOOR. IT IS TO MAKE OTHER GOVERNMENTAL INSTITUTIONS DO RIGHT.

THE TRUTH IS THAT IN THE MAIN THE COURTS HAVE PERFORMED WELL - PERHAPS TOO WELL. I PERSONALLY BELIEVE THAT THE MOST SUCCESSFUL GOVERNMENTAL INSTITUTION OF ALL

TIMES HAS BEEN THE SUPREME COURT OF THE UNITED STATES. OUR BLINDFOLDED FIGURE HOLDING THE SCALES OF JUSTICE HAS BEEN WORLDWIDE BOTH A SYMBOL AND A REALITY. THE COURTS HAVE ACHIEVED SUCCESS WHERE THE OTHER INSTITUTIONS HAVE NOT - SUCCESS AS SEEN BY THE NEGLECTED AND THE IGNORED AS BEING A MEANINGFUL VEHICLE FOR ACHIEVING DESIRABLE SOCIAL CHANGE.

THAT VERY SUCCESS HAS CREATED THIS PROBLEM: AS RELIANCE UPON THE COURTS HAS INCREASED, THERE HAS BEEN A CONCOMMITANT DECREASE IN THE INSTITUTIONAL POWER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT.

DEMOCRATIC INSTITUTIONS TODAY SIMPLY ARE NEITHER AS DEOMCRATIC NOR EFFECTIVE AS THEY ONCE WERE. BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES HAVE BECOME INCAPABLE OF

RESOLVING THE TOUGHER QUESTIONS OF PUBLIC POLICY. GOVERNMENTAL CAREER EMPLOYEES - WHO ACTUALLY SET MOST OFFICIAL ACTION - ARE USUALLY AS INSULATED FROM POPULAR ACCOUNTABILITY AS JUDGES - AND LEGISLATURES EVEN TODAY ARE NOTORIOUSLY SWAYED BY SPECIAL INTEREST GROUPS. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES MUST ACT.

IN MY ESTIMATION - THAT DEFAULT BY OTHER BRANCHES OF GOVERNMENT HAS HURT THE JUDICIAL SYSTEM IN TWO WAYS: QUANTITATIVELY - THE COURTS ARE CARRYING TOO HEAVY A BURDEN -- AND PROBABLY A BURDEN BEYOND THE CAPACITY OF MITIGATION BY MERELY INCREASING THE NUMBER OF JUDGES: AND QUALITATIVELY - THE COURTS ARE BEING ASKED TO SOLVE PROBLEMS FOR WHICH

THEY ARE NOT INSTITUTIONALLY EQUIPPED -- OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF GOVERNMENT.

IF THE JUDICIAL SYSTEM IS TO FUNCTION AS IT WAS DESIGNED - A REORDERING OF OUR OWN CONCEPTION OF THE JUDICIAL SYSTEM IS NOW TIMELY. LAWYERS SHOULD RECOGNIZE THAT JUSTICE NEED NOT NECESSARILY EMANATE PRIMARILY FROM THE COURTS. LAWYERS MORE THAN OTHERS HAVE AN OBLIGATION TO LOOK ELSEWHERE THAN THE COURTS TO SECURE CONFLICT RESOLUTION. LAWYERS MUST CONVINCE THEIR CLIENTS THAT OTHER FORUMS ARE APPROPRIATE ARENAS FOR SEEKING REDRESS. THE AMERICAN PUBLIC TODAY PERCEIVES THE COURTS AS JACK-OF-ALL-TRADES - AVAILABLE TO FURNISH THE ANSWER TO WHATEVER MAY TROUBLE US: SHALL WE PROSECUTE A WAR - OR MAKE PEACE? WHAT IS LIFE - OR WHEN DOES DEATH BEGIN? SHALL WE ACHIEVE RACIAL

INTEGRATION BY CUMBERSOME BUSING OF CHILDREN TO FAR-AWAY SCHOOLS? HOW SHOULD WE OPERATE PRISONS AND MENTAL INSTITUTIONS? SHALL WE BUILD NUCLEAR POWER PLANTS - AND IF SO - WHERE? SHALL THE CONCORDE FLY TO OUR SHORE? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? SHALL THE SNAIL DARTER SURVIVE? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE?

A LAWSUIT IS PROBABLY QUICKER AND CHEAPER THAN LOBBYING OR A REFERENDUM AND MORE AUTHORITATIVE THAN A PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A LEGAL DECISION ACCOMPLISH? IT IS SIMPLY A JUDICIAL PRONOUNCEMENT AND NOTHING MORE. IT DOES NOT SETTLE THE DEVISIVE MORAL - ETHICAL AND POLICITAL QUESTIONS THAT LIE THEREUNDER. IT

SIMPLY IS NOT AN EXPRESSION OF THE POPULAR WILL NOR THE PUBLIC WEAL. I BELIEVE THAT IF THIS DEFAULT BY OTHERS CONTINUES TO MANDATE THIS SHIFT TO ONE AUTHORITY - THE LIVING LAW - THE RESPONSIBLE COURTS - IT ULTIMATELY WILL SEVERELY IMPAIR OR DESTROY THE PRECARIOUS BALANCE BETWEEN THE VARIOUS BRANCHES OF GOVERNMENT SET FORTH IN OUR NOBLE CONSTITUTION. IF THAT IS SO AS I BELIEVE - THEN THE PRINCIPAL TASK FACING THOSE OF US WHO WORK IN THE LAW IS THE RESTORATION OF PROPER BALANCE.

PERHAPS OUR EFFORTS TO RESTORE THAT BALANCE SHOULD START WITH A RECOGNITION - AT LEAST BY THE LAWYERS AND JUDGES - OF THE PRESENTLY UNPOPULAR VIEW THAT OUR COURTS REALLY SHOULD BE ONLY INSTITUTIONS OF LAST RESORT. COURTS SHOULD NEVER BE CONSIDERED TO BE THE FIRST STOP IN CORRECTING

SOCIAL INJUSTICE - EVEN THOUGH MANY MODERN LITIGANTS AND THEIR LAWYERS STEER TO THAT COURSE. THE JUDGES THEMSELVES ARE NOT WITHOUT BLAME. RARELY DO WE SEE OUR COURTS GOING ALL OUT TO CONFINE THE IMPACT OF A CONSTITUTIONAL OR STATUTORY DECISION ONLY TO THE CASE AT HAND. JUDGES FACED WITH AN UNCONSTITUTIONAL LAW RARELY SEEM CONTENT WITH SIMPLY DECLARING IT TO BE SO: INSTEAD - THEY OFTEN SEEM TO PREFER SOME SORT OF SALVAGE AT THE PRICE OF FORSAKING THEIR JUDICIAL ROLE FOR THAT OF THE LEGISLATIVE POLICY MAKER. INDEED, IT SEEMS TO ME THAT MANY JUDGES FREQUENTLY DESIGN THEIR DECISION SO THAT IT WILL HAVE THE BROADEST POSSIBLE PUBLIC IMPACT - IN EXACTLY THE SAME WAY THEY AS AN INDIVIDUAL WOULD DO IF THEY WERE ACTING IN A LEGISLATIVE CAPACITY.

AS FAR AS POSSIBLE - WE SHOULD PRESERVE OUR JUDICIAL FORUMS FOR DOING ONLY THAT WHICH CANNOT BE DONE ELSEWHERE. THAT IS A SIMPLE TRUTH - PERHAPS INDISPUTABLE - BUT IT IS ONE NOW ACCEPTED AT BEST ONLY BY LIP SERVICE BY MOST JUDGES - LAWYERS AND LITIGANTS. IT IS MY THESIS TODAY THAT THE QUESTION WHICH MUST BE FACED BY THOUGHTFUL PEOPLE IS WHETHER AS A MATTER OF SOCIAL PRINCIPLE OUR COURTS SHALL IN THE FUTURE BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM-SOLVERS OF OUR SOCIETY. SHOULD NOT WE DEMAND THAT OTHERS DO WHAT THEY WERE CREATED TO DO?

JUDGES - BEING HUMAN - ARE NOT AVERSE TO THEIR ENLARGED ROLE AND EXPANDED RESPONSIBILITY. MANY EVEN CHERISH THEIR ENLARGED OPPORTUNITIES. IT IS EXHILIRATING TO ADMINISTER RELIEF TO A UNIVERSE OF VICTIMS - AND IF

SOME ARE UNKNOWN AND UNKNOWABLE - THEN TO DISTRIBUTE LARGESSE TO THE DESERVING. A GIFTED JUDGE OFTEN FINDS IT A REWARDING AND SELF-FULFILLING EXPERIENCE TO WRITE A PRESCRIPTION FOR THE REHABILITATION AND PACIFICATION OF A LARGE STRIFE-TORN COMMUNITY.

BUT IN A DEMOCRATIC SOCIETY THERE HAS TO BE NUMEROUS QUESTIONS ABOUT THOSE ALL ENCOMPASSING IMPERIAL PRONOUNCEMENTS - MADE BY A SINGLE JUDGE ACTING SOMEWHAT AS A MINI-LEGISLATURE. AT LEAST THEY BOTHER ME AS A TRIAL LAWYER EVEN THOUGH SOME OF THOSE JUDICIAL PRONOUNCEMENTS HAVE HAD BRILLIANT CONCLUSIONS - HAVE ACHIEVED BENEFICIAL RESULTS WHICH WOULD HAVE PERHAPS BEEN IMPOSSIBLE TO ATTAIN OTHERWISE THROUGH THE POLITICAL PROCESS. THE ONE-MAN ONE-VOTE DECISIONS ARE PERHAPS THE CLEAREST EXAMPLE.

SO LET US THINK ABOUT THE ROLE OF THE COURTS IN CONNECTION WITH EVEN BIGGER DEMANDS WHICH PERHAPS SOON MAY BE PLACED UPON THEM. OUR COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF OUR CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE. THE RISING CRIME RATE HAS ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF OUR SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE. WE ARE WITNESSING QUITE PROPERLY A SEXUAL REVOLUTION - THERE HAS BEEN AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE TO THE ENVIRONMENT; I COULD GO ON AND ON. BUT DO WE AS A FREEDOM-LOVING GROUP OF RUGGED INDIVIDUALS REALLY

BELIEVE THAT THE ORDINARY - NORMAL PERSON CALLED UPON TO SIT AS A JUDGE HAS ANY SPECIAL APTITUDE WHICH MAKES HER OR HIM SUITABLE CUSTODIANS OF THE SOLE RESPONSIBILITY FOR THE SOLUTION OF THESE VEXING PROBLEMS? IS THERE ANYTHING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF SUCH PROBLEMS?

INDEED NOT. IT IS ONE THING FOR JUDGES TO DECIDE BY-PARTY CONTROVERSIES AND - IN SO DOING - PRONOUNCE PRINCIPLES WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIMES FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS.

AND FOR ALL THEIR POWER - JUDGES REMAIN REMARKABLY UNACCOUNTABLE AND UNKNOWN. FACELESS MEN AND WOMEN IN BLACK ROBES - THEY OFTEN SPEAK A LANGUAGE THAT LEAVES THE AVERAGE CITIZEN BEWILDERED. THEY ARE RESPONSIBLE ONLY TO HIGHER JUDGES - WHICH CAN MEAN ONLY THAT EVENTUALLY SOME JUDGES ARE BEHOLDEN TO NO ONE AT ALL.

SO THE PUBLIC FEELING OF A SUBSTANTIAL GROUP PERSISTS: OUR AMERICAN JUDGES HAVE BEEN FORCED BY POPULAR DEMAND AND DEFAULT OF GOVERNMENTAL POLICY MAKERS TO TAKE ON TOO BIG A BURDEN - AND AS A RESULT - AT LEAST SOME OF OUR PEOPLE NOW CLAMOR THAT THEY BE HELD MUCH MORE ACCOUNTABLE FOR BOTH THEIR JUDGEMENTS AND THEIR JUDICIAL REMEDIES. AS LAWYERS - IT IS OUR PROFESSIONAL OBLIGATION TO INSURE THAT

ANY REVISED ACCOUNTABILITY NOT COME AT THE COST OF COMPROMISING JUDICIAL INDEPENDENCE. WE WHO VALUE BOTH MAJORITY RULE AND INDIVIDUAL FREEDOM LONG HAVE REALIZED THAT AN INDEPENDENT JUDICIARY IS THE BULWARK OF OUR WAY OF LIFE. TO SAFEGUARD BOTH PRECIOUS VALUES IT IS PROPER FOR US TO RELY ON THE JUDGES THEMSELVES TO EXERCISE GREATER SELF-RESTRAINT.

EVEN THE STRIDENT FEW WOULD NOT ASK THE JUDGES TO UNDO ALL THE RIGHTS THEY HAVE ADVANCED THROUGHOUT OUR HISTORY.

YET - HAVING DONE SO MUCH TO CHANGE SOCIETY - I MYSELF AM BEGINNING TO BELIEVE THAT THE MOST IMPORTANT THING THAT THE JUDICIARY CAN DO TO REFURBISH OUR DEFAULTING LEGISLATIVE AND EXECUTIVE BRANCHES IS TO DO AS LITTLE AS POSSIBLE.

IN CLOSING - I ADVANCE MY UNSHAKEABLE CONCLUSION THAT THE COURTS OF THE SEVERAL STATES AND THE COURTS OF THIS INDIVISIBLE NATION CANNOT BE THE PRIMARY AGENCY RELIED UPON TO SOLVE ALL OUR SOCIAL PROBLEMS AND ILLS. THE COURTS HAVE DONE WHAT HAD TO BE DONE. OTHER INSTITUTIONS - OTHER BRANCHES OF THE GOVERNMENT - AND THOSE FORCES OUTSIDE OF GOVERNMENT HAVE NOT - LEAVING IT TO THE JUDGES TO DO. --AND THEY MUST IMMEDIATELY BE REQUIRED TO ASSUME FAR GREATER AND LEGITIMATE RESPONSIBILITY. WE DO NOT NEED HERE IN OUR NOBLE REPUBLIC AN IMPERIAL JUDICIARY -- BUT WE WILL HAVE ONE IF OTHER AREAS OF GOVERNMENT CONTINUE TO DEFAULT IN THEIR OBLIGATIONS.

THANK YOU.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 218

VOLUME XVI

ADDRESS OF:	CHESTERFIELD SMITH LAWYER BARTOW, FLORIDA
BEFORE:	CORPORATE COUNSEL SEMINAR DIPLOMAT RESORT & COUNTRY CLUB HOLLYWOOD, FLORIDA
DATE:	THURSDAY, MARCH 20, 1980 12:00 O'CLOCK NOON
SUBJECT:	RANDOM WANDERINGS THROUGH THE PIG-TRAILS OF THE LAW AND THE LEGAL PROFESSION
TIME:	THIRTY MINUTES

on my cards - Dick Yeh

BOTH PRAGMATICALLY AND PROFESSIONALLY - LAWYERS HAVE SPECIAL OBLIGATIONS TO MAINTAIN THE VIABILITY AND INTEGRITY OF THIS NATION'S LAW AND ITS LEGAL PROFESSION. MY COMMENTS TODAY WILL CONSIST OF RANDOM PERSONAL WANDERINGS THROUGH VARIOUS PIG-TRAILS REFLECTING DIVERSE PERSONAL PERCEPTIONS THEREIN.

THERE LONG HAVE BEEN MULTIPLE PROGRAMS DESIGNED TO FURTHER THE LEGAL PROFESSION'S TRADITIONAL POSITION THAT ALL INTERESTS IN SOCIETY SHOULD HAVE EQUAL ACCESS TO THE JUSTICE SYSTEM.

THE ORGANIZED BAR HAS OF COURSE LONG BEEN QUITE SENSITIVE TO THE FACT THAT THE POOR HAVE BEEN

UNDER-REPRESENTED - IN THE SENSE THAT THEY HAVE NOT HAD EITHER EQUAL ACCESS AS PLAINTIFFS - OR EQUAL REPRESENTATION AS DEFENDANTS. BUT CONCERN FOR THE INDIGENT IS ONLY ONE PART OF WHAT I PERCEIVE TO BE LAWYER RESPONSIBILITY TO INSURE THAT EVERY SEGMENT OF SOCIETY IS REPRESENTED IN TRIBUNALS WHERE THEIR RIGHTS ARE BEING DETERMINED. EXISTING DETERRENTS TO THE FULL AVAILABILITY OF LEGAL REPRESENTATION ARE MORE THAN ECONOMIC - AND THE LACK OF ADEQUATE LEGAL REPRESENTATION EMBRACES FAR MORE PEOPLE THAN THE POOR.

LET'S CONFRONT THE ISSUE - OUR LEGAL SYSTEM TODAY FACES CRISES CONDITIONS. INDIVIDUALS IN THE

PAST 20 YEARS HAVE BEEN ACCORDED A NEW PANOPLY OF RIGHTS AND REMEDIES IN ADDITION TO THOSE WHICH HAVE BEEN TRADITIONALLY AVAILABLE. MOST IMPORTANT - IN THE PAST TWO DECADES - ALMOST ALL AMERICANS HAVE COME TO REALIZE THAT LEGAL COUNSEL MUST BE AVAILABLE TO ASSIST IN THE VINDICATION OF THESE RIGHTS. BUT IN SO MANY WAYS THE PROMISE HELD OUT BY NEWLY-WON RIGHTS HAS REMAINED ILLUSORY. THERE SIMPLY ARE NOT WAYS AND MEANS PRESENTLY READY TO MAKE QUALITY LEGAL SERVICES AVAILABLE TO ALL WHO EITHER NEED OR WANT THOSE LEGAL SERVICES. ONE SUCCESSFUL DEVICE WHICH EVOLVED DURING THE 70'S TO REMEDY AT LEAST IN PART THIS

IMBALANCE IS THE PUBLIC INTEREST LAW FIRM. LAWYERS SHOULD SUPPORT PUBLIC INTEREST LAW FIRMS. INDEED - IT SEEMS TO ME THAT THE IMPOSITION OF AN ASSESSMENT DIRECTLY ON THE INDIVIDUAL LAWYER FOR THE USE OF PUBLIC INTEREST LAW FIRMS CREATED BY THE ORGANIZED BAR IS NOT DISSIMILAR TO THE FUNDING OF LAWYER DISCIPLINARY PROGRAMS THROUGH ASSESSMENT MADE ANNUALLY UPON LAWYERS. I URGE THAT THE FLORIDA BAR CONSIDER THE INSTITUTION OF SUCH A PROGRAM FOR THE SUPPORT OF BAR APPROVED PUBLIC INTEREST LAW FIRMS HERE IN FLORIDA.

NOW LET ME NOW DISCUSS THE GRANDIOSE LEGEND OFTEN VOICED AT BAR MEETINGS THAT LOCAL LAWYERS AS

NEEDED WILL ROLL UP THEIR SLEEVES AND GIVE UNSELFISHLY OF THEIR TIME TO DO THOSE PROFESSIONAL THINGS WHICH LAWYERS OUGHT TO DO.

THE FACT THAT SOME GOOD LAWYERS HAVE PROVIDED LEGAL SERVICES TO THE POOR AT NO COMPENSATION - AS IN LEGAL AID - OR FOR REDUCED COMPENSATION - AS IN GOVERNMENT SPONSORED LEGAL SERVICE PROGRAMS - CANNOT VALIDLY BE LONGER USED BY THE MASS OF LAWYERS NOT SO PARTICIPATING AS A SHIELD AGAINST THE RENDERING OF FREE PUBLIC SERVICE THEMSELVES. THE INDIGENT CLIENT - WHILE SIGNIFICANT - IS ONLY A PART OF THE PROBLEM - AND A PART IN WHICH THE GOVERNMENT QUITE PROPERLY HAS

ASSUMED A FAR GREATER RESPONSIBILITY THAN THE LEGAL PROFESSION.

ADMITTEDLY - MANY MAGNIFICENT LAWYERS OVER THE YEARS WILLINGLY HAVE RENDERED TO THE PUBLIC SUBSTANTIAL SERVICE WITHOUT RECEIVING PECUNIARY COMPENSATION. BUT NOT ALL - OR EVEN MOST - HAVE. THUS - IT SEEMS TO ME SUITABLE - PROPER - SEEMLY - AND TIMELY - THAT THE ORGANIZED LEGAL PROFESSION FORMALLY RECOGNIZE THAT EACH LAWYER HAS AN OBLIGATION FOR SOME FREE PUBLIC SERVICE WHICH IF UNREASONABLY IGNORED WARRANTS PRO-FESSIONAL SANCTIONS.

NO LONGER CAN THE OLD LAWYER - OR THE YOUNG -

LOOK OUT ONLY FOR PAYING CLIENTS. NO LONGER CAN THE LEGAL PROFESSION MERIT PUBLIC APPROBATION UNDER A RANDOM AND HAPHAZARD STANDARD THAT LETS SOME LAWYERS DO GOOD AND SOME DO NOT SO GOOD. THE PRIME ONUS OF LAWYERS NOW MUST BE TO MAKE SOCIETY BETTER BY UTILIZING PRO BONO THE LAWYERS' SPECIAL AND UNIQUE SKILLS WHERE NECESSARY IN THE PUBLIC INTEREST.

ADMITTEDLY - THE LEGAL PROFESSION ALONE CANNOT BEAR THE RESPONSIBILITY FOR ALL UNMET NEEDS FOR LEGAL SERVICES. HOWEVER - I DO ASSERT THAT EVERY LAWYER - AS A PROFESSIONAL AND AN OFFICER OF THE COURTS - HAS A UNIQUE RESPONSIBILITY AND OPPORTUNITY TO MAKE A FREE

CONTRIBUTION TO THE SATISFACTION OF SUCH NEEDS. I FURTHER SUGGEST THAT THE CURRENT PROPOSALS FOR A MANDATORY OBLIGATION ON THE PART OF LAWYERS TO ENGAGE IN FREE PUBLIC SERVICE PRACTICE ON A REGULAR BASIS IS INNOVATIVE - EVOLUTIONARY - BUT NOT REVOLUTIONARY. SUCH PROPOSALS ARE - IN FACT - SIMPLY A CALL TO REAFFIRM THE HIGHEST AND NOBLEST TRADITIONS OF THE LEGAL PROFESSION AT A TIME WHEN ALMOST EVERYTHING ELSE URGES US INTO THE COMMERCIAL ARENA.

LAWYERS ARE THE ONLY KEY GIVING ACCESS TO THAT BEWILDERING - ENVELOPING GOVERNMENTAL - LEGAL SYSTEM WHICH INCREASINGLY TOUCHES SO MANY ASPECTS OF

THE LIFE OF AN INDIVIDUAL. IF WE DO REGARD THE LEGAL PROFESSION AS UNIQUE - AND RECOGNIZE THAT THE POWERS THAT ACCOMPANY A LICENSE TO PRACTICE LAW ARE EQUALLY UNIQUE - THEN WE MUST BE WILLING TO ACCEPT A UNIQUE OBLIGATION IN ORDER TO PERMIT OUR CHOSEN PROFESSION TO FULFILL OUR OWN NOBLE PERCEPTION OF ITS ROLE.

IT IS TIMELY NOW THAT THE COLLECTIVE RESPONSIBILITY OF LAWYERS BE TRANSLATED INTO A DEFINED PROFESSIONAL DUTY THAT EACH LAWYER DEVOTE A SIGNIFICANT PORTION OF HIS OR HER PROFESSIONAL TIME EACH YEAR TO PUBLIC SERVICE PRACTICE. THAT CONTRIBUTION AS

I SEE IT IS ONLY A NATURAL AND DESIRABLE EXTENSION OF THE LAWYER'S ACCEPTANCE OF THE BENEFITS OF THE PROFESSION.

IN MY SECOND PIG-TRAIL OF LAW AND LAWYERS - I SHALL WANDER THROUGH THE MAZE OF PUBLIC CARPING AND CLAMOR AT COURTS FOR ALLEGEDLY RUSHING INTO THOSE COMPLEX AREAS WHERE ALL OTHERS FEAR TO TREAD. AS PUBLIC RELIANCE UPON THE COURTS HAS INCREASED - IT IS CLEAR THAT BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES HAVE BECOME ALMOST INCAPABLE OF RESOLVING TOUGHER QUESTIONS OF PUBLIC POLICY. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL

GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES HAVE NO CHOICE BUT TO ACT. ADMITTEDLY - THE COURTS ARE BEING ASKED TO SOLVE PROBLEMS FOR WHICH THEY ARE NOT INSTITUTIONALLY EQUIPPED -- OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF GOVERNMENT. IF THE JUDICIAL SYSTEM IS TO FUNCTION AS IT WAS DESIGNED - A REWORKING IS TIMELY. JUSTICE NEED NOT NECESSARILY EMANATE PRIMARILY FROM THE COURTS. INDEED - LAWYERS AND JUDGES HAVE AN OBLIGATION TO SECURE CONFLICT RESOLUTION IN OTHER FORUMS.

THE AMERICAN PUBLIC TODAY DOES PERCEIVE THE COURTS AS JACKS-OF-ALL-TRADES - AVAILABLE TO FURNISH THE

ANSWER TO WHATEVER MAY TROUBLE US: SHALL WE PROSECUTE A WAR - OR MAKE PEACE? WHAT IS LIFE - OR WHEN DOES DEATH BEGIN? SHALL WE ACHIEVE RACIAL INTEGRATION BY CUMBERSOME BUSING OF CHILDREN TO FAR-AWAY SCHOOLS? HOW SHALL WE OPERATE PRISONS AND MENTAL INSTITUTIONS? SHALL WE BUILD NUCLEAR POWER PLANTS - AND IF SO - WHERE? SHALL THE CONCORDE FLY TO OUR SHORE? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? SHALL THE SNAIL DARTER SURVIVE? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE? A LAWSUIT IS PROBABLY QUICKER AND CHEAPER THAN LOBBYING OR A REFERENDUM AND MORE AUTHORITATIVE THAN A

PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A HIGHLY CONTROVERSIAL DECISION ACCOMPLISH? IT IS SIMPLY A JUDICIAL PRONOUNCEMENT AND NOTHING MORE. IT DOES NOT SETTLE THE DIVISIVE MORAL - ETHICAL AND POLITICAL QUESTIONS THAT LIE THEREUNDER. IT SIMPLY IS NOT AN EXPRESSION OF THE POPULAR WILL NOR THE PUBLIC WEAL - BUT ONLY THE JUDGMENT OF A COURT.

NOT SURPRISINGLY - MANY WHO CHERISH JUSTICE HAVE NOW REACHED THE CONCLUSION THAT IF THIS SHIFT BY THE PEOPLE OF THEIR HARDEST PROBLEMS TO THE AUTHORITY OF THE COURTS CONTINUES - IT ULTIMATELY WILL DESTROY THE BALANCE BETWEEN THE SEVERAL BRANCHES OF GOVERNMENT. IF THAT

IS SO - THEN THE PRINCIPAL TASK FACING THOSE OF US WHO WORK IN THE LAW IS THE RESTORATION OF A PROPER BALANCE BETWEEN ALL THREE OF THE PRINCIPAL BRANCHES OF GOVERNMENT.

COURTS SHOULD NEVER BE CONSIDERED TO BE THE FIRST STOP IN CORRECTING SOCIAL INJUSTICE - EVEN THOUGH MANY MODERN LITIGANTS AND THEIR LAWYERS STEER TO THAT COURSE. AS FAR AS POSSIBLE - WE SHOULD PRESERVE OUR JUDICIAL FORUMS FOR DOING ONLY THAT WHICH CANNOT BE DONE ELSEWHERE. THOUGHTFUL PEOPLE - AS A MATTER OF SOCIAL PRINCIPLE - MUST FACE UP TO THE ISSUE OF WHETHER OUR COURTS SHALL IN THE FUTURE BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM-SOLVERS - OF OUR SOCIETY.

SHOULD NOT WE NOW DEMAND THAT OTHER GOVERNMENTAL IN-
STITUTIONS TOO DO WHAT THEY WERE CREATED TO DO?

OUR COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF OUR CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE. THE RISING CRIME RATE CONTINUES TO HAVE ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF OUR SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE. WE ARE WITNESSING QUITE PROPERLY A SEXUAL REVOLUTION - THERE HAS BEEN AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE

TO THE ENVIRONMENT - I COULD GO ON AND ON. IS THERE ANYTHING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF SUCH VEXING PROBLEMS?

INDEED NOT. IT IS ONE THING FOR JUDGES TO DECIDE BI-PARTY CONTROVERSIES AND - IN SO DOING - PRONOUNCE PRINCIPLES WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIMES FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS.

JUDGES HAVE BEEN FORCED BY DEFAULT OF GOVERN-

MENTAL POLICYMAKERS TO TAKE ON TOO BIG A BURDEN - YET - WE THE PEOPLE HAVE MADE THEM DO WHAT THEY HAVE DONE. IT SEEMS TO ME THAT FAIRNESS SHOULD FORCE THOSE OTHERS TO DO THE HARD JOBS THAT THEY SHOULD BE DOING BUT ARE NOT NOW DOING - AND THAT LAWYERS SHOULD PROTECT THE JUDGES FROM THAT ACCELERATING BUT UNWARRANTED PUBLIC CLAMOR.

NOW I SHALL WANDER DOWN MY THIRD - LAST AND PERHAPS MOST CONFUSING - PIG-TRAIL OF THE LAW AND LAWYERS: PUBLIC AND PRIVATE PURPOSES TODAY SHOUT EVERYWHERE IN THE LANGUAGE OF TERRORISM - GENOCIDE - DEPLETION - BREADOWN - POLLUTION - EXHAUSTION - CRYING OUT LOUDLY FOR THE RULE OF LAW. WHILE MANY LAWMAKERS CONTINUE

TO ENGAGE IN THE IDOLATRY OF MORE AND MORE LAWS - OF BIGGER AND BIGGER LEGAL SOLUTIONS - MANY RESPONSIBLE AND REASONING LAWYERS - JUDGES - AND LEGISLATORS YEARN - OR AT LEAST ARE BEGINNING TO YEARN - FOR THE CONVENIENCE - HUMANITY - AND MANAGEABILITY OF SMALLNESS - A TENDENCY WHICH I SUGGEST CAN - INSOFAR AS NEW LAWS ARE CONCERNED - BE EASILY OBSERVED.

WHAT MAKES THIS STURDY LAND YEARN FOR A DIFFERING QUALITY OF LEGAL LIFE? TO ANALYZE THAT DESIRE - IT APPEARS TO ME THAT WE NEED TO RECOGNIZE THE IMPORTANCE OF TWO PRIME VALUES SIMULTANEOUSLY - TWO VALUES WHICH ON THE FACE MAY SEEM INCOMPATIBLE:

FIRST - FREEDOM FROM OVER-CONTROL BY OTHERS - THE INDIVIDUAL PRIVACY TO DO ONE'S OWN THING ALONE OR IN SMALL AUTONOMOUS UNITS - AND SECOND - ORDER - THE SOCIETAL ORDERLINESS WHICH CAN COME ONLY FROM LARGE-SCALE UNITY AND COORDINATION BY ALL - THE ORDER WHICH PERMITS EFFICIENCIES AND PREVENTS ANARCHY.

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"CORPORATE ACCOUNTABILITY" OR "CORPORATE GOVERNANCE" ARE TERMS CURRENTLY POPULAR WITH REFORMERS WHO WANT LEGISLATION ENACTED TO CONTROL THE EXERCISE OF CORPORATE POWER. I BELIEVE THAT ENHANCING CORPORATE ACCOUNTABILITY DOES NOT LEND ITSELF TO EFFECTIVE LEGISLATIVE PRESCRIPTION - YET THAT IS WHERE MUCH OF THE PUBLIC DISCUSSION IS NOW LODGED. AS I SEE IT - THE MOST EFFECTIVE RESPONSE IS FOR PUBLIC CORPORATIONS TO TAKE STEPS TO ASSURE AND DEMONSTRATE THAT THEY ARE CAPABLE OF SELF-DISCIPLINE WHICH IS CONSISTENT WITH BOTH THE REALITIES OF THE MARKETPLACE AND THE NON-ECONOMIC ASPECTS OF THE PUBLIC INTEREST.

IT WOULD BE UNREALISTIC TO IGNORE THE FACT THAT CORPORATE ACCOUNTABILITY CAN BE IMPROVED - THAT NOT ALL BOARDS ARE DISCHARING THEIR OVERSIGHT RESPONSIBILITIES - AND THAT THE CORPORATE SYSTEM SHOULD BE STRENGTHENED. WHAT CONCERNS ME IS THAT A LEGALISTIC APPROACH DOES NOT ASSURE A CONSTRUCTIVE SOLUTION AND CAN BE AVOIDED IF BUSINESS - AND THE CORPORATE BAR WHICH SERVES PUBLIC CORPORATIONS RESPOND SUBSTANTIVELY.

THERE ARE EVEN LARGER RISKS IN A LEGALISTIC APPROACH THAN THE IMPOSITION OF FURTHER GOVERNMENTAL RESTRICTIONS ON BUSINESS. THE "LAW" CANNOT AND SHOULD NOT PROVIDE THE ANSWER TO ALL SOCIO-ECONOMIC

PROBLEMS. THE LAW MOST OFTEN LAGS RATHER THAN LEADS. IMPLEMENTED BY THE POLITICAL SYSTEM - THE PRIMARY ROLE OF LAW IS TO ARTICULATE PRE-ESTABLISHED NORMS OF A SOCIETY. THE ABSENCE OF AN OBJECTIVE MORAL ORDER FOR PUBLIC CORPORATIONS MUST LEAD TO A LEGALISTIC SYSTEM IN WHICH THE GOAL IS FOR EACH CORPORATION TO GET THE MOST OUT OF THE SYSTEM FOR ITS OWN ADVANTAGE. LAWYERS CERTAINLY ARE ALL AWARE OF THE EXTENT TO WHICH PUBLIC MANAGERS HAVE ACQUIRED SKILL IN USING - INTERPRETING - AND MANIPULATING THE LAW - FOR IT IS CORPORATE LAWYERS WHO HAVE TRAINED AND ASSISTED THEM IN ACQUIRING SUCH SKILLS. FOR MANY - CORPORATE LAWYERS - THE CORPORATION BEING RIGHT FROM A

LEGAL POINT OF VIEW - MEANS THAT NOTHING MORE IS REQUIRED. I SURMISE THAT FEW LAWYERS TELL THEIR CORPORATE CLIENTS THAT MEETING MINIMUM LEGAL REQUIREMENTS MIGHT STILL NOT MAKE ONE ENTIRELY "RIGHT" - AND THEN URGE SELF-RESTRAINT OR COUNSEL RENUNCIATION BY THE CORPORATION OF SUCH LEGAL RIGHTS.

AS LAWYERS - WHAT ARE OUR CHOICES FOR MITIGATING THESE TRENDS. IS IT JUST A MATTER OF DECIDING BY MORALISTIC STANDARDS ONLY HOW TO REACH THE BETTER LIFE? LAWYERS - MORE THAN MOST - ALWAYS HAVE HAD A CERTAIN ADAPTABILITY FOR THE RESOLUTION OF DILEMMAS. INDEED - LAWYERS HAVE NOT ALWAYS BEEN BOUND BY PUBLIC TRENDS -

OR EVEN BY PRIVATE LOGIC. BUT LEGAL ENTITIES - PEOPLE - CORPORATIONS - AND EVEN LAWYERS - ARE BOUND BY TRUTH. ONLY IN THE SERVICE OF TRUTH CAN THERE BE A PERFECT SOCIETY.

HOPEFULLY NOT BEING TOO NAIVE - WHAT COULD BE OF GREATER IMPORTANCE TODAY THAN THE STUDY AND CULTIVATION - BY ALL AMERICANS - PRIVATE CITIZENS - OR CORPORATE CITIZENS - OF DISCREET FRUGALITY - WHICH WOULD ALMOST INEVITABLY LEAD TO A REAL UNDERSTANDING - AND PERHAPS UNDERTAKING - OF OTHER CARDINAL AMERICAN VIRTUES - SUCH AS EQUITY - MODERATION - PRIVACY - AND ORDER - ALL OF WHICH MAY WELL HENCEFORTH BE INDISPENSABLE TO THE SURVIVAL

OF THE RULE OF LAW IN THIS NATION AS WE HAVE KNOWN IT.

UNFORTUNATELY - WE HAVE BECOME A LITIGIOUS SOCIETY WHERE INDIVIDUALS AND GROUPS -- IN DRAMATICALLY INCREASING NUMBERS -- BRING SUITS TO RESOLVE ISSUES WHICH PREVIOUSLY WOULD HAVE BEEN SETTLED PRIVATELY. A LITIGIOUS SOCIETY BREEDS CONFUSION - AMBIGUITY - AND LACK OF SUBTLETY IN THE LAW. IT IMPAIRS INSTITUTIONAL AUTONOMY AND LEADERSHIP AND CREATES INSTITUTIONAL PARALYSIS WHILE LITIGATION WINDS ITS LABORIOUS WAY THROUGH THE PROCEDURAL MAZE AND DELAY LIKELY TO CHARACTERIZE SUCH A SOCIETY'S JUDICIAL SYSTEM.

IF THE LEGAL STRUCTURE CANNOT PROVIDE EITHER

THE PROCESS OR THE PHILOSOPHY NEEDED - WHERE CAN IT BE FOUND? I REITERATE THAT PERHAPS THE ANSWER LIES BEYOND THE LAW -- IN ASSURING THAT WE BRING A SENSE OF RESPONSIBILITY -- OF VALUES AND MORALITY TRANSCENDING THOSE ARTICULATED BY THE LAW -- TO OUR ECONOMIC AND POLITICAL DECISIONMAKING. WE SHOULD CONTINUALLY REMIND OURSELVES OF THE ESSENTIAL ROLE OF ETHICS AND MORALITY TO BOTH INDIVIDUALS AND ORGANIZATIONS - AS LAWYERS WE SHOULD ASPIRE FOR BETTER - FROM OURSELVES AND FROM THOSE WE COUNSEL. SUCH INTERNAL CHECKS ARE A NECESSARY COMPLEMENT TO EXTERNAL RESTRICTIONS. ONLY THE COMBINATION OF AN INTERNALIZED VALUE SYSTEM AND

EXTERNAL CONSTRAINTS CAN ASSURE THAT INDIVIDUALS AND INSTITUTIONS ACT TRULY RESPONSIBLY. WE NEED TO EVOLVE A SET OF CONSENSUS VALUES WHICH GIVE BETTER SHAPE TO THE INSTITUTIONS OF SOCIETY.

CONSUMERS - ENVIRONMENTALISTS - WORKERS - AND OTHER GROUPS WHICH HAVE INCREASINGLY CAST THEMSELVES IN THE ROLE OF PUBLIC CORPORATE OPPONENTS MUST RECOGNIZE THEIR OWN OBLIGATION TO TEMPER THE DEMANDS OF THEIR INTERESTS WITH CONSIDERATION FOR THE HEALTH OF THE MARKET SYSTEM SO VITAL TO THE OVERALL OBJECTIVE OF A STRONG SOCIETY. THEY MUST ALSO RECOGNIZE THAT THEY - TOO - MUST TAKE A BROADER VIEW THAN THE LEGALISTIC OF SOCIETY'S

NEEDS. CORPORATE OR PRIVATE VICTORIES VINDICATING THAT WHICH IS LEGAL BUT NOT NECESSARILY THAT WHICH IS "RIGHT" IN THE CONTEXT OF THE LARGER SOCIETY - WHETHER WON IN THE COURTROOM OR IN THE LEGISLATURE - CAN SOMETIMES BE AS DISASTEROUS TO OUR CLIENTS AS WINNING A BATTLE BUT LOSING THE WAR IS TO A DICTATOR.

IN CONCLUSION - I STATE MY FERVENT BELIEF THAT THE PUBLIC - BE IT PRIVATE CITIZEN OR PUBLIC CORPORATION - HAS THE RIGHT TO DEMAND THAT WE WHO AS LAWYERS HAVE BEEN GRANTED THE SEMI-MONOPOLY TO SERVE AS THE MAJOR BULWARK BETWEEN THEM AND THEIR GOVERNMENT - TO BE THEIR ADVOCATE - TO BE THEIR COUNSELLOR WHEN THE

MOST SERIOUS DECISIONS MUST BE MADE - BE OF THE HIGHEST PROFESSIONAL QUALITY AND WORTHY OF THE UNIQUE TRUST SO PLACED IN US. LAWYERS MUST BE LEGAL - BUT LAWYERS SHOULD ALSO BE MORAL. MY PURPOSE HERE IN WANDERING DOWN THESE DIVERSE AND DISJOINTED PIG-TRAILS OF THE LAW AND THE LEGAL PROFESSION HAS BEEN TO CHALLENGE YOU - AND ME - AND LAWYERS EVERYWHERE - TO ASPIRE TO BE TRULY HONORABLE PROFESSIONALS.

(END)

ADDRESS OF:	CHESTERFIELD SMITH LAWYER BARTOW, FLORIDA
BEFORE:	CORPORATE COUNSEL SEMINAR DIPLOMAT RESORT & COUNTRY CLUB HOLLYWOOD, FLORIDA
DATE:	THURSDAY, MARCH 20, 1980 12:00 O'CLOCK NOON
SUBJECT:	RANDOM WANDERINGS THROUGH THE PIG-TRAILS OF THE LAW AND THE LEGAL PROFESSION
TIME:	THIRTY MINUTES

BOTH PRAGMATICALLY AND PROFESSIONALLY - LAWYERS HAVE SPECIAL OBLIGATIONS TO MAINTAIN THE VIABILITY AND INTEGRITY OF THIS NATION'S LAW AND ITS LEGAL PROFESSION. MY COMMENTS TODAY WILL CONSIST OF RANDOM PERSONAL WANDERINGS THROUGH VARIOUS PIG-TRAILS REFLECTING DIVERSE PERSONAL PERCEPTIONS THEREIN.

THERE LONG HAVE BEEN MULTIPLE PROGRAMS DESIGNED TO FURTHER THE LEGAL PROFESSION'S TRADITIONAL POSITION THAT ALL INTERESTS IN SOCIETY SHOULD HAVE EQUAL ACCESS TO THE JUSTICE SYSTEM.

THE ORGANIZED BAR HAS OF COURSE LONG BEEN QUITE SENSITIVE TO THE FACT THAT THE POOR HAVE BEEN

UNDER-REPRESENTED - IN THE SENSE THAT THEY HAVE NOT HAD EITHER EQUAL ACCESS AS PLAINTIFFS - OR EQUAL REPRESENTATION AS DEFENDANTS. BUT CONCERN FOR THE INDIGENT IS ONLY ONE PART OF WHAT I PERCEIVE TO BE LAWYER RESPONSIBILITY TO INSURE THAT EVERY SEGMENT OF SOCIETY IS REPRESENTED IN TRIBUNALS WHERE THEIR RIGHTS ARE BEING DETERMINED. EXISTING DETERRENTS TO THE FULL AVAILABILITY OF LEGAL REPRESENTATION ARE MORE THAN ECONOMIC - AND THE LACK OF ADEQUATE LEGAL REPRESENTATION EMBRACES FAR MORE PEOPLE THAN THE POOR.

LET'S CONFRONT THE ISSUE - OUR LEGAL SYSTEM TODAY FACES CRISES CONDITIONS. INDIVIDUALS IN THE

PAST 20 YEARS HAVE BEEN ACCORDED A NEW PANOPLY OF RIGHTS AND REMEDIES IN ADDITION TO THOSE WHICH HAVE BEEN TRADITIONALLY AVAILABLE. MOST IMPORTANT - IN THE PAST TWO DECADES - ALMOST ALL AMERICANS HAVE COME TO REALIZE THAT LEGAL COUNSEL MUST BE AVAILABLE TO ASSIST IN THE VINDICATION OF THESE RIGHTS. BUT IN SO MANY WAYS THE PROMISE HELD OUT BY NEWLY-WON RIGHTS HAS REMAINED ILLUSORY. THERE SIMPLY ARE NOT WAYS AND MEANS PRESENTLY READY TO MAKE QUALITY LEGAL SERVICES AVAILABLE TO ALL WHO EITHER NEED OR WANT THOSE LEGAL SERVICES. ONE SUCCESSFUL DEVICE WHICH EVOLVED DURING THE 70'S TO REMEDY AT LEAST IN PART THIS

IMBALANCE IS THE PUBLIC INTEREST LAW FIRM. LAWYERS SHOULD SUPPORT PUBLIC INTEREST LAW FIRMS. INDEED - IT SEEMS TO ME THAT THE IMPOSITION OF AN ASSESSMENT DIRECTLY ON THE INDIVIDUAL LAWYER FOR THE USE OF PUBLIC INTEREST LAW FIRMS CREATED BY THE ORGANIZED BAR IS NOT DISSIMILAR TO THE FUNDING OF LAWYER DISCIPLINARY PROGRAMS THROUGH ASSESSMENT MADE ANNUALLY UPON LAWYERS. I URGE THAT THE FLORIDA BAR CONSIDER THE INSTITUTION OF SUCH A PROGRAM FOR THE SUPPORT OF BAR APPROVED PUBLIC INTEREST LAW FIRMS HERE IN FLORIDA.

NOW LET ME NOW DISCUSS THE GRANDIOSE LEGEND OFTEN VOICED AT BAR MEETINGS THAT LOCAL LAWYERS AS

NEEDED WILL ROLL UP THEIR SLEEVES AND GIVE UNSELFISHLY OF THEIR TIME TO DO THOSE PROFESSIONAL THINGS WHICH LAWYERS OUGHT TO DO.

THE FACT THAT SOME GOOD LAWYERS HAVE PROVIDED LEGAL SERVICES TO THE POOR AT NO COMPENSATION - AS IN LEGAL AID - OR FOR REDUCED COMPENSATION - AS IN GOVERNMENT SPONSORED LEGAL SERVICE PROGRAMS - CANNOT VALIDLY BE LONGER USED BY THE MASS OF LAWYERS NOT SO PARTICIPATING AS A SHIELD AGAINST THE RENDERING OF FREE PUBLIC SERVICE THEMSELVES. THE INDIGENT CLIENT - WHILE SIGNIFICANT - IS ONLY A PART OF THE PROBLEM - AND A PART IN WHICH THE GOVERNMENT QUITE PROPERLY HAS

ASSUMED A FAR GREATER RESPONSIBILITY THAN THE LEGAL PROFESSION.

ADMITTEDLY - MANY MAGNIFICENT LAWYERS OVER THE YEARS WILLINGLY HAVE RENDERED TO THE PUBLIC SUBSTANTIAL SERVICE WITHOUT RECEIVING PECUNIARY COMPENSATION. BUT NOT ALL - OR EVEN MOST - HAVE. THUS - IT SEEMS TO ME SUITABLE - PROPER - SEEMLY - AND TIMELY - THAT THE ORGANIZED LEGAL PROFESSION FORMALLY RECOGNIZE THAT EACH LAWYER HAS AN OBLIGATION FOR SOME FREE PUBLIC SERVICE WHICH IF UNREASONABLY IGNORED WARRANTS PROFESSIONAL SANCTIONS.

NO LONGER CAN THE OLD LAWYER - OR THE YOUNG -

LOOK OUT ONLY FOR PAYING CLIENTS. NO LONGER CAN THE LEGAL PROFESSION MERIT PUBLIC APPROBATION UNDER A RANDOM AND HAPHAZARD STANDARD THAT LETS SOME LAWYERS DO GOOD AND SOME DO NOT SO GOOD. THE PRIME ONUS OF LAWYERS NOW MUST BE TO MAKE SOCIETY BETTER BY UTILIZING PRO BONO THE LAWYERS' SPECIAL AND UNIQUE SKILLS WHERE NECESSARY IN THE PUBLIC INTEREST.

ADMITTEDLY - THE LEGAL PROFESSION ALONE CANNOT BEAR THE RESPONSIBILITY FOR ALL UNMET NEEDS FOR LEGAL SERVICES. HOWEVER - I DO ASSERT THAT EVERY LAWYER - AS A PROFESSIONAL AND AN OFFICER OF THE COURTS - HAS A UNIQUE RESPONSIBILITY AND OPPORTUNITY TO MAKE A FREE

CONTRIBUTION TO THE SATISFACTION OF SUCH NEEDS. I FURTHER SUGGEST THAT THE CURRENT PROPOSALS FOR A MANDATORY OBLIGATION ON THE PART OF LAWYERS TO ENGAGE IN FREE PUBLIC SERVICE PRACTICE ON A REGULAR BASIS IS INNOVATIVE - EVOLUTIONARY - BUT NOT REVOLUTIONARY. SUCH PROPOSALS ARE - IN FACT - SIMPLY A CALL TO REAFFIRM THE HIGHEST AND NOBLEST TRADITIONS OF THE LEGAL PROFESSION AT A TIME WHEN ALMOST EVERYTHING ELSE URGES US INTO THE COMMERCIAL ARENA.

LAWYERS ARE THE ONLY KEY GIVING ACCESS TO THAT BEWILDERING - ENVELOPING GOVERNMENTAL - LEGAL SYSTEM WHICH INCREASINGLY TOUCHES SO MANY ASPECTS OF

THE LIFE OF AN INDIVIDUAL. IF WE DO REGARD THE LEGAL PROFESSION AS UNIQUE - AND RECOGNIZE THAT THE POWERS THAT ACCOMPANY A LICENSE TO PRACTICE LAW ARE EQUALLY UNIQUE - THEN WE MUST BE WILLING TO ACCEPT A UNIQUE OBLIGATION IN ORDER TO PERMIT OUR CHOSEN PROFESSION TO FULFILL OUR OWN NOBLE PERCEPTION OF ITS ROLE.

IT IS TIMELY NOW THAT THE COLLECTIVE RESPONSIBILITY OF LAWYERS BE TRANSLATED INTO A DEFINED PROFESSIONAL DUTY THAT EACH LAWYER DEVOTE A SIGNIFICANT PORTION OF HIS OR HER PROFESSIONAL TIME EACH YEAR TO PUBLIC SERVICE PRACTICE. THAT CONTRIBUTION AS

I SEE IT IS ONLY A NATURAL AND DESIRABLE EXTENSION OF THE LAWYER'S ACCEPTANCE OF THE BENEFITS OF THE PROFESSION.

IN MY SECOND PIG-TRAIL OF LAW AND LAWYERS - I SHALL WANDER THROUGH THE MAZE OF PUBLIC CARPING AND CLAMOR AT COURTS FOR ALLEGEDLY RUSHING INTO THOSE COMPLEX AREAS WHERE ALL OTHERS FEAR TO TREAD. AS PUBLIC RELIANCE UPON THE COURTS HAS INCREASED - IT IS CLEAR THAT BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES HAVE BECOME ALMOST INCAPABLE OF RESOLVING TOUGHER QUESTIONS OF PUBLIC POLICY. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL

GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES HAVE NO CHOICE BUT TO ACT. ADMITTEDLY - THE COURTS ARE BEING ASKED TO SOLVE PROBLEMS FOR WHICH THEY ARE NOT INSTITUTIONALLY EQUIPPED -- OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF GOVERNMENT. IF THE JUDICIAL SYSTEM IS TO FUNCTION AS IT WAS DESIGNED - A REWORKING IS TIMELY. JUSTICE NEED NOT NECESSARILY EMANATE PRIMARILY FROM THE COURTS. INDEED - LAWYERS AND JUDGES HAVE AN OBLIGATION TO SECURE CONFLICT RESOLUTION IN OTHER FORUMS.

THE AMERICAN PUBLIC TODAY DOES PERCEIVE THE COURTS AS JACKS-OF-ALL-TRADES - AVAILABLE TO FURNISH THE

ANSWER TO WHATEVER MAY TROUBLE US: SHALL WE PROSECUTE A WAR - OR MAKE PEACE? WHAT IS LIFE - OR WHEN DOES DEATH BEGIN? SHALL WE ACHIEVE RACIAL INTEGRATION BY CUMBERSOME BUSING OF CHILDREN TO FAR-AWAY SCHOOLS? HOW SHALL WE OPERATE PRISONS AND MENTAL INSTITUTIONS? SHALL WE BUILD NUCLEAR POWER PLANTS - AND IF SO - WHERE? SHALL THE CONCORDE FLY TO OUR SHORE? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? SHALL THE SNAIL DARTER SURVIVE? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE? A LAWSUIT IS PROBABLY QUICKER AND CHEAPER THAN LOBBYING OR A REFERENDUM AND MORE AUTHORITATIVE THAN A

PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A HIGHLY CONTROVERSIAL DECISION ACCOMPLISH? IT IS SIMPLY A JUDICIAL PRONOUNCEMENT AND NOTHING MORE. IT DOES NOT SETTLE THE DIVISIVE MORAL - ETHICAL AND POLITICAL QUESTIONS THAT LIE THEREUNDER. IT SIMPLY IS NOT AN EXPRESSION OF THE POPULAR WILL NOR THE PUBLIC WEAL - BUT ONLY THE JUDGMENT OF A COURT.

NOT SURPRISINGLY - MANY WHO CHERISH JUSTICE HAVE NOW REACHED THE CONCLUSION THAT IF THIS SHIFT BY THE PEOPLE OF THEIR HARDEST PROBLEMS TO THE AUTHORITY OF THE COURTS CONTINUES - IT ULTIMATELY WILL DESTROY THE BALANCE BETWEEN THE SEVERAL BRANCHES OF GOVERNMENT. IF THAT

IS SO - THEN THE PRINCIPAL TASK FACING THOSE OF US WHO WORK IN THE LAW IS THE RESTORATION OF A PROPER BALANCE BETWEEN ALL THREE OF THE PRINCIPAL BRANCHES OF GOVERNMENT.

COURTS SHOULD NEVER BE CONSIDERED TO BE THE FIRST STOP IN CORRECTING SOCIAL INJUSTICE - EVEN THOUGH MANY MODERN LITIGANTS AND THEIR LAWYERS STEER TO THAT COURSE. AS FAR AS POSSIBLE - WE SHOULD PRESERVE OUR JUDICIAL FORUMS FOR DOING ONLY THAT WHICH CANNOT BE DONE ELSEWHERE. THOUGHTFUL PEOPLE - AS A MATTER OF SOCIAL PRINCIPLE - MUST FACE UP TO THE ISSUE OF WHETHER OUR COURTS SHALL IN THE FUTURE BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM-SOLVERS - OF OUR SOCIETY.

SHOULD NOT WE NOW DEMAND THAT OTHER GOVERNMENTAL IN-

STITUTIONS TOO DO WHAT THEY WERE CREATED TO DO?

OUR COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF OUR CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE. THE RISING CRIME RATE CONTINUES TO HAVE ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF OUR SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE. WE ARE WITNESSING QUITE PROPERLY A SEXUAL REVOLUTION - THERE HAS BEEN AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE

TO THE ENVIRONMENT - I COULD GO ON AND ON. IS THERE ANYTHING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF SUCH VEXING PROBLEMS?

INDEED NOT. IT IS ONE THING FOR JUDGES TO DECIDE BI-PARTY CONTROVERSIES AND - IN SO DOING - PRONOUNCE PRINCIPLES WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIMES FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS.

JUDGES HAVE BEEN FORCED BY DEFAULT OF GOVERN-

MENTAL POLICYMAKERS TO TAKE ON TOO BIG A BURDEN - YET - WE THE PEOPLE HAVE MADE THEM DO WHAT THEY HAVE DONE. IT SEEMS TO ME THAT FAIRNESS SHOULD FORCE THOSE OTHERS TO DO THE HARD JOBS THAT THEY SHOULD BE DOING BUT ARE NOT NOW DOING - AND THAT LAWYERS SHOULD PROTECT THE JUDGES FROM THAT ACCELERATING BUT UNWARRANTED PUBLIC CLAMOR.

NOW I SHALL WANDER DOWN MY THIRD - LAST AND PERHAPS MOST CONFUSING - PIG-TRAIL OF THE LAW AND LAWYERS: PUBLIC AND PRIVATE PURPOSES TODAY SHOUT EVERYWHERE IN THE LANGUAGE OF TERRORISM - GENOCIDE - DEPLETION - BREADOWN - POLLUTION - EXHAUSTION - CRYING OUT LOUDLY FOR THE RULE OF LAW. WHILE MANY LAWMAKERS CONTINUE

TO ENGAGE IN THE IDOLATRY OF MORE AND MORE LAWS - OF BIGGER AND BIGGER LEGAL SOLUTIONS - MANY RESPONSIBLE AND REASONING LAWYERS - JUDGES - AND LEGISLATORS YEARN - OR AT LEAST ARE BEGINNING TO YEARN - FOR THE CONVENIENCE - HUMANITY - AND MANAGEABILITY OF SMALLNESS - A TENDENCY WHICH I SUGGEST CAN - INSOFAR AS NEW LAWS ARE CONCERNED - BE EASILY OBSERVED.

WHAT MAKES THIS STURDY LAND YEARN FOR A DIFFERING QUALITY OF LEGAL LIFE? TO ANALYZE THAT DESIRE - IT APPEARS TO ME THAT WE NEED TO RECOGNIZE THE IMPORTANCE OF TWO PRIME VALUES SIMULTANEOUSLY - TWO VALUES WHICH ON THE FACE MAY SEEM INCOMPATIBLE:

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THE RESULT IS A FUNDAMENTAL CHANGE IN WHERE THE RESPONSIBILITY LIES FOR ESTABLISHING THE BEHAVIOR AND MORES OF OUR SOCIETY. IT ABSOLVES INDIVIDUALS AND ORGANIZATIONS FOR BEHAVIOR WHICH IS NOT LEGALLY PROSCRIBED - AND LEGITIMIZES INDIVIDUALS AND ORGANIZATIONS TO USE THE LAW TO ADVANCE THEIR OWN ENDS. IT PLACES THE BURDEN ON LEGISLATION - REGULATION AND THE JUDICIAL PROCESS TO SHAPE THE VALUES OF OUR SOCIETY.

"CORPORATE ACCOUNTABILITY" OR "CORPORATE GOVERNANCE" ARE TERMS CURRENTLY POPULAR WITH REFORMERS WHO WANT LEGISLATION ENACTED TO CONTROL THE EXERCISE OF CORPORATE POWER. I BELIEVE THAT ENHANCING CORPORATE ACCOUNTABILITY DOES NOT LEND ITSELF TO EFFECTIVE LEGISLATIVE PRESCRIPTION - YET THAT IS WHERE MUCH OF THE PUBLIC DISCUSSION IS NOW LODGED. AS I SEE IT - THE MOST EFFECTIVE RESPONSE IS FOR PUBLIC CORPORATIONS TO TAKE STEPS TO ASSURE AND DEMONSTRATE THAT THEY ARE CAPABLE OF SELF-DISCIPLINE WHICH IS CONSISTENT WITH BOTH THE REALITIES OF THE MARKETPLACE AND THE NON-ECONOMIC ASPECTS OF THE PUBLIC INTEREST.

IT WOULD BE UNREALISTIC TO IGNORE THE FACT THAT CORPORATE ACCOUNTABILITY CAN BE IMPROVED - THAT NOT ALL BOARDS ARE DISCHARING THEIR OVERSIGHT RESPONSIBILITIES - AND THAT THE CORPORATE SYSTEM SHOULD BE STRENGTHENED. WHAT CONCERNS ME IS THAT A LEGALISTIC APPROACH DOES NOT ASSURE A CONSTRUCTIVE SOLUTION AND CAN BE AVOIDED IF BUSINESS - AND THE CORPORATE BAR WHICH SERVES PUBLIC CORPORATIONS RESPOND SUBSTANTIVELY.

THERE ARE EVEN LARGER RISKS IN A LEGALISTIC APPROACH THAN THE IMPOSITION OF FURTHER GOVERNMENTAL RESTRICTIONS ON BUSINESS. THE "LAW" CANNOT AND SHOULD NOT PROVIDE THE ANSWER TO ALL SOCIO-ECONOMIC

PROBLEMS. THE LAW MOST OFTEN LAGS RATHER THAN LEADS. IMPLEMENTED BY THE POLITICAL SYSTEM - THE PRIMARY ROLE OF LAW IS TO ARTICULATE PRE-ESTABLISHED NORMS OF A SOCIETY. THE ABSENCE OF AN OBJECTIVE MORAL ORDER FOR PUBLIC CORPORATIONS MUST LEAD TO A LEGALISTIC SYSTEM IN WHICH THE GOAL IS FOR EACH CORPORATION TO GET THE MOST OUT OF THE SYSTEM FOR ITS OWN ADVANTAGE. LAWYERS CERTAINLY ARE ALL AWARE OF THE EXTENT TO WHICH PUBLIC MANAGERS HAVE ACQUIRED SKILL IN USING - INTERPRETING - AND MANIPULATING THE LAW - FOR IT IS CORPORATE LAWYERS WHO HAVE TRAINED AND ASSISTED THEM IN ACQUIRING SUCH SKILLS. FOR MANY - CORPORATE LAWYERS - THE CORPORATION BEING RIGHT FROM A

LEGAL POINT OF VIEW - MEANS THAT NOTHING MORE IS REQUIRED. I SURMISE THAT FEW LAWYERS TELL THEIR CORPORATE CLIENTS THAT MEETING MINIMUM LEGAL REQUIREMENTS MIGHT STILL NOT MAKE ONE ENTIRELY "RIGHT" - AND THEN URGE SELF-RESTRAINT OR COUNSEL RENUNCIATION BY THE CORPORATION OF SUCH LEGAL RIGHTS.

AS LAWYERS - WHAT ARE OUR CHOICES FOR MITIGATING THESE TRENDS. IS IT JUST A MATTER OF DECIDING BY MORALISTIC STANDARDS ONLY HOW TO REACH THE BETTER LIFE? LAWYERS - MORE THAN MOST - ALWAYS HAVE HAD A CERTAIN ADAPTABILITY FOR THE RESOLUTION OF DILEMMAS. INDEED - LAWYERS HAVE NOT ALWAYS BEEN BOUND BY PUBLIC TRENDS -

OR EVEN BY PRIVATE LOGIC. BUT LEGAL ENTITIES - PEOPLE - CORPORATIONS - AND EVEN LAWYERS - ARE BOUND BY TRUTH. ONLY IN THE SERVICE OF TRUTH CAN THERE BE A PERFECT SOCIETY.

HOPEFULLY NOT BEING TOO NAIVE - WHAT COULD BE OF GREATER IMPORTANCE TODAY THAN THE STUDY AND CULTIVATION - BY ALL AMERICANS - PRIVATE CITIZENS - OR CORPORATE CITIZENS - OF DISCREET FRUGALITY - WHICH WOULD ALMOST INEVITABLY LEAD TO A REAL UNDERSTANDING - AND PERHAPS UNDERTAKING - OF OTHER CARDINAL AMERICAN VIRTUES - SUCH AS EQUITY - MODERATION - PRIVACY - AND ORDER - ALL OF WHICH MAY WELL HENCEFORTH BE INDISPENSABLE TO THE SURVIVAL

OF THE RULE OF LAW IN THIS NATION AS WE HAVE KNOWN IT.

UNFORTUNATELY - WE HAVE BECOME A LITIGIOUS SOCIETY WHERE INDIVIDUALS AND GROUPS -- IN DRAMATICALLY INCREASING NUMBERS -- BRING SUITS TO RESOLVE ISSUES WHICH PREVIOUSLY WOULD HAVE BEEN SETTLED PRIVATELY. A LITIGIOUS SOCIETY BREEDS CONFUSION - AMBIGUITY - AND LACK OF SUBTLETY IN THE LAW. IT IMPAIRS INSTITUTIONAL AUTONOMY AND LEADERSHIP AND CREATES INSTITUTIONAL PARALYSIS WHILE LITIGATION WINDS ITS LABORIOUS WAY THROUGH THE PROCEDURAL MAZE AND DELAY LIKELY TO CHARACTERIZE SUCH A SOCIETY'S JUDICIAL SYSTEM.

IF THE LEGAL STRUCTURE CANNOT PROVIDE EITHER

THE PROCESS OR THE PHILOSOPHY NEEDED - WHERE CAN IT BE FOUND? I REITERATE THAT PERHAPS THE ANSWER LIES BEYOND THE LAW -- IN ASSURING THAT WE BRING A SENSE OF RESPONSIBILITY -- OF VALUES AND MORALITY TRANSCENDING THOSE ARTICULATED BY THE LAW -- TO OUR ECONOMIC AND POLITICAL DECISIONMAKING. WE SHOULD CONTINUALLY REMIND OURSELVES OF THE ESSENTIAL ROLE OF ETHICS AND MORALITY TO BOTH INDIVIDUALS AND ORGANIZATIONS - AS LAWYERS WE SHOULD ASPIRE FOR BETTER - FROM OURSELVES AND FROM THOSE WE COUNSEL. SUCH INTERNAL CHECKS ARE A NECESSARY COMPLEMENT TO EXTERNAL RESTRICTIONS. ONLY THE COMBINATION OF AN INTERNALIZED VALUE SYSTEM AND

EXTERNAL CONSTRAINTS CAN ASSURE THAT INDIVIDUALS AND INSTITUTIONS ACT TRULY RESPONSIBLY. WE NEED TO EVOLVE A SET OF CONSENSUS VALUES WHICH GIVE BETTER SHAPE TO THE INSTITUTIONS OF SOCIETY.

CONSUMERS - ENVIRONMENTALISTS - WORKERS - AND OTHER GROUPS WHICH HAVE INCREASINGLY CAST THEMSELVES IN THE ROLE OF PUBLIC CORPORATE OPPONENTS MUST RECOGNIZE THEIR OWN OBLIGATION TO TEMPER THE DEMANDS OF THEIR INTERESTS WITH CONSIDERATION FOR THE HEALTH OF THE MARKET SYSTEM SO VITAL TO THE OVERALL OBJECTIVE OF A STRONG SOCIETY. THEY MUST ALSO RECOGNIZE THAT THEY - TOO - MUST TAKE A BROADER VIEW THAN THE LEGALISTIC OF SOCIETY'S

NEEDS. CORPORATE OR PRIVATE VICTORIES VINDICATING THAT WHICH IS LEGAL BUT NOT NECESSARILY THAT WHICH IS "RIGHT" IN THE CONTEXT OF THE LARGER SOCIETY - WHETHER WON IN THE COURTROOM OR IN THE LEGISLATURE - CAN SOMETIMES BE AS DISASTEROUS TO OUR CLIENTS AS WINNING A BATTLE BUT LOSING THE WAR IS TO A DICTATOR.

IN CONCLUSION - I STATE MY FERVENT BELIEF THAT THE PUBLIC - BE IT PRIVATE CITIZEN OR PUBLIC CORPORATION - HAS THE RIGHT TO DEMAND THAT WE WHO AS LAWYERS HAVE BEEN GRANTED THE SEMI-MONOPOLY TO SERVE AS THE MAJOR BULWARK BETWEEN THEM AND THEIR GOVERNMENT - TO BE THEIR ADVOCATE - TO BE THEIR COUNSELLOR WHEN THE

MOST SERIOUS DECISIONS MUST BE MADE - BE OF THE HIGHEST PROFESSIONAL QUALITY AND WORTHY OF THE UNIQUE TRUST SO PLACED IN US. LAWYERS MUST BE LEGAL - BUT LAWYERS SHOULD ALSO BE MORAL. MY PURPOSE HERE IN WANDERING DOWN THESE DIVERSE AND DISJOINTED PIG-TRAILS OF THE LAW AND THE LEGAL PROFESSION HAS BEEN TO CHALLENGE YOU - AND ME - AND LAWYERS EVERYWHERE - TO ASPIRE TO BE TRULY HONORABLE PROFESSIONALS.

(END)

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 219

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	JUDICIAL/MEDIA SEMINAR CAMPUS OF NORTHWESTERN STATE UNIVERSITY NATCHITOCHES, LOUISIANA
DATE:	FRIDAY, APRIL 11, 1980 NOON
TITLE:	PUBLIC CRITICISM OF THE JUDICIARY -- IS IT CAUSED BY THE DEFAULT OF OTHER GOVERNMENTAL INSTITUTIONS?
TIME:	TWENTY MINUTES

PEOPLE REPEATEDLY COMPLAIN THAT THE COURTS HAVE ARROGATED TO THEMSELVES MATTERS BEYOND THEIR COMPETENCE SATISFACTORILY TO HANDLE - THAT THE COURTS WITHOUT A PUBLIC MANDATE HAVE GROWN TOO BIG FOR THEIR BRITCHES. THEY - INCLUDING OFTEN SOME OF THE MEDIA - ASSERT THAT JUDGES - BOTH STATE AND FEDERAL - SANCTIMONIOUSLY AND SELF-RIGHTEOUSLY - VIEW THEMSELVES AS SOCIETY'S WILD CARD - THE ULTIMATE PROBLEM SOLVER WHO FEEL THAT THEY MUST ACT WHEN OTHER GOVERNMENT INSTITUTIONS DO NOT. AS A TRIAL LAWYER I KNOW THAT SUCH A BLANKET CRITICISM OF JUDGES IS TOTALLY UNMERITED - BUT I ALSO ACKNOWLEDGE THAT SOME JUDGES HAVE BEEN ROVING ALL OVER THE LOT - HAVE BEEN DOING A GREAT

AMOUNT OF JUDICIAL LABOR THAT HAS AT LEAST EXTENDED JUDICIAL TRADITIONS.

IN CONVERSATIONAL DISCUSSIONS - IN EDITORIALS - IN SPEECHES - IN ARTICLES AND LETTERS - NON-LAWYER CITIZENS - THE PRESS - COLUMNISTS AND COMMENTATORS - POLITICIANS - GRIPE WITH CONVICTION THAT THE COURTS OF TODAY ARE - WITHOUT PORTFOLIO OR AUTHORITY - ATTEMPTING - OFTEN UNSUCCESSFULLY - TO RUN SCHOOLS AND PRISONS SYSTEMS - INDEED TO REGULATE ALMOST EVERYTHING - AND AS THOSE CITIZENS SAY - THINGS THAT THEY KNOW LITTLE ABOUT. BUT OF COURSE THAT VERSION OF WHAT COURTS ARE DOING CONCEALS MORE THAN IT REVEALS. ALMOST ALWAYS - IT IS MADE IN

VERY GENERAL TERMS WITHOUT SPECIFICTY. IN VIRTUALLY ALL OF THE CASES IN WHICH JUDGES HAVE ENTERED REMEDIAL AREAS THAT - IN THE JUDGMENT OF SOME - MORE PROPERLY AND MORE EFFECTIVELY SHOULD HAVE BEEN DEALT WITH BY OTHER SOCIETAL INSTITUTIONS - THE COURTS HAVE DONE SO BY REASON OF THE DEFAULT OF THOSE OTHER SYSTEMIC BRANCHES - AND USUALLY - IN MY JUDGMENT - BY REASON OF THE SPECIFIC DEFAULT OF OTHER BRANCHES OF GOVERNMENT. THE COURTS BY THE OVERWHELMING CHOICE OF THE PEOPLE SEEMINGLY HAVE BECOME THE FORUM FOR REDRESS OF ALL THINGS UNFAIR IN LIFE - TRULY - THE OPPRESSED CITIZEN'S LAST HOPE - SIMPLY BECAUSE THE PEOPLE HAVE LEARNED THAT THE COURT

STILL WILL MAKE THE HARD CHOICES THAT OTHER GOVERNMENT OFFICIALS DUCK.

JUDGES GET INVOLVED IN DECREEING DRASTIC REMEDIES AGAINST THE GOVERNMENT IN TOUGH AREAS PRIMARILY BECAUSE IT IS THEIR RESPONSIBILITY TO SEE THAT JUSTICE IS DONE - AND IF THEY DO NOTHING - JUSTICE WILL NOT BE DONE. GENERALLY - THE JUDGE BEGINS BY ONLY HOLDING WHAT THE GOVERNMENT CANNOT DO -- THE JUDGE DOES NOT POINT OUT WHAT GOVERNMENT CAN DO. SOMETIMES THAT IS ENOUGH. BUT MORE OFTEN - THE GOVERNMENT THEN DOES NOTHING - AND THE ONLY JUDICIAL ALTERNATIVE THEN IS FOR A COURT DECREED RESOLUTION. UNDER SUCH

CIRCUMSTANCES - THE ANSWER TO SUCH JUDICIAL ACTIVISM MOST CERTAINLY IS NOT TO CLOSE THE COURTHOUSE DOOR. OBVIOUSLY IT IS TO MAKE THOSE OTHER GOVERNMENTAL INSTITUTIONS DO RIGHT.

IN THE MAIN - THE COURTS HAVE PERFORMED WELL - PERHAPS TOO WELL. OUR BLINDFOLDED FIGURE HOLDING THE SCALES OF JUSTICE HAS BEEN WORLDWIDE BOTH A SYMBOL AND A REALITY. THE COURTS HAVE ACHIEVED SUCCESS WHERE THE OTHER GOVERNMENTAL INSTITUTIONS HAVE NOT - SUCCESS AS SEEN BY THE NEGLECTED AND IGNORED - AND THE POOR AND THE WEAK - AS BEING A MEANINGFUL VEHICLE FOR ACHIEVING DESIRABLE SOCIAL CHANGE.

THAT VERY SUCCESS HAS CREATED THIS PROBLEM:

AS RELIANCE UPON THE COURTS HAS INCREASED - THERE HAS BEEN A CONCOMITANT DECREASE IN THE INSTITUTIONAL POWER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT. DEMOCRATIC INSTITUTIONS TODAY SIMPLY ARE NEITHER AS DEMOCRATIC NOR EFFECTIVE AS THEY ONCE WERE. BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES HAVE BECOME INCAPABLE OR RESOLVING TOUGHER QUESTIONS OF PUBLIC POLICY. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES HAVE NO CHOICE BUT TO ACT. IF OUR GOVERNMENTAL

SYSTEM IS TO FUNCTION PROPERLY - A REWORKING IS TIMELY.

JUSTICE NEED NOT NECESSARILY EMANATE FROM THE COURTS.

INDEED - LAWYERS AND JUDGES - AND OTHERS - HAVE AN

OBLIGATION TO SECURE CONFLICT RESOLUTION IN OTHER FORUMS.

THE AMERICAN PUBLIC TODAY PERCEIVES THE COURTS

AS JACKS-OF-ALL-TRADES - AVAILABLE TO FURNISH THE ANSWER

TO WHATEVER MAY TROUBLE US: SHALL WE PROSECUTE A

WAR - OR MAKE PEACE? WHAT IS LIFE - OR WHEN DOES

DEATH BEGIN? SHALL WE ACHIEVE RACIAL INTEGRATION

BY CUMBERSOME BUSING OF CHILDREN TO FAR-AWAY SCHOOLS?

HOW SHALL WE OPERATE PRISONS AND MENTAL INSTITUTIONS?

SHALL WE BUILD NUCLEAR POWER PLANTS - AND IF SO - WHERE?

SHALL THE CONCORDE FLY TO OUR SHORE? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? SHALL THE SNAIL DARTER SURVIVE? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE?

A LAWSUIT IS PROBABLY QUICKER AND CHEAPER THAN LOBBYING OR A REFERENDUM AND MORE AUTHORITATIVE THAN A PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A HIGHLY CONTROVERSIAL LEGAL DECISION ACCOMPLISH? IT IS SIMPLY A JUDICIAL PRONOUNCEMENT AND NOTHING MORE. IT DOES NOT SETTLE THE DIVISIVE MORAL - ETHICAL AND POLITICAL QUESTIONS THAT LIE THEREUNDER. MANY WHO CHERISH JUSTICE HAVE NOW REACHED THE CONCLUSION THAT IF THIS GROWING SHIFT

BY THE PEOPLE OF THEIR HARDEST PROBLEMS TO THE AUTHORITY OF THE COURTS CONTINUES - IT ULTIMATELY WILL SEVERELY IMPAIR OR DESTROY THE ESSENTIAL BALANCE BETWEEN THE SEVERAL BRANCHES OF GOVERNMENT. COURTS SHOULD NEVER BE CONSIDERED TO BE THE FIRST STOP IN CORRECTING SOCIAL INJUSTICE - EVEN THOUGH MANY MODERN LITIGANTS AND THEIR LAWYERS STEER TO THAT COURSE. I UNDERSTAND THE PERSONAL COMPULSION OF JUDGES TO ACT TO CORRECT THOSE WRONGS BROUGHT BEFORE THEM - BUT THE OVER-REACTION OF JUDGES IN A FEW INSTANCES OF SELF-PERCEIVED TRANSGRESSION AND MIS-CONCEIVED PUBLIC OBLIGATION HAVE UNDERSTANDABLY LED THE PUBLIC - AND PERHAPS THE NEWS MEDIA - TO BLAME ALL

JUDGES. IT IS INFREQUENT NOW TO SEE OUR COURTS GOING ALL OUT TO CONFINE OR RESTRICT THE IMPACT OF A CONSTITUTIONAL OR STATUTORY DECISION ONLY TO THE CASE AT HAND. JUDGES FACED WITH A UNCONSTITUTIONAL LAW RARELY SEEM CONTENT WITH SIMPLY DECLARING IT TO BE SO -- INSTEAD THEY OFTEN SEEM TO PREFER SOME SORT OF SALVAGE AT THE PRICE OF FORSAKING THEIR JUDICIAL DISPUTE-RESOLVING ROLE FOR THAT OF THE LEGISLATIVE POLICYMAKER.

PERHAPS THOUGHTFUL PEOPLE - AS A MATTER OF SOCIAL PRINCIPLE - SHOULD FACE UP TO THE ISSUE OF WHETHER OUR COURTS IN THE FUTURE SHALL BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM-SOLVERS - OF OUR SOCIETY.

SHOULD NOT WE NOW DEMAND THAT OTHER GOVERNMENTAL IN-STITUTIONS TOO DO WHAT THEY WERE CREATED TO DO? IT SEEMS TO ME THAT AS FAR AS POSSIBLE - WE HENCEFORTH SHOULD PRESERVE OUR JUDICIAL FORUMS FOR DOING ONLY THAT WHICH CANNOT BE DONE ELSEWHERE.

OUR COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF OUR CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE. THE RISING CRIME RATE CONTINUES TO HAVE ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF OUR SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS

SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE.

WE ARE WITNESSING QUITE PROPERLY A SEXUAL REVOLUTION - THERE HAS BEEN AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE TO THE ENVIRONMENT -- THE LIST COULD GO ON AND ON. BUT DO AMERICANS AS A FREEDOM-LOVING GROUP OF RUGGED INDIVIDUALS REALLY BELIEVE THAT THE ORDINARY - NORMAL LAWYER - CALLED UPON BY THE PUBLIC WEAL TO SIT AS A JUDGE - HAS ANY SPECIAL APTITUDE WHICH MAKES HER OR HIM ALONE THE SUITABLE CUSTODIAN OF THE RESPONSIBILITY FOR THE SOLUTION OF THESE VEXING PROBLEMS? IS THERE ANY-THING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF

SUCH PROBLEMS?

INDEED NOT. IT IS ONE THING FOR JUDGES TO DECIDE BI-PARTY CONTROVERSIES AND - IN SO DOING - PRONOUNCE PRINCIPLES WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIMES FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS.

THOSE WHO VALUE BOTH MAJORITY RULE AND INDIVIDUAL FREEDOM LONG HAVE REALIZED THAT AN INDEPENDENT JUDICIARY IS A BULWARK OF THEIR WAY OF LIFE. TO SAFEGUARD BOTH PREVIOUS VALUES - PERHAPS IT IS PROPER NOW TO ASK THE

JUDGES THEMSELVES TO EXERCISE GREATER SELF-RESTRAINT. EVEN THE STRIDENT FEW WOULD NOT ASK THE JUDGES TO UNDO ALL THE RIGHTS ADVANCED BY THE COURTS THROUGHOUT OUR HISTORY. HAVING DONE SO MUCH TO CHANGE SOCIETY - PERHAPS IT IS TIME THAT THE JUDICIARY - STATE AND FEDERAL - NOW HELP TO REFURBISH OUR DEFAULTING LEGISLATIVE AND EXECUTIVE BRANCHES BY HENCEFORTH DOING AS LITTLE AS POSSIBLE - YET - EVEN AS WE SAY THAT - WE KNOW THAT JUDGES MUST CONTINUE TO RENDER JUSTICE TO OUR PEOPLE IF NO OTHER GOVERNMENT AGENCY DOES SO - AND OF COURSE THAT IS THE WAY WE WANT IT. JUDGES ARE - HAVE BEEN - AND MUST BE THE LAST REFUGE OF A FREE AMERICAN AGAINST

THOSE WHO WOULD UNJUSTLY OPPRESS HIM OR HER. NEVERTHELESS IT IS TIMELY THAT THOSE WHO UNTHINKINGLY SOMETIME BLAME JUDGES FOR CORRECTING OPPRESSIVE GOVERNMENT SHOULD PLACE THE MAJOR RESPONSIBILITY UPON THOSE WHO BY THEIR DEFAULT HAVE FORCED THOSE JUDGES TO ACT - AND A LARGE SHARE OF THE RESPONSIBILITY PROPERLY TO INFORM OUR PEOPLE ABOUT THE ESSENTIAL FUNCTION OF THE COURTS MUST REST WITH THE NEWS MEDIA.

IT IS VERY HARD TO SEE WHY INTELLIGENT - HIGHLY MOTIVATED INDIVIDUALS CANNOT ACT UPON CONSTITUTIONAL PRINCIPLES WHICH PROCLAIM THE RIGHT TO CRITICIZE THEIR COURTS - AND OTHER INSTITUTIONS - WITH RESPECT FOR THE

ACCOMMODATION OF OTHER CONSTITUTIONAL PRINCIPLES - RIGHTS AND DUTIES. WHY HAVE WE AT THIS STAGE OF NATIONAL LIFE SHIFTED OUR CONCERNS FROM POLICIES TO PERSONALITIES - FROM MATTERS OF TANGIBLE CONSEQUENCE TO THE PUBLIC AS A WHOLE TO MATTERS OF UNCERTAIN RELEVANCE TO THE PUBLIC INTEREST? WHY ARE SO MANY OF US APPARENTLY MORE PRONE TO CRITICIZE THAN TO SUPPORT? WHY DO SOME FEVERISHLY SUPPORT SOME CONSTITUTIONAL GUARANTIES AND THEN IGNORE OTHERS EQUALLY PRECIOUS?

WHEN THE AMERICAN CONSTITUTION WAS WRITTEN - IT ASSUMED STANDARDS OF BEHAVIOR BASED UPON HISTORICALLY ACCEPTED TENETS. THE FOUNDERS QUITE OBVIOUSLY BELIEVED

THAT A GOVERNMENT COULD SUCCEED WHICH WAS PREDICATED UPON HISTORICAL EXPERIENCE AND THE INSIGHTS OF GREAT PHILOSOPHERS LEADING THEM TO DESIGN A DEMOCRATIC EXPERIMENT THAT ASSUMED THAT INSTITUTIONS COULD EXIST IN HEALTHY CONFRONTATION BECAUSE THERE WOULD BE AMONG ALL PEOPLES AND ALL INSTITUTIONS GENERAL RESPECT FOR THE PURPOSES OF EACH OTHER INSTITUTION - EVEN IF THERE WAS NOT ALWAYS TO BE ACCEPTANCE OF SPECIFIC INSTITUTIONAL DECISIONS OR ACTIONS. IT HAS NOT ALWAYS WORKED OUT THAT WAY -- AND THE TREND IN EVER ACCELERATING GEOMETRIC PROPORTIONS IS TO MISTRUST AND CONFLICT.

PERHAPS THE REAL NEED OF ALL OF OUR INSTITUTIONS -

INCLUDING PERHAPS PARTICULARLY THE COURTS - IS SELF-EXAMINATION - AND A DEGREE OF OPEN-MINDEDNESS TO THE CRITICISMS WHICH ARE LEVELED AGAINST THEM. INDIVIDUAL JUDGES ARE IN MANY INSTANCES PARANOID IN THEIR REACTION TO ANY CRITICISM - AND QUITE OFTEN THEIR RESPONSE IS TO OVER-REACT BY THE LEVELING OF UNJUST - UNWARRANTED - AND UNWORTHY COUNTER-ACTS OR COUNTER-ACCUSATIONS - PARTICULARLY AGAINST THE NEWS MEDIA.

I RELUCTANTLY TOO HAVE BECOME CONVINCED THAT THE NEWS MEDIA MUST - INSOFAR AS THE COURTS ARE CONCERNED - ACQUIRE AN ENHANCED AWARENESS OF ITS GREAT POWER AND COMMENSURATE RESPONSIBILITY - A RESPONSIBILITY WHICH IS

ALL THE LARGER BECAUSE THERE IS NO ONE TO EXERCISE PRIOR RESTRAINT UPON THE NEWS MEDIA EXCEPT ITSELF - NOR SHOULD THERE BE.

AFTER A LONG ERA OF FUSSING AND FEUDING AND ACRIMONY BETWEEN THESE TWO GREAT PRESERVERS OF ORDERED LIBERTY - DEMOCRACY - AND CONSTITUTIONAL FREEDOM - PERHAPS AMERICA IS IN NEED OF A REAFFIRMATION OF AN OLD FASHIONED UNDERSTANDING WHEREBY BOTH - THE JUDGES AND THE NEWS MEDIA - EACH TREAT THE OTHER WITH COURTESY AND RESPECT - AT LEAST MORE THAN IS NOW THE CUSTOM. THE ESSENCE OF ANY SUCH UNDERSTANDING HAS TO BE A MEASURE OF VOLUNTARY RESTRAINT - AN UNSPOKEN UNDERSTANDING THAT NEITHER WILL

APPLY THEIR POWERS AGAINST THE OTHER TO THE MAXIMUM.

ONE INSTITUTION MUST NOT DOMINATE THE OTHER. A SITUATION WHERE ONE ATTEMPTS TO DOMINATE DOES MORE THAN ENCOURAGE UNSEEMLY CONFLICT - IT DEMANDS IT. BOTH INSTITUTIONS MUST UNDERSTAND THE INDUTIABLE CONTRIBUTION OF THE OTHER TO THE RULE OF LAW - AND THEY EACH MUST WORK TO INSURE THAT CONTRIBUTION BY THE OTHER. NO ONE INSTITUTION - THE NEWS MEDIA - THE JUSTICE SYSTEM - OR OF COURSE ANY OTHER AGENCY - IS AUTHORIZED OR QUALIFIED TO SERVE AS THE SOLE AND ONLY KEEPER OF THE CONSCIENCE OF ALL HUMANKIND. UNDERSTANDING OF THE ROLE OF OTHERS IS THE ROUTE TO THE PRODUCTIVE ADVERSARY RELATIONSHIP

WHICH I SEE AS THE KEY TO MORE EFFECTIVE DEMOCRATIC RELATIONSHIPS.

EVEN THE HEALTHIEST ADVERSARIAL POSITIONS AMONG THE COURTS AND THEIR CRITICS WILL OF COURSE NOT RESULT IN BETTER SOLUTIONS TO EVERY SINGLE PROBLEM IN THE JUSTICE SYSTEM. NO ONE IS SO NAIVE AS TO BELIEVE THAT PERFECTION IN THE ADMINISTRATION OF JUSTICE IS POSSIBLE. BUT A RESOLUTION OF THE UNWARRANTED CRITICISM OF JUDGES FOR DOING WHAT THEY HAVE TO DO BECAUSE OF THE DEFAULT OF OTHERS WILL HELP. A BETTER MEASURE OF JUSTICE IS POSSIBLE WHERE THERE IS REASON - RESPECT - UNDERSTANDING - AND ACCOMMODATION BY BOTH THE COURTS

AND THEIR CRITICS. SUCH RATIONAL RESOLUTION ALLOWS FURTHER RATIONAL RESOLUTION - AND WHEN THERE IS SOMETHING TO BUILD UPON - SOCIETY CAN ONLY ANTICIPATE A HIGHER ORDER OF JUSTICE - A BETTER QUALITY OF LIFE FOR ALL PEOPLE - THE HIGHEST AND NOBLEST ASPIRATION OF JUDGES - LAWYERS - AND THE PRESS.

(THE END)

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 220

VOLUME XVI

#220

REMARKS OF:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	ANNUAL MEETING DETROIT BAR ASSOCIATION BOOK CADILLAC HOTEL DETROIT, MICHIGAN
DATE:	THURSDAY, MAY 1, 1980 7:00 P.M.
TITLE:	RANDOM CURRENT THOUGHTS OF A TRIAL LAWYER ABOUT THE LAW - THE COURTS - AND THE RESPONSIBILITIES OF LAWYERS
TIME:	TWENTY MINUTES

PUBLIC AND PRIVATE PURPOSES EVERYWHERE SHOUT TODAY IN THE LANGUAGE OF TERRORISM - ASSASSINATION - HOSTAGES - GEONOCIDE - INVASION - KIDNAPPING - ECONOMIC WARFARE - CRYING OUT LOUDLY AND CLEARLY FOR THE WORLD-WIDE APPLICATION OF THE RULE OF LAW. SOME AMERICANS TOO CONTINUE TO ENGAGE IN THE LONG ESTABLISHED NATIONAL IDOLATRY OF LAW AS A CURE FOR ALL SOCIAL ILLS - OF BIGGER AND BETTER SOLUTIONS THROUGH LAW TO ALL PROBLEMS. BUT MANY RESPONSIBLE AND REASONING PEOPLE - INCLUDING EVEN SOME OF THOSE WHO MAKE LAW - YEARN - OR AT LEAST ARE BEGINNING TO YEARN - FOR THE CONVENIENCE AND MANAGEABILITY OF SMALLNESS IN THE LAW - AN EMBRYONIC TREND TOWARD FEWER DETAILED LAWS WHICH I BELIEVE CAN BE ACCELERATED.

THROUGHOUT ITS HISTORY - AMERICA - MORE THAN ANY NATION

HAS BELIEVED THAT THROUGH LAW - JUSTICE AND GOODNESS AND FAIRNESS CAN BE GUARANTEED TO ALL PEOPLE. FAITH IN THE RULE OF LAW HAS DEVELOPED TO SUCH A POINT THAT AMERICANS NOW ARE PLACING LESS AND LESS RELIANCE UPON STANDARDS OF VALUE ABOVE THE LAW - A DIRECTION WHICH IN THE LONG RUN CAN ONLY BE DEVASTATING FOR SOCIETY AS WELL AS THE RULE OF LAW.

WHAT HAS MADE SO MANY IN THIS STURDY LAND COME TO REALIZE THAT THERE NEVER CAN BE A FINAL RESOLUTION OF DAY-TO-DAY PROBLEMS IN ACTUAL LIFE THROUGH LAW ALONE - AND THUS TO YEARN FOR A DIFFERING QUALITY OF LAW? PROPERLY TO ANALYZE THAT DESIRE - THE IMPORTANCE OF TWO PRIME TRADITIONAL VALUES NEED TO BE RECOGNIZED SIMULTANEOUSLY - TWO VALUES WHICH MAY SEEM TO SOME INCOMPATIBLE: <u>FIRST</u> - FREEDOM - FREEDOM FROM OVER-CONTROL BY OTHERS - THE INDIVIDUAL

PRIVACY TO DO ONE'S OWN THING - WHATEVER THAT IS - ALONE OR IN SMALL AUTONOMOUS UNITS - AND SECOND - ORDER - ORDER WHICH CAN COME ONLY FOR SOCIETY AS AN ENTITIY FROM LARGE-SCALE UNITY AND COORDINATION - THE SOCIETAL ORDERLINESS WHICH PERMITS EFFICIENCIES AND PREVENTS ANARCHY.

THE DUALITY OF THESE TWO HUMAN VALUES MUST BE EMPHASIZED ALWAYS WHEN EXISTING LAW IS CHANGED IN AN EFFORT TO RE-ORDER PUBLIC AND PRIVATE PURPOSES. YET THOSE WHO MAKE LAW FIND IT MOST DIFFICULT TO KEEP IN MIND THE DISPARATE PURPOSES OF PRIVACY AND ORDERLINESS. THE QUESTION BETWEEN TOO MUCH AND TOO LITTLE IN LAW MIGHT BE PUT ANOTHER WAY: WHAT SHOULD BE SOUGHT IN SUCH MATTERS IS TO DISCRIMINATE - TO GET THINGS SORTED OUT. FOR EVERY

LAW THERE IS A CERTAIN APPROPRIATE SCALE. PRIVACY BEGETS LITTLE LAW AND SMALL LEGAL SOLUTIONS - AND ORDER BEGETS BIG LAW AND MASSIVE LEGAL SOLUTIONS. YET - THOSE TWO COMPETING VALUES IN REALITY ARE NOT INCOMPATIBLE - AND ANY RE-ORDERED LEGAL PRIORITIES MUST RECONCILE THEM.

AMERICANS NOW ROUTINELY ASK THE LAW TO DETERMINE RIGHT FROM WRONG - THE ETHICAL FROM THE UNETHICAL - AND THE MORAL FROM THE IMMORAL - AN ACTIVITY WHICH SEEMS TO ME TO BE PERSONALLY SELF-DEBILITATING BECAUSE IT INNATELY ABSOLVES INDIDIVUALS FROM ALL CONDUCT BEYOND THAT REQUIRED BY LAW. SADLY - PURPOSEFUL GOALS OF PERSONAL RECTITUDE BEYOND THE MINIMUM SET BY LAW RECEIVE LITTLE CURRENT POPULAR SUPPORT. TO PERMIT LAW ALONE THUS TO CONTROL THE ENTIRE VALUE STANDARDS OF HUMAN BEINGS CAN ONLY RESULT IN A TOTAL ATROPHY OF SOCIETAL

RESPONSIBILITY. AS CURRENT WORLD EVENTS SHOW - A LEGALISTIC SOCIETY WHICH IGNORES ALL VALUES OTHER THAN LAW IS A SOCIETY IN WHICH ULTIMATELY BOTH ORDER AND PRIVACY WILL WITHER AWAY AND DISAPPEAR. INDEED - HISTORY HAS REPEATEDLY DEMONSTRATED THAT NO STATE CAN LONG SURVIVE IF ITS PEOPLE ASSUME THAT CONDUCT NOT FORBIDDEN BY LAW IS ACCEPTABLE CONDUCT. LAW SHOULD SET MINIMUM STANDARDS - BUT NOT THE LOFTIER GOALS. IT CAN BE THE BOTTOM - BUT IT MUST NOT BE THE CEILING.

DURING MY OWN LIFETIME - THIS EVER-ENHANCING RELIANCE ON THE LAW HAS LED TO A SHIFT IN THE RESPONSIBILITY FOR DEVELOPING THE MORES OF THIS NATIONS'S SOCIAL STRUCTURE. TO ACCEPT THE LAW AS A FLOOR FORGIVES INDIVIDUALS FOR ALL BEHAVIOR WHICH IS NOT PROHIBITED BY LAW - AND AS A NECESSARY COROLLARY -

PERMITS THEM TO USE THOSE MINIMUM LEGAL STANDARDS TO ADVANCE THEIR OWN PURPOSES.

WHAT ARE THE CHOICES FOR MITIGATING THIS TREND? IS IT JUST A MATTER OF DECIDING THAT HENCEFORTH ONLY MORALISTIC STANDARDS WILL BE UTILIZED TO ACHIEVE THE BETTER LIFE? AS I SEE IT - THE MOST EFFECTIVE RESPONSE IS FOR INDIVIDUAL AMERICANS TO TAKE STEPS TO ASSURE AND DEMONSTRATE THAT THEY THEMSELVES ARE CAPABLE OF INDIVIDUAL SELF-DISCIPLINE WHICH IS CONSISTENT WITH BOTH THE REALITIES OF THE DESIRED PRIVACY AND THE ESSENTIAL ORDER WHICH MUST BE PROVIDED UNDER LAW FOR THE GREATER PUBLIC INTEREST. IT IS UNREALISTIC TO IGNORE THE FACT THAT TO DATE INDIVIDUAL PERFORMANCE UNDER EXISTING LAW CAN BE IMPROVED - AND I DO NOT IGNORE IT. NOT ALL

AMERICANS CURRENTLY ARE DISCHARGING PROPERLY THEIR ACKNOWLEDGED RESPONSIBILITIES - AND ADDITIONAL EFFORTS TO OBTAIN INDIVIDUAL ADHERENCE TO THE RULE OF LAW CLEARLY IS WARRANTED. BUT AN ENHANCED LEGALISTIC APPROACH - EVEN IF ACCEPTED - DOES NOT ASSURE THE PERMANENT SOLUTION WHICH CAN BE OBTAINED ONLY IF PEOPLE RESPOND SUBSTANTIVELY.

OF COURSE THERE ARE LARGER RISKS IN A LEGALISTIC APPROACH THAN THE INCONVENIENT AND VEXING IMPOSITION OF FURTHER GOVERNMENTAL RESTRICTIONS ON DAY-TO-DAY LIVING. THE LAW CANNOT AND SHOULD NOT PROVIDE A RESPONSE TO ALL SOCIAL OR ECONOMIC PROBLEMS. LAWYERS KNOW THAT THE LAW MORE OFTEN LAGS THAN LEADS. IMPLEMENTED THROUGH THE POLITICAL SYSTEM - THE PROPER ROLE OF LAW IS TO ARTICULATE PRE-ESTABLISHED NORMS

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IF THE PRESENT LEGAL STRUCTURE DOES NOT PROVIDE THE PHILOSOPHY NEEDED - WHERE CAN IT BE FOUND? THE ANSWER LIES BEYOND THE LAW. A SENSE OF RESPONSIBILITY - OF VALUES TRANSCENDING THOSE ARTICULATED BY THE LAW - SHOULD BE APPLIED TO DECISION MAKING. LAWYERS SHOULD CONTINUALLY REMIND THEIR CLIENTS OF THE ESSENTIAL ROLE OF ETHICS AND MORALITY. LAWYERS SHOULD ASPIRE FOR HIGHER STANDARDS THAN THE MINIMUM FROM THOSE THEY COUNSEL. THE TRUE RULE OF LAW INVISIONS INTERNAL CHECKS AS A NECESSARY COMPLEMENT TO EXTERNAL

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WHY HAS AMERICA AT THIS STAGE SEEMINGLY SHIFTED EMPHASIS FROM THAT WHICH IS RIGHT TO THAT WHICH IS LEGAL? HAS THE DEVELOPMENT OF A STRONG LEGAL PROFESSION IN THIS COUNTRY - UNPARALLELLED THROUGHOUT RECORDED HISTORY IN NUMBERS, INDEPENDENCE, INFLUENCE, AFFLUENCE AND COMPETENCE - CONTRIBUTED TO THIS DEPLORABLE TREND. FOR MANY LAWYERS - IT DOES APPEAR THAT BEING RIGHT FROM A LEGAL POINT OF VIEW MEANS THAT NOTHING MORE IS REQUIRED. I SURMISE THAT FEW LAWYERS TELL THEIR CLIENTS THAT MEETING MINIMUM LEGAL REQUIREMENTS MIGHT STILL NOT MAKE ONE ENTIRELY RIGHT - AND THEN URGE SELF-RESTRAINT -

OR COUNSEL REPUDIATION BY THE CLIENT OF THE RIGHT SO TO ACT. INDIVIDUAL LEGAL VICTORIES VINDICATING THAT WHICH MEETS MINIMUM LEGAL DEMANDS - BUT NOT NECESSARILY THAT WHICH IS RIGHT IN THE CONTEXT OF THE LARGER SOCIETY - WHETHER WON IN THE COURTROOM OR IN THE LEGISLATURE - CAN SOMETIMES BE AS DISASTEROUS TO A LAWYER'S CLIENTS AS WINNING A BATTLE BUT LOSING THE WAR IS TO A DICTATOR.

WHEN THE AMERICAN CONSTITUTION WAS WRITTEN - IT ASSUMED STANDARDS OF BEHAVIOR BASED UPON HISTORICALLY ACCEPTED TENETS. THE FOUNDERS BELIEVED THAT A CONSTITUTIONAL GOVERNMENT COULD SUCCEED WHICH WAS PREDICATED UPON HISTORICAL EXPERIENCE AND THE INSIGHTS OF GREAT PHILOSOPHERS - LEADING TO AN EXPERIMENT UNIQUE IN THE ANNALS OF GOVERNMENT WHICH PUT INSTITUTIONS

IN A HEALTHY CONFRONTATION - A CHECK AND BALANCE DIVISION OF THE THERETOFORE ABSOLUTE POWER OF THE SOVEREIGN. THE FOUNDERS ASSUMED THAT THERE WOULD BE GENERAL RESPECT - ALTHOUGH NOT ALWAYS AGREEMENT - BY THE PEOPLE FOR THE PURPOSES OF EACH GOVERNMENTAL AND SOCIETAL INSTITUTION. IT HAS NOT ALWAYS WORKED OUT THAT WAY---AND THE EVER-INCREASING PUBLIC TENDENCY IS TO MISTRUST - TO DISPUTE - AND TO DISRUPT.

AFTER A LONG ERA OF PUBLIC FUSSING AND FEUDING AND ACRIMONY - AMERICA IS IN NEED OF A REAFFIRMATION OF AN OLD-FASHIONED UNDERSTANDING WHEREBY ALL ELEMENTS OF GOVERNMENT - FEDERAL - STATE - AND THE SEVERAL DIVISIONS THEREOF - MUST EACH TREAT THE OTHERS WITH COURTESY AND RESPECT - AT LEAST MORE THAN NOW. THE ESSENCE OF ANY SUCH UNDERSTANDING HAS TO BE A

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ONE INSTITUTION MUST NOT DOMINATE. A SITUATION WHERE ONE ATTEMPTS TO DOMINATE DOES MORE THAN ENCOURAGE UNSEEMLY CONFLICT - IT DEMANDS IT. AFTER ALMOST TWO HUNDRED YEARS OF NATIONAL EXPERIENCE - EACH INSTITUION SHOULD NOW UNDERSTAND THE INDUBITABLE CONTRIBUTION OF THE OTHERS TO ORDERLINESS AND PRIVACY - AND EACH SHOULD WORK TO INSURE THAT CONTRIBUTION BY THOSE OTHERS. NO INSTITUTION - THE EXECUTIVE DEPARTMENT - THE JUDICIAL SYSTEM - OR THE LEGISLATIVE BRANCH - THE NATIONAL GOVERNMENT OR THE SEVERAL STATES - OR OF COURSE ANY OTHER GOVERNMENTAL OR NON-GOVERNMENTAL AGENCY - IS QUALIFIED TO SERVE AS THE PRIME KEEPER OF THE CONSCIENCE OF ALL HUMANKIND.

UNDERSTANDING OF THE ROLE OF OTHERS IS THE ONLY PRODUCTIVE ROUTE TO THE HARMONIZATION OF FREEDOM AND ORDER WHICH I SEE AS THE KEY TO AN EFFECTIVE DEMOCRATIC RELATIONSHIP.

NOW LET ME GO TO MY OTHER POINT - PERHAPS UNRELATED - BUT IT IS A CURRENT PERCEPTION OF MINE. IT IS INCREASINGLY CLEAR THAT BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT HAVE BECOME INCAPABLE OF RESOLVING MANY OF THE TOUGHER QUESTIONS OF PUBLIC POLICY. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL SEGMENTS OF GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES HAVE HAD NO CHOICE BUT TO ACT. THE COURTS ARE BEING ASKED TODAY TO SOLVE PROBLEMS FOR WHICH THEY ARE NOT INSTITUTIONALLY EQUIPPED--OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF

GOVERNMENT.

JUSTICE NEED NOT NECESSARILY EMANATE FROM THE COURTS. INDEED - LAWYERS AND JUDGES THEMSELVES HAVE AN OBLIGATION WHENEVER FEASIBLE TO SECURE CONFLICT RESOLUTION IN OTHER FORUMS. AS FAR AS POSSIBLE - JUDICIAL FORUMS SHOULD BE RESERVED FOR DOING ONLY THAT WHICH CANNOT BE BEST DONE ELSEWHERE. THE PUBLIC TODAY PERCEIVES THE COURTS AS JACKS-OF-ALL-TRADES - AVAILABLE TO FURNISH THE ANSWER TO WHATEVER MAY TROUBLE THEM: SHALL A WAR BE PROSECUTED OR PEACE MADE? WHAT IS LIFE - OR WHEN DOES DEATH BEGIN? SHALL RACIAL INTEGRATION BE ACHIEVED BY CUMBERSOME BUSING OF CHILDREN TO FAR-AWAY SCHOOLS? HOW SHALL PRISONS AND MENTAL INSTITUTIONS

BE OPERATED? SHALL NUCLEAR POWER PLANTS BE BUILT - AND IF SO - WHERE? SHALL THE CONCORDE FLY TO THESE SHORES? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE? IT SEEMS UNFORTUNATE TO ME THAT AMERICA HAS BECOME SUCH A LITIGIOUS SOCIETY THAT SUITS ROUTINELY ARE BROUGHT TO RESOLVE THOSE KIND OF ISSUES - ISSUES WHICH PREVIOUSLY WOULD HAVE BEEN SETTLED PRIVATELY - OR AT LEAST IN FORUMS OTHER THAN THE COURTS. A RE-SHAPING OF THE JUDICIAL SYSTEM TO MAKE IT FUNCTION AS IT WAS DESIGNED IS TIMELY.

A LAWSUIT PROBABLY IS QUICKER AND CHEAPER THAN LOBBYING OR A REFERENDUM - AND MORE AUTHORITATIVE THAN A PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A HIGHTLY CONTROVERSIAL LEGAL DECISION ACCOMPLISH? IT IS SIMPLY A

JUDICIAL PRONOUNCEMENT - AND NOTHING MORE. IT DOES NOT SETTLE THE DIVISIVE MORAL - ETHICAL - AND POLITICAL QUESTIONS THAT LIE THEREUNDER. IT SIMPLY IS NOT AN EXPRESSION OF THE POPULAR WILL - NOR THE PUBLIC WEAL - BUT ONLY THE JUDGMENT OF ONE OR A FEW HUMAN BEINGS TRANSITORILY PRESIDING OVER A COURT.

THIS SHIFT BY THE PEOPLE OF THEIR HARDEST PROBLEMS TO THE AUTHORITY OF THE COURTS WILL IN TIME JEOPARDIZE - AND PERHAPS ULTIMATELY DESTROY - THE CHECKS AND BALANCES SO CAREFULLY INCORPORATED IN OUR FEDERAL SYSTEM OF GOVERNMENT BY THE CONSTITUTION. IF THAT IS SO - AS IT SEEMS TO ME - THEN THE PRINCIPAL TASK FACING THOSE WHO CHERISH JUSTICE - AND THE RULE OF LAW - IS THE RESTORATION SOON OF A PROPER BALANCE BETWEEN THE COURTS AND THE OTHER BRANCHES OF GOVERNMENT.

THIS COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF ITS CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE. THE RISING CRIME RATE CONTINUES TO HAVE ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE. A SEXUAL REVOLUTION QUITE PROPERLY IS NOW UNDERWAY. AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE TO THE ENVIRONMENT IS EVIDENCED EVERYWHERE. IS THERE ANYTHING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF SUCH VEXING PROBLEMS? INDEED NOT! IT IS ONE THING FOR JUDGES TO DECIDE BI-PARTY CONTROVERSIES

AND - IN SO DOING - PRONOUNCE PRINCIPLES WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIME FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS. THE COURTS PROPERLY SHOULD BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM SOLVERS - OF AMERICAN SOCIETY.

THE AMERICAN PEOPLE FORCED JUDGES TO TAKE ON TOO BIG A BURDEN BECAUSE THEY RECOGNIZED THE DEFAULT OF GOVERNMENTAL POLICYMAKERS. THEY MADE JUDGES ACT BECAUSE THEY HAD NO OTHER PLACE TO TURN. IT SEEMS TO ME THAT THOSE POLICYMAKERS SHOULD HENCEFORTH BE REQUIRED TO DO THE HARD JOBS THAT THEY SHOULD HAVE BEEN DOING ALL ALONG - AND THAT LAWYERS AND OTHERS

WHO HONOR THE RULE OF LAW AND THE ADMINISTRATION OF JUSTICE SHOULD DEFEND THE JUDGES FROM AN ACCELERATING BUT MOST OFTEN UNWARRANTED PUBLIC CLAMOR AGAINST JUDICIAL ACTIVISM.

THOSE WHO VALUE BOTH MAJORITY RULE AND MINORITY RIGHTS - THOSE WHO VALUE BOTH INDIVIDUAL PRIVACY AND SOCIETAL ORDER - LONG HAVE REALIZED THAT A PRINCIPLED AND STRONG JUDICIARY IS A PRIME BULWARK OF THE AMERICAN WAY OF LIFE. BUT TO SAFEGUARD THOSE PRECIOUS VALUES FOR LATER YEARS - PERHAPS IT IS PROPER NOW TO ASK THE JUDGES THEMSELVES TO EXERCISE GREATER SELF-RESTRAINT. EVEN THE STRIDENT FEW WOULD NOT ASK THE JUDGES TO UNDO THAT WHICH HAS BEEN DONE TO INTEGRATE BASIC INDIVIDUAL RIGHTS INTO THE FABRIC OF AMERICAN LIFE - BUT IF THE JUDGES HENCEFORTH DO LESS - PERHAPS THE PEOPLE WILL DEMAND MORE FROM

OTHERS.

AS A TRIAL LAWYER - AS A CONCERNED CITIZEN - I URGE IN CLOSING THAT THOSE WHO HAVE UNTHINKINGLY BLAMED JUDGES FOR CORRECTING OPPRESSION - FOR RIGHTING WRONGS DONE TO THE NEGLETED OR THE IGNORED - FOR DOING WHAT HAD TO BE DONE IF JUSTICE WAS TO BE MORE THAN A WORD - SHOULD PLACE THE MAJOR RESPONSIBILITY IN THE FUTURE FOR THE RESOLUTION OF DIFFICULT PROBLEMS UPON THOSE POLICYMAKERS WHO HAVE THE PRIME RESPONSIBILITY BUT WHO HAVE FAILED TO ACT - AND WHO BY THEIR DEFAULT HAVE FORCED JUDGES TO ACT. THE RULE OF LAW IS THE NOBLEST ASPIRATION OF HUMANKIND - AND IT DESERVES ALWAYS THE NURTURE AND SUPPORT OF NOBLE PEOPLE.

(THE END)

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 221

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	BPI ANNUAL LAW DAY LUNCHEON THE CHICAGO PUBLIC LIBRARY CULTURAL CENTER PRESTON BRADLEY HALL CHICAGO, ILLINOIS
DATE:	THURSDAY, MAY 1, 1980 NOON
TITLE:	RANDOM CURRENT THOUGHTS OF A TRIAL LAWYER ABOUT THE LAW - THE COURTS - AND THE RESPONSIBILITIES OF LAWYERS
TIME:	TWENTY MINUTES

PUBLIC AND PRIVATE PURPOSES EVERYWHERE SHOUT TODAY IN THE LANGUAGE OF TERRORISM - ASSASSINATION - HOSTAGES - GEONOCIDE - INVASION - KIDNAPPING - ECONOMIC WARFARE - CRYING OUT LOUDLY AND CLEARLY FOR THE WORLD-WIDE APPLICATION OF THE RULE OF LAW. SOME AMERICANS TOO CONTINUE TO ENGAGE IN THE LONG ESTABLISHED NATIONAL IDOLATRY OF LAW AS A CURE FOR ALL SOCIAL ILLS - OF BIGGER AND BETTER SOLUTIONS THROUGH LAW TO ALL PROBLEMS. BUT MANY RESPONSIBLE AND REASONING PEOPLE - INCLUDING EVEN SOME OF THOSE WHO MAKE LAW - YEARN - OR AT LEAST ARE BEGINNING TO YEARN - FOR THE CONVENIENCE AND MANAGEABILITY OF SMALLNESS IN THE LAW - AN EMBRYONIC TREND TOWARD FEWER DETAILED LAWS WHICH I BELIEVE CAN BE ACCELERATED.

THROUGHOUT ITS HISTORY - AMERICA - MORE THAN ANY NATION

HAS BELIEVED THAT THROUGH LAW - JUSTICE AND GOODNESS AND FAIRNESS CAN BE GUARANTEED TO ALL PEOPLE. FAITH IN THE RULE OF LAW HAS DEVELOPED TO SUCH A POINT THAT AMERICANS NOW ARE PLACING LESS AND LESS RELIANCE UPON STANDARDS OF VALUE ABOVE THE LAW - A DIRECTION WHICH IN THE LONG RUN CAN ONLY BE DEVASTATING FOR SOCIETY AS WELL AS THE RULE OF LAW.

WHAT HAS MADE SO MANY IN THIS STURDY LAND COME TO REALIZE THAT THERE NEVER CAN BE A FINAL RESOLUTION OF DAY-TO-DAY PROBLEMS IN ACTUAL LIFE THROUGH LAW ALONE - AND THUS TO YEARN FOR A DIFFERING QUALITY OF LAW? PROPERLY TO ANALYZE THAT DESIRE - THE IMPORTANCE OF TWO PRIME TRADITIONAL VALUES NEED TO BE RECOGNIZED SIMULTANEOUSLY - TWO VALUES WHICH MAY SEEM TO SOME INCOMPATIBLE: <u>FIRST</u> - FREEDOM - FREEDOM FROM OVER-CONTROL BY OTHERS - THE INDIVIDUAL

PRIVACY TO DO ONE'S OWN THING - WHATEVER THAT IS - ALONE OR IN SMALL AUTONOMOUS UNITS - AND SECOND - ORDER - ORDER WHICH CAN COME ONLY FOR SOCIETY AS AN ENTITIY FROM LARGE-SCALE UNITY AND COORDINATION - THE SOCIETAL ORDERLINESS WHICH PERMITS EFFICIENCIES AND PREVENTS ANARCHY.

THE DUALITY OF THESE TWO HUMAN VALUES MUST BE EMPHASIZED ALWAYS WHEN EXISTING LAW IS CHANGED IN AN EFFORT TO RE-ORDER PUBLIC AND PRIVATE PURPOSES. YET THOSE WHO MAKE LAW FIND IT MOST DIFFICULT TO KEEP IN MIND THE DISPARATE PURPOSES OF PRIVACY AND ORDERLINESS. THE QUESTION BETWEEN TOO MUCH AND TOO LITTLE IN LAW MIGHT BE PUT ANOTHER WAY: WHAT SHOULD BE SOUGHT IN SUCH MATTERS IS TO DISCRIMINATE - TO GET THINGS SORTED OUT. FOR EVERY

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THIS SHIFT BY THE PEOPLE OF THEIR HARDEST PROBLEMS TO THE AUTHORITY OF THE COURTS WILL IN TIME JEOPARDIZE - AND PERHAPS ULTIMATELY DESTROY - THE CHECKS AND BALANCES SO CAREFULLY INCORPORATED IN OUR FEDERAL SYSTEM OF GOVERNMENT BY THE CONSTITUTION. IF THAT IS SO - AS IT SEEMS TO ME - THEN THE PRINCIPAL TASK FACING THOSE WHO CHERISH JUSTICE - AND THE RULE OF LAW - IS THE RESTORATION SOON OF A PROPER BALANCE BETWEEN THE COURTS AND THE OTHER BRANCHES OF GOVERNMENT.

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THE AMERICAN PEOPLE FORCED JUDGES TO TAKE ON TOO BIG A BURDEN BECAUSE THEY RECOGNIZED THE DEFAULT OF GOVERNMENTAL POLICYMAKERS. THEY MADE JUDGES ACT BECAUSE THEY HAD NO OTHER PLACE TO TURN. IT SEEMS TO ME THAT THOSE POLICYMAKERS SHOULD HENCEFORTH BE REQUIRED TO DO THE HARD JOBS THAT THEY SHOULD HAVE BEEN DOING ALL ALONG - AND THAT LAWYERS AND OTHERS

WHO HONOR THE RULE OF LAW AND THE ADMINISTRATION OF JUSTICE SHOULD DEFEND THE JUDGES FROM AN ACCELERATING BUT MOST OFTEN UNWARRANTED PUBLIC CLAMOR AGAINST JUDICIAL ACTIVISM.

THOSE WHO VALUE BOTH MAJORITY RULE AND MINORITY RIGHTS - THOSE WHO VALUE BOTH INDIVIDUAL PRIVACY AND SOCIETAL ORDER - LONG HAVE REALIZED THAT A PRINCIPLED AND STRONG JUDICIARY IS A PRIME BULWARK OF THE AMERICAN WAY OF LIFE. BUT TO SAFEGUARD THOSE PRECIOUS VALUES FOR LATER YEARS - PERHAPS IT IS PROPER NOW TO ASK THE JUDGES THEMSELVES TO EXERCISE GREATER SELF-RESTRAINT. EVEN THE STRIDENT FEW WOULD NOT ASK THE JUDGES TO UNDO THAT WHICH HAS BEEN DONE TO INTEGRATE BASIC INDIVIDUAL RIGHTS INTO THE FABRIC OF AMERICAN LIFE - BUT IF THE JUDGES HENCEFORTH DO LESS - PERHAPS THE PEOPLE WILL DEMAND MORE FROM

OTHERS.

AS A TRIAL LAWYER - AS A CONCERNED CITIZEN - I URGE IN CLOSING THAT THOSE WHO HAVE UNTHINKINGLY BLAMED JUDGES FOR CORRECTING OPPRESSION - FOR RIGHTING WRONGS DONE TO THE NEGLETED OR THE IGNORED - FOR DOING WHAT HAD TO BE DONE IF JUSTICE WAS TO BE MORE THAN A WORD - SHOULD PLACE THE MAJOR RESPONSIBILITY IN THE FUTURE FOR THE RESOLUTION OF DIFFICULT PROBLEMS UPON THOSE POLICYMAKERS WHO HAVE THE PRIME RESPONSIBILITY BUT WHO HAVE FAILED TO ACT - AND WHO BY THEIR DEFAULT HAVE FORCED JUDGES TO ACT. THE RULE OF LAW IS THE NOBLEST ASPIRATION OF HUMANKIND - AND IT DESERVES ALWAYS THE NURTURE AND SUPPORT OF NOBLE PEOPLE.

(THE END)

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 222

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	ANNUAL LAW DAY BANQUET FACULTY AND STUDENTS COLLEGE OF LAW FLORIDA STATE UNIVERSITY SILVER SLIPPER RESTAURANT TALLAHASSEE, FLORIDA
DATE:	SATURDAY, MAY 3, 1980 7:00 P.M.
TITLE:	RANDOM CURRENT THOUGHTS OF A TRIAL LAWYER ABOUT THE LAW - COURTS - AND THE RESPONSIBILITIES OF LAWYERS
TIME:	TWENTY MINUTES

PUBLIC AND PRIVATE PURPOSES EVERYWHERE SHOUT TODAY IN THE LANGUAGE OF TERRORISM - ASSASSINATION - HOSTAGES - GEONOCIDE - INVASION - KIDNAPPING - ECONOMIC WARFARE - CRYING OUT LOUDLY AND CLEARLY FOR THE WORLD-WIDE APPLICATION OF THE RULE OF LAW. SOME AMERICANS TOO CONTINUE TO ENGAGE IN THE LONG ESTABLISHED NATIONAL IDOLATRY OF LAW AS A CURE FOR ALL SOCIAL ILLS - OF BIGGER AND BETTER SOLUTIONS THROUGH LAW TO ALL PROBLEMS. BUT MANY RESPONSIBLE AND REASONING PEOPLE - INCLUDING EVEN SOME OF THOSE WHO MAKE LAW - YEARN - OR AT LEAST ARE BEGINNING TO YEARN - FOR THE CONVENIENCE AND MANAGEABILITY OF SMALLNESS IN THE LAW - AN EMBRYONIC TREND TOWARD FEWER DETAILED LAWS WHICH I BELIEVE CAN BE ACCELERATED.

THROUGHOUT ITS HISTORY - AMERICA - MORE THAN ANY NATION

HAS BELIEVED THAT THROUGH LAW - JUSTICE AND GOODNESS AND FAIRNESS CAN BE GUARANTEED TO ALL PEOPLE. FAITH IN THE RULE OF LAW HAS DEVELOPED TO SUCH A POINT THAT AMERICANS NOW ARE PLACING LESS AND LESS RELIANCE UPON STANDARDS OF VALUE ABOVE THE LAW - A DIRECTION WHICH IN THE LONG RUN CAN ONLY BE DEVASTATING FOR SOCIETY AS WELL AS THE RULE OF LAW.

WHAT HAS MADE SO MANY IN THIS STURDY LAND COME TO REALIZE THAT THERE NEVER CAN BE A FINAL RESOLUTION OF DAY-TO-DAY PROBLEMS IN ACTUAL LIFE THROUGH LAW ALONE - AND THUS TO YEARN FOR A DIFFERING QUALITY OF LAW? PROPERLY TO ANALYZE THAT DESIRE - THE IMPORTANCE OF TWO PRIME TRADITIONAL VALUES NEED TO BE RECOGNIZED SIMULTANEOUSLY - TWO VALUES WHICH MAY SEEM TO SOME INCOMPATIBLE: <u>FIRST</u> - FREEDOM - FREEDOM FROM OVER-CONTROL BY OTHERS - THE INDIVIDUAL

PRIVACY TO DO ONE'S OWN THING - WHATEVER THAT IS - ALONE OR IN SMALL AUTONOMOUS UNITS - AND SECOND - ORDER - ORDER WHICH CAN COME ONLY FOR SOCIETY AS AN ENTITIY FROM LARGE-SCALE UNITY AND COORDINATION - THE SOCIETAL ORDERLINESS WHICH PERMITS EFFICIENCIES AND PREVENTS ANARCHY.

THE DUALITY OF THESE TWO HUMAN VALUES MUST BE EMPHASIZED ALWAYS WHEN EXISTING LAW IS CHANGED IN AN EFFORT TO RE-ORDER PUBLIC AND PRIVATE PURPOSES. YET THOSE WHO MAKE LAW FIND IT MOST DIFFICULT TO KEEP IN MIND THE DISPARATE PURPOSES OF PRIVACY AND ORDERLINESS. THE QUESTION BETWEEN TOO MUCH AND TOO LITTLE IN LAW MIGHT BE PUT ANOTHER WAY: WHAT SHOULD BE SOUGHT IN SUCH MATTERS IS TO DISCRIMINATE - TO GET THINGS SORTED OUT. FOR EVERY

LAW THERE IS A CERTAIN APPROPRIATE SCALE. PRIVACY BEGETS LITTLE LAW AND SMALL LEGAL SOLUTIONS - AND ORDER BEGETS BIG LAW AND MASSIVE LEGAL SOLUTIONS. YET - THOSE TWO COMPETING VALUES IN REALITY ARE NOT INCOMPATIBLE - AND ANY RE-ORDERED LEGAL PRIORITIES MUST RECONCILE THEM.

AMERICANS NOW ROUTINELY ASK THE LAW TO DETERMINE RIGHT FROM WRONG - THE ETHICAL FROM THE UNETHICAL - AND THE MORAL FROM THE IMMORAL - AN ACTIVITY WHICH SEEMS TO ME TO BE PERSONALLY SELF-DEBILITATING BECAUSE IT INNATELY ABSOLVES INDIDIVUALS FROM ALL CONDUCT BEYOND THAT REQUIRED BY LAW. SADLY - PURPOSEFUL GOALS OF PERSONAL RECTITUDE BEYOND THE MINIMUM SET BY LAW RECEIVE LITTLE CURRENT POPULAR SUPPORT. TO PERMIT LAW ALONE THUS TO CONTROL THE ENTIRE VALUE STANDARDS OF HUMAN BEINGS CAN ONLY RESULT IN A TOTAL ATROPHY OF SOCIETAL

RESPONSIBILITY. AS CURRENT WORLD EVENTS SHOW - A LEGALISTIC SOCIETY WHICH IGNORES ALL VALUES OTHER THAN LAW IS A SOCIETY IN WHICH ULTIMATELY BOTH ORDER AND PRIVACY WILL WITHER AWAY AND DISAPPEAR. INDEED - HISTORY HAS REPEATEDLY DEMONSTRATED THAT NO STATE CAN LONG SURVIVE IF ITS PEOPLE ASSUME THAT CONDUCT NOT FORBIDDEN BY LAW IS ACCEPTABLE CONDUCT. LAW SHOULD SET MINIMUM STANDARDS - BUT NOT THE LOFTIER GOALS. IT CAN BE THE BOTTOM - BUT IT MUST NOT BE THE CEILING.

DURING MY OWN LIFETIME - THIS EVER-ENHANCING RELIANCE ON THE LAW HAS LED TO A SHIFT IN THE RESPONSIBILITY FOR DEVELOPING THE MORES OF THIS NATIONS'S SOCIAL STRUCTURE. TO ACCEPT THE LAW AS A FLOOR FORGIVES INDIVIDUALS FOR ALL BEHAVIOR WHICH IS NOT PROHIBITED BY LAW - AND AS A NECESSARY COROLLARY -

PERMITS THEM TO USE THOSE MINIMUM LEGAL STANDARDS TO ADVANCE THEIR OWN PURPOSES.

WHAT ARE THE CHOICES FOR MITIGATING THIS TREND? IS IT JUST A MATTER OF DECIDING THAT HENCEFORTH ONLY MORALISTIC STANDARDS WILL BE UTILIZED TO ACHIEVE THE BETTER LIFE? AS I SEE IT - THE MOST EFFECTIVE RESPONSE IS FOR INDIVIDUAL AMERICANS TO TAKE STEPS TO ASSURE AND DEMONSTRATE THAT THEY THEMSELVES ARE CAPABLE OF INDIVIDUAL SELF-DISCIPLINE WHICH IS CONSISTENT WITH BOTH THE REALITIES OF THE DESIRED PRIVACY AND THE ESSENTIAL ORDER WHICH MUST BE PROVIDED UNDER LAW FOR THE GREATER PUBLIC INTEREST. IT IS UNREALISTIC TO IGNORE THE FACT THAT TO DATE INDIVIDUAL PERFORMANCE UNDER EXISTING LAW CAN BE IMPROVED - AND I DO NOT IGNORE IT. NOT ALL

AMERICANS CURRENTLY ARE DISCHARGING PROPERLY THEIR ACKNOWLEDGED RESPONSIBILITIES - AND ADDITIONAL EFFORTS TO OBTAIN INDIVIDUAL ADHERENCE TO THE RULE OF LAW CLEARLY IS WARRANTED. BUT AN ENHANCED LEGALISTIC APPROACH - EVEN IF ACCEPTED - DOES NOT ASSURE THE PERMANENT SOLUTION WHICH CAN BE OBTAINED ONLY IF PEOPLE RESPOND SUBSTANTIVELY.

OF COURSE THERE ARE LARGER RISKS IN A LEGALISTIC APPROACH THAN THE INCONVENIENT AND VEXING IMPOSITION OF FURTHER GOVERNMENTAL RESTRICTIONS ON DAY-TO-DAY LIVING. THE LAW CANNOT AND SHOULD NOT PROVIDE A RESPONSE TO ALL SOCIAL OR ECONOMIC PROBLEMS. LAWYERS KNOW THAT THE LAW MORE OFTEN LAGS THAN LEADS. IMPLEMENTED THROUGH THE POLITICAL SYSTEM - THE PROPER ROLE OF LAW IS TO ARTICULATE PRE-ESTABLISHED NORMS

OF A SOCIETY. THE ABSENCE OF AN OBJECTIVE MORAL ORDER INEVITABLY WILL LEAD TO A LEGALISTIC SYSTEM IN WHICH EACH PERSON ALWAYS SEEKS TO USE THAT SYSTEM IN A WAY TO SECURE THE MOST PERSONAL ADVANTAGE.

IF THE PRESENT LEGAL STRUCTURE DOES NOT PROVIDE THE PHILOSOPHY NEEDED - WHERE CAN IT BE FOUND? THE ANSWER LIES BEYOND THE LAW. A SENSE OF RESPONSIBILITY - OF VALUES TRANSCENDING THOSE ARTICULATED BY THE LAW - SHOULD BE APPLIED TO DECISION MAKING. LAWYERS SHOULD CONTINUALLY REMIND THEIR CLIENTS OF THE ESSENTIAL ROLE OF ETHICS AND MORALITY. LAWYERS SHOULD ASPIRE FOR HIGHER STANDARDS THAN THE MINIMUM FROM THOSE THEY COUNSEL. THE TRUE RULE OF LAW INVISIONS INTERNAL CHECKS AS A NECESSARY COMPLEMENT TO EXTERNAL

RESTRICTIONS. ONLY THE COMBINATION OF AN INTERNALIZED VALUE SYSTEM AND EXTERNAL CONSTRAINTS CAN ASSURE THAT INDIVIDUALS AND THEIR CREATED INSTITUTIONS ACT RESPONSIBLY.

WHY HAS AMERICA AT THIS STAGE SEEMINGLY SHIFTED EMPHASIS FROM THAT WHICH IS RIGHT TO THAT WHICH IS LEGAL? HAS THE DEVELOPMENT OF A STRONG LEGAL PROFESSION IN THIS COUNTRY - UNPARALLELLED THROUGHOUT RECORDED HISTORY IN NUMBERS, INDEPENDENCE, INFLUENCE, AFFLUENCE AND COMPETENCE - CONTRIBUTED TO THIS DEPLORABLE TREND. FOR MANY LAWYERS - IT DOES APPEAR THAT BEING RIGHT FROM A LEGAL POINT OF VIEW MEANS THAT NOTHING MORE IS REQUIRED. I SURMISE THAT FEW LAWYERS TELL THEIR CLIENTS THAT MEETING MINIMUM LEGAL REQUIREMENTS MIGHT STILL NOT MAKE ONE ENTIRELY RIGHT - AND THEN URGE SELF-RESTRAINT -

OR COUNSEL REPUDIATION BY THE CLIENT OF THE RIGHT SO TO ACT. INDIVIDUAL LEGAL VICTORIES VINDICATING THAT WHICH MEETS MINIMUM LEGAL DEMANDS - BUT NOT NECESSARILY THAT WHICH IS RIGHT IN THE CONTEXT OF THE LARGER SOCIETY - WHETHER WON IN THE COURTROOM OR IN THE LEGISLATURE - CAN SOMETIMES BE AS DISASTEROUS TO A LAWYER'S CLIENTS AS WINNING A BATTLE BUT LOSING THE WAR IS TO A DICTATOR.

WHEN THE AMERICAN CONSTITUTION WAS WRITTEN - IT ASSUMED STANDARDS OF BEHAVIOR BASED UPON HISTORICALLY ACCEPTED TENETS. THE FOUNDERS BELIEVED THAT A CONSTITUTIONAL GOVERNMENT COULD SUCCEED WHICH WAS PREDICATED UPON HISTORICAL EXPERIENCE AND THE INSIGHTS OF GREAT PHILOSOPHERS - LEADING TO AN EXPERIMENT UNIQUE IN THE ANNALS OF GOVERNMENT WHICH PUT INSTITUTIONS

IN A HEALTHY CONFRONTATION - A CHECK AND BALANCE DIVISION OF THE THERETOFORE ABSOLUTE POWER OF THE SOVEREIGN. THE FOUNDERS ASSUMED THAT THERE WOULD BE GENERAL RESPECT - ALTHOUGH NOT ALWAYS AGREEMENT - BY THE PEOPLE FOR THE PURPOSES OF EACH GOVERNMENTAL AND SOCIETAL INSTITUTION. IT HAS NOT ALWAYS WORKED OUT THAT WAY---AND THE EVER-INCREASING PUBLIC TENDENCY IS TO MISTRUST - TO DISPUTE - AND TO DISRUPT.

AFTER A LONG ERA OF PUBLIC FUSSING AND FEUDING AND ACRIMONY - AMERICA IS IN NEED OF A REAFFIRMATION OF AN OLD-FASHIONED UNDERSTANDING WHEREBY ALL ELEMENTS OF GOVERNMENT - FEDERAL - STATE - AND THE SEVERAL DIVISIONS THEREOF - MUST EACH TREAT THE OTHERS WITH COURTESY AND RESPECT - AT LEAST MORE THAN NOW. THE ESSENCE OF ANY SUCH UNDERSTANDING HAS TO BE A

A MEASURE OF VOLUNTARY RESTRAINT - AN UNSPOKEN UNDERSTANDING THAT NONE OF THEM WILL APPLY THEIR FULL POWERS AGAINST ANOTHER.

ONE INSTITUTION MUST NOT DOMINATE. A SITUATION WHERE ONE ATTEMPTS TO DOMINATE DOES MORE THAN ENCOURAGE UNSEEMLY CONFLICT - IT DEMANDS IT. AFTER ALMOST TWO HUNDRED YEARS OF NATIONAL EXPERIENCE - EACH INSTITUION SHOULD NOW UNDERSTAND THE INDUBITABLE CONTRIBUTION OF THE OTHERS TO ORDERLINESS AND PRIVACY - AND EACH SHOULD WORK TO INSURE THAT CONTRIBUTION BY THOSE OTHERS. NO INSTITUTION - THE EXECUTIVE DEPARTMENT - THE JUDICIAL SYSTEM - OR THE LEGISLATIVE BRANCH - THE NATIONAL GOVERNMENT OR THE SEVERAL STATES - OR OF COURSE ANY OTHER GOVERNMENTAL OR NON-GOVERNMENTAL AGENCY - IS QUALIFIED TO SERVE AS THE PRIME KEEPER OF THE CONSCIENCE OF ALL HUMANKIND.

UNDERSTANDING OF THE ROLE OF OTHERS IS THE ONLY PRODUCTIVE ROUTE TO THE HARMONIZATION OF FREEDOM AND ORDER WHICH I SEE AS THE KEY TO AN EFFECTIVE DEMOCRATIC RELATIONSHIP.

NOW LET ME GO TO MY OTHER POINT - PERHAPS UNRELATED - BUT IT IS A CURRENT PERCEPTION OF MINE. IT IS INCREASINGLY CLEAR THAT BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT HAVE BECOME INCAPABLE OF RESOLVING MANY OF THE TOUGHER QUESTIONS OF PUBLIC POLICY. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL SEGMENTS OF GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES HAVE HAD NO CHOICE BUT TO ACT. THE COURTS ARE BEING ASKED TODAY TO SOLVE PROBLEMS FOR WHICH THEY ARE NOT INSTITUTIONALLY EQUIPPED--OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF

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SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 223

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER TAMPA, FLORIDA
BEFORE:	HEADLINERS BREAKFAST DAYTONA BEACH AREA CHAMBER OF COMMERCE AMERICANO BEACH LODGE DAYTONA BEACH, FLORIDA
DATE:	THURSDAY, MAY 8, 1980 8:00 A.M.
TITLE:	RANDOM CURRENT THOUGHTS OF A TRIAL LAWYER ABOUT THE LAW - THE COURTS - AND THE RESPONSIBILITIES OF LAWYERS
TIME:	TWENTY MINUTES

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THE DUALITY OF THESE TWO HUMAN VALUES MUST BE EMPHASIZED ALWAYS WHEN EXISTING LAW IS CHANGED IN AN EFFORT TO RE-ORDER PUBLIC AND PRIVATE PURPOSES. YET THOSE WHO MAKE LAW FIND IT MOST DIFFICULT TO KEEP IN MIND THE DISPARATE PURPOSES OF PRIVACY AND ORDERLINESS. THE QUESTION BETWEEN TOO MUCH AND TOO LITTLE IN LAW MIGHT BE PUT ANOTHER WAY: WHAT SHOULD BE SOUGHT IN SUCH MATTERS IS TO DISCRIMINATE - TO GET THINGS SORTED OUT. FOR EVERY

LAW THERE IS A CERTAIN APPROPRIATE SCALE. PRIVACY BEGETS LITTLE LAW AND SMALL LEGAL SOLUTIONS - AND ORDER BEGETS BIG LAW AND MASSIVE LEGAL SOLUTIONS. YET - THOSE TWO COMPETING VALUES IN REALITY ARE NOT INCOMPATIBLE - AND ANY RE-ORDERED LEGAL PRIORITIES MUST RECONCILE THEM.

AMERICANS NOW ROUTINELY ASK THE LAW TO DETERMINE RIGHT FROM WRONG - THE ETHICAL FROM THE UNETHICAL - AND THE MORAL FROM THE IMMORAL - AN ACTIVITY WHICH SEEMS TO ME TO BE PERSONALLY SELF-DEBILITATING BECAUSE IT INNATELY ABSOLVES INDIDIVUALS FROM ALL CONDUCT BEYOND THAT REQUIRED BY LAW. SADLY - PURPOSEFUL GOALS OF PERSONAL RECTITUDE BEYOND THE MINIMUM SET BY LAW RECEIVE LITTLE CURRENT POPULAR SUPPORT. TO PERMIT LAW ALONE THUS TO CONTROL THE ENTIRE VALUE STANDARDS OF HUMAN BEINGS CAN ONLY RESULT IN A TOTAL ATROPHY OF SOCIETAL

RESPONSIBILITY. AS CURRENT WORLD EVENTS SHOW - A LEGALISTIC SOCIETY WHICH IGNORES ALL VALUES OTHER THAN LAW IS A SOCIETY IN WHICH ULTIMATELY BOTH ORDER AND PRIVACY WILL WITHER AWAY AND DISAPPEAR. INDEED - HISTORY HAS REPEATEDLY DEMONSTRATED THAT NO STATE CAN LONG SURVIVE IF ITS PEOPLE ASSUME THAT CONDUCT NOT FORBIDDEN BY LAW IS ACCEPTABLE CONDUCT. LAW SHOULD SET MINIMUM STANDARDS - BUT NOT THE LOFTIER GOALS. IT CAN BE THE BOTTOM - BUT IT MUST NOT BE THE CEILING.

DURING MY OWN LIFETIME - THIS EVER-ENHANCING RELIANCE ON THE LAW HAS LED TO A SHIFT IN THE RESPONSIBILITY FOR DEVELOPING THE MORES OF THIS NATIONS'S SOCIAL STRUCTURE. TO ACCEPT THE LAW AS A FLOOR FORGIVES INDIVIDUALS FOR ALL BEHAVIOR WHICH IS NOT PROHIBITED BY LAW - AND AS A NECESSARY COROLLARY -

PERMITS THEM TO USE THOSE MINIMUM LEGAL STANDARDS TO ADVANCE THEIR OWN PURPOSES.

WHAT ARE THE CHOICES FOR MITIGATING THIS TREND? IS IT JUST A MATTER OF DECIDING THAT HENCEFORTH ONLY MORALISTIC STANDARDS WILL BE UTILIZED TO ACHIEVE THE BETTER LIFE? AS I SEE IT - THE MOST EFFECTIVE RESPONSE IS FOR INDIVIDUAL AMERICANS TO TAKE STEPS TO ASSURE AND DEMONSTRATE THAT THEY THEMSELVES ARE CAPABLE OF INDIVIDUAL SELF-DISCIPLINE WHICH IS CONSISTENT WITH BOTH THE REALITIES OF THE DESIRED PRIVACY AND THE ESSENTIAL ORDER WHICH MUST BE PROVIDED UNDER LAW FOR THE GREATER PUBLIC INTEREST. IT IS UNREALISTIC TO IGNORE THE FACT THAT TO DATE INDIVIDUAL PERFORMANCE UNDER EXISTING LAW CAN BE IMPROVED - AND I DO NOT IGNORE IT. NOT ALL

AMERICANS CURRENTLY ARE DISCHARGING PROPERLY THEIR ACKNOWLEDGED RESPONSIBILITIES - AND ADDITIONAL EFFORTS TO OBTAIN INDIVIDUAL ADHERENCE TO THE RULE OF LAW CLEARLY IS WARRANTED. BUT AN ENHANCED LEGALISTIC APPROACH - EVEN IF ACCEPTED - DOES NOT ASSURE THE PERMANENT SOLUTION WHICH CAN BE OBTAINED ONLY IF PEOPLE RESPOND SUBSTANTIVELY.

OF COURSE THERE ARE LARGER RISKS IN A LEGALISTIC APPROACH THAN THE INCONVENIENT AND VEXING IMPOSITION OF FURTHER GOVERNMENTAL RESTRICTIONS ON DAY-TO-DAY LIVING. THE LAW CANNOT AND SHOULD NOT PROVIDE A RESPONSE TO ALL SOCIAL OR ECONOMIC PROBLEMS. LAWYERS KNOW THAT THE LAW MORE OFTEN LAGS THAN LEADS. IMPLEMENTED THROUGH THE POLITICAL SYSTEM - THE PROPER ROLE OF LAW IS TO ARTICULATE PRE-ESTABLISHED NORMS

OF A SOCIETY. THE ABSENCE OF AN OBJECTIVE MORAL ORDER INEVITABLY WILL LEAD TO A LEGALISTIC SYSTEM IN WHICH EACH PERSON ALWAYS SEEKS TO USE THAT SYSTEM IN A WAY TO SECURE THE MOST PERSONAL ADVANTAGE.

IF THE PRESENT LEGAL STRUCTURE DOES NOT PROVIDE THE PHILOSOPHY NEEDED - WHERE CAN IT BE FOUND? THE ANSWER LIES BEYOND THE LAW. A SENSE OF RESPONSIBILITY - OF VALUES TRANSCENDING THOSE ARTICULATED BY THE LAW - SHOULD BE APPLIED TO DECISION MAKING. LAWYERS SHOULD CONTINUALLY REMIND THEIR CLIENTS OF THE ESSENTIAL ROLE OF ETHICS AND MORALITY. LAWYERS SHOULD ASPIRE FOR HIGHER STANDARDS THAN THE MINIMUM FROM THOSE THEY COUNSEL. THE TRUE RULE OF LAW INVISIONS INTERNAL CHECKS AS A NECESSARY COMPLEMENT TO EXTERNAL

RESTRICTIONS. ONLY THE COMBINATION OF AN INTERNALIZED VALUE SYSTEM AND EXTERNAL CONSTRAINTS CAN ASSURE THAT INDIVIDUALS AND THEIR CREATED INSTITUTIONS ACT RESPONSIBLY.

WHY HAS AMERICA AT THIS STAGE SEEMINGLY SHIFTED EMPHASIS FROM THAT WHICH IS RIGHT TO THAT WHICH IS LEGAL? HAS THE DEVELOPMENT OF A STRONG LEGAL PROFESSION IN THIS COUNTRY - UNPARALLELLED THROUGHOUT RECORDED HISTORY IN NUMBERS, INDEPENDENCE, INFLUENCE, AFFLUENCE AND COMPETENCE - CONTRIBUTED TO THIS DEPLORABLE TREND. FOR MANY LAWYERS - IT DOES APPEAR THAT BEING RIGHT FROM A LEGAL POINT OF VIEW MEANS THAT NOTHING MORE IS REQUIRED. I SURMISE THAT FEW LAWYERS TELL THEIR CLIENTS THAT MEETING MINIMUM LEGAL REQUIREMENTS MIGHT STILL NOT MAKE ONE ENTIRELY RIGHT - AND THEN URGE SELF-RESTRAINT -

OR COUNSEL REPUDIATION BY THE CLIENT OF THE RIGHT SO TO ACT. INDIVIDUAL LEGAL VICTORIES VINDICATING THAT WHICH MEETS MINIMUM LEGAL DEMANDS - BUT NOT NECESSARILY THAT WHICH IS RIGHT IN THE CONTEXT OF THE LARGER SOCIETY - WHETHER WON IN THE COURTROOM OR IN THE LEGISLATURE - CAN SOMETIMES BE AS DISASTEROUS TO A LAWYER'S CLIENTS AS WINNING A BATTLE BUT LOSING THE WAR IS TO A DICTATOR.

WHEN THE AMERICAN CONSTITUTION WAS WRITTEN - IT ASSUMED STANDARDS OF BEHAVIOR BASED UPON HISTORICALLY ACCEPTED TENETS. THE FOUNDERS BELIEVED THAT A CONSTITUTIONAL GOVERNMENT COULD SUCCEED WHICH WAS PREDICATED UPON HISTORICAL EXPERIENCE AND THE INSIGHTS OF GREAT PHILOSOPHERS - LEADING TO AN EXPERIMENT UNIQUE IN THE ANNALS OF GOVERNMENT WHICH PUT INSTITUTIONS

IN A HEALTHY CONFRONTATION - A CHECK AND BALANCE DIVISION OF THE THERETOFORE ABSOLUTE POWER OF THE SOVEREIGN. THE FOUNDERS ASSUMED THAT THERE WOULD BE GENERAL RESPECT - ALTHOUGH NOT ALWAYS AGREEMENT - BY THE PEOPLE FOR THE PURPOSES OF EACH GOVERNMENTAL AND SOCIETAL INSTITUTION. IT HAS NOT ALWAYS WORKED OUT THAT WAY---AND THE EVER-INCREASING PUBLIC TENDENCY IS TO MISTRUST - TO DISPUTE - AND TO DISRUPT.

AFTER A LONG ERA OF PUBLIC FUSSING AND FEUDING AND ACRIMONY - AMERICA IS IN NEED OF A REAFFIRMATION OF AN OLD-FASHIONED UNDERSTANDING WHEREBY ALL ELEMENTS OF GOVERNMENT - FEDERAL - STATE - AND THE SEVERAL DIVISIONS THEREOF - MUST EACH TREAT THE OTHERS WITH COURTESY AND RESPECT - AT LEAST MORE THAN NOW. THE ESSENCE OF ANY SUCH UNDERSTANDING HAS TO BE A

A MEASURE OF VOLUNTARY RESTRAINT - AN UNSPOKEN UNDERSTANDING THAT NONE OF THEM WILL APPLY THEIR FULL POWERS AGAINST ANOTHER.

ONE INSTITUTION MUST NOT DOMINATE. A SITUATION WHERE ONE ATTEMPTS TO DOMINATE DOES MORE THAN ENCOURAGE UNSEEMLY CONFLICT - IT DEMANDS IT. AFTER ALMOST TWO HUNDRED YEARS OF NATIONAL EXPERIENCE - EACH INSTITUION SHOULD NOW UNDERSTAND THE INDUBITABLE CONTRIBUTION OF THE OTHERS TO ORDERLINESS AND PRIVACY - AND EACH SHOULD WORK TO INSURE THAT CONTRIBUTION BY THOSE OTHERS. NO INSTITUTION - THE EXECUTIVE DEPARTMENT - THE JUDICIAL SYSTEM - OR THE LEGISLATIVE BRANCH - THE NATIONAL GOVERNMENT OR THE SEVERAL STATES - OR OF COURSE ANY OTHER GOVERNMENTAL OR NON-GOVERNMENTAL AGENCY - IS QUALIFIED TO SERVE AS THE PRIME KEEPER OF THE CONSCIENCE OF ALL HUMANKIND.

UNDERSTANDING OF THE ROLE OF OTHERS IS THE ONLY PRODUCTIVE ROUTE TO THE HARMONIZATION OF FREEDOM AND ORDER WHICH I SEE AS THE KEY TO AN EFFECTIVE DEMOCRATIC RELATIONSHIP.

NOW LET ME GO TO MY OTHER POINT - PERHAPS UNRELATED - BUT IT IS A CURRENT PERCEPTION OF MINE. IT IS INCREASINGLY CLEAR THAT BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT HAVE BECOME INCAPABLE OF RESOLVING MANY OF THE TOUGHER QUESTIONS OF PUBLIC POLICY. WHEN A POLICY DECISION IS NOT DIRECTED BY A CITIZENS CONSENSUS - IT APPEARS THAT ALL SEGMENTS OF GOVERNMENT EXCEPT THE COURTS DEFAULT - AND RESPONSIBLE JUDGES HAVE HAD NO CHOICE BUT TO ACT. THE COURTS ARE BEING ASKED TODAY TO SOLVE PROBLEMS FOR WHICH THEY ARE NOT INSTITUTIONALLY EQUIPPED--OR AT LEAST NOT AS WELL EQUIPPED AS OTHER AREAS OF

GOVERNMENT.

JUSTICE NEED NOT NECESSARILY EMANATE FROM THE COURTS. INDEED - LAWYERS AND JUDGES THEMSELVES HAVE AN OBLIGATION WHENEVER FEASIBLE TO SECURE CONFLICT RESOLUTION IN OTHER FORUMS. AS FAR AS POSSIBLE - JUDICIAL FORUMS SHOULD BE RESERVED FOR DOING ONLY THAT WHICH CANNOT BE BEST DONE ELSEWHERE. THE PUBLIC TODAY PERCEIVES THE COURTS AS JACKS-OF-ALL-TRADES - AVAILABLE TO FURNISH THE ANSWER TO WHATEVER MAY TROUBLE THEM: SHALL A WAR BE PROSECUTED OR PEACE MADE? WHAT IS LIFE - OR WHEN DOES DEATH BEGIN? SHALL RACIAL INTEGRATION BE ACHIEVED BY CUMBERSOME BUSING OF CHILDREN TO FAR-AWAY SCHOOLS? HOW SHALL PRISONS AND MENTAL INSTITUTIONS

BE OPERATED? SHALL NUCLEAR POWER PLANTS BE BUILT - AND IF SO - WHERE? SHALL THE CONCORDE FLY TO THESE SHORES? IS AFFIRMATIVE ACTION REALLY INVERSE DISCRIMINATION? ALL THESE QUESTIONS ARE NOW CONTINUOUS GRIST OF THE JUDICIAL MILLS. SHOULD THEY BE? IT SEEMS UNFORTUNATE TO ME THAT AMERICA HAS BECOME SUCH A LITIGIOUS SOCIETY THAT SUITS ROUTINELY ARE BROUGHT TO RESOLVE THOSE KIND OF ISSUES - ISSUES WHICH PREVIOUSLY WOULD HAVE BEEN SETTLED PRIVATELY - OR AT LEAST IN FORUMS OTHER THAN THE COURTS. A RE-SHAPING OF THE JUDICIAL SYSTEM TO MAKE IT FUNCTION AS IT WAS DESIGNED IS TIMELY.

A LAWSUIT PROBABLY IS QUICKER AND CHEAPER THAN LOBBYING OR A REFERENDUM - AND MORE AUTHORITATIVE THAN A PUBLIC OPINION POLL. BUT WHAT DOES THE RENDERING OF A HIGHTLY CONTROVERSIAL LEGAL DECISION ACCOMPLISH? IT IS SIMPLY A

JUDICIAL PRONOUNCEMENT - AND NOTHING MORE. IT DOES NOT SETTLE THE DIVISIVE MORAL - ETHICAL - AND POLITICAL QUESTIONS THAT LIE THEREUNDER. IT SIMPLY IS NOT AN EXPRESSION OF THE POPULAR WILL - NOR THE PUBLIC WEAL - BUT ONLY THE JUDGMENT OF ONE OR A FEW HUMAN BEINGS TRANSITORILY PRESIDING OVER A COURT.

THIS SHIFT BY THE PEOPLE OF THEIR HARDEST PROBLEMS TO THE AUTHORITY OF THE COURTS WILL IN TIME JEOPARDIZE - AND PERHAPS ULTIMATELY DESTROY - THE CHECKS AND BALANCES SO CAREFULLY INCORPORATED IN OUR FEDERAL SYSTEM OF GOVERNMENT BY THE CONSTITUTION. IF THAT IS SO - AS IT SEEMS TO ME - THEN THE PRINCIPAL TASK FACING THOSE WHO CHERISH JUSTICE - AND THE RULE OF LAW - IS THE RESTORATION SOON OF A PROPER BALANCE BETWEEN THE COURTS AND THE OTHER BRANCHES OF GOVERNMENT.

THIS COUNTRY FACES A GREAT ENERGY PROBLEM - A PROBLEM RELATING TO THE DECAY OF ITS CITIES. ENORMOUS DEMOGRAPHIC CHANGES ARE GENERATING A SERIES OF PROBLEMS WHICH HAVE PROVED ESPECIALLY INTRACTABLE. THE RISING CRIME RATE CONTINUES TO HAVE ALL THE EARMARKS OF A REVOLUTIONARY CHANGE IN THE PATTERNS OF SOCIAL BEHAVIOR. THE WHOLE EDUCATIONAL ESTABLISHMENT IS SHAKING WITH TREMORS OF DISSATISFACTION AND CHANGE. A SEXUAL REVOLUTION QUITE PROPERLY IS NOW UNDERWAY. AN ENORMOUS TURNAROUND IN PUBLIC ATTITUDE TO THE ENVIRONMENT IS EVIDENCED EVERYWHERE. IS THERE ANYTHING IN THE JUDICIAL MACHINERY WHICH MAKES IT A PECULIARLY SUITABLE INSTRUMENT FOR THE RESOLUTION OF SUCH VEXING PROBLEMS? INDEED NOT!

IT IS ONE THING FOR JUDGES TO DECIDE BI-PARTY CONTROVERSIES

AND - IN SO DOING - PRONOUNCE PRINCIPLES WHICH INCIDENTALLY MAY HAVE AN EFFECT ON THE SOLUTION OF THE UNDERLYING PROBLEM - SOMETIME FAVORABLE AND SOMETIMES UNFAVORABLE. IT IS QUITE ANOTHER FOR THE COURTS TO BE BURDENED WITH THE RESPONSIBILITY FOR THE TOTAL SOLUTION OF THOSE PROBLEMS. THE COURTS PROPERLY SHOULD BE ONLY THE CONFLICT-RESOLVERS - AND NOT THE PROBLEM SOLVERS - OF AMERICAN SOCIETY.

THE AMERICAN PEOPLE FORCED JUDGES TO TAKE ON TOO BIG A BURDEN BECAUSE THEY RECOGNIZED THE DEFAULT OF GOVERNMENTAL POLICYMAKERS. THEY MADE JUDGES ACT BECAUSE THEY HAD NO OTHER PLACE TO TURN. IT SEEMS TO ME THAT THOSE POLICYMAKERS SHOULD HENCEFORTH BE REQUIRED TO DO THE HARD JOBS THAT THEY SHOULD HAVE BEEN DOING ALL ALONG - AND THAT LAWYERS AND OTHERS

WHO HONOR THE RULE OF LAW AND THE ADMINISTRATION OF JUSTICE SHOULD DEFEND THE JUDGES FROM AN ACCELERATING BUT MOST OFTEN UNWARRANTED PUBLIC CLAMOR AGAINST JUDICIAL ACTIVISM.

THOSE WHO VALUE BOTH MAJORITY RULE AND MINORITY RIGHTS - THOSE WHO VALUE BOTH INDIVIDUAL PRIVACY AND SOCIETAL ORDER - LONG HAVE REALIZED THAT A PRINCIPLED AND STRONG JUDICIARY IS A PRIME BULWARK OF THE AMERICAN WAY OF LIFE. BUT TO SAFEGUARD THOSE PRECIOUS VALUES FOR LATER YEARS - PERHAPS IT IS PROPER NOW TO ASK THE JUDGES THEMSELVES TO EXERCISE GREATER SELF-RESTRAINT. EVEN THE STRIDENT FEW WOULD NOT ASK THE JUDGES TO UNDO THAT WHICH HAS BEEN DONE TO INTEGRATE BASIC INDIVIDUAL RIGHTS INTO THE FABRIC OF AMERICAN LIFE - BUT IF THE JUDGES HENCEFORTH DO LESS - PERHAPS THE PEOPLE WILL DEMAND MORE FROM

OTHERS.

AS A TRIAL LAWYER - AS A CONCERNED CITIZEN - I URGE IN CLOSING THAT THOSE WHO HAVE UNTHINKINGLY BLAMED JUDGES FOR CORRECTING OPPRESSION - FOR RIGHTING WRONGS DONE TO THE NEGLETED OR THE IGNORED - FOR DOING WHAT HAD TO BE DONE IF JUSTICE WAS TO BE MORE THAN A WORD - SHOULD PLACE THE MAJOR RESPONSIBILITY IN THE FUTURE FOR THE RESOLUTION OF DIFFICULT PROBLEMS UPON THOSE POLICYMAKERS WHO HAVE THE PRIME RESPONSIBILITY BUT WHO HAVE FAILED TO ACT - AND WHO BY THEIR DEFAULT HAVE FORCED JUDGES TO ACT. THE RULE OF LAW IS THE NOBLEST ASPIRATION OF HUMANKIND - AND IT DESERVES ALWAYS THE NURTURE AND SUPPORT OF NOBLE PEOPLE.

(THE END)

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 224

VOLUME XVI

EQUAL RIGHTS FOR ALL PEOPLE

Incorporation of the Equal Rights Amendment into the Federal constitution is of paramount importance to both women and men. ERA is not designed to protect women's rights; instead, it abolishes forever discrimination on the basis of sex alone. ERA of course cannot eliminate the differences between the sexes. That cannot be done -- by law or otherwise. ERA can simply guarantee that no person on the basis of sex alone will suffer at the hands of government. Under ERA, each individual will be judged on ability -- not his or her sex.

What ERA does give to women that they do not now have is a choice -- women, too, under ERA would be free to choose on the basis of individualized abilities and preferences. Women henceforth would not be foreclosed as now from seeking eclectic futures because of archaic notions about woman's proper role. In the eyes of the law, ERA would give to every woman full freedom to choose -- to stay at home and perform a vital and necessary function as homemaker, wife and mother -- or to be employed in a stimulating and rewarding career -- or both.

I personally believe that the modification of our legal system by the adoption of ERA is a necessary first step in insuring that our social system too recognizes that every woman has the same rights as every man. A choice to do whatever one can achieve in life must not be foreclosed because of one's sex. ERA symbolically eliminates existing patent discrimination, eradicating existing legal and social barriers to the full use by women of their capabilities.

As a lawyer and as a citizen, I thus favor adoption of ERA without reservation. I know that any special exemptions or other favorable treatment required by some individuals because of their physical stature or family roles can constitutionally be preserved under ERA by laws which utilize those factors, rather than sex, as the basis for distinction.

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SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 225

VOLUME XVI

DUTY TO COUNSEL CORPORATE CLIENTS ALWAYS TO ACT ABOVE THE LEGAL MINIMUM TO THE EXTENT SOCIETALLY AND ECONOMICALLY PRACTICAL. THE TRUE RULE OF LAW ENVISIONS INTERNAL CHECKS AS A NECESSARY COMPLEMENT TO EXTERNAL RESTRICTIONS - AND THOSE RESTRICTIONS AND CHECKS ON BOTH INDIVIDUALS AND CORPORATIONS INCLUDE THE SOUND COUNSEL OF THEIR LAWYER. ONLY THE COMBINATION OF AN INTERNALIZED VALUE SYSTEM AND EXTERNAL CONSTRAINTS CAN ASSURE THAT INDIVIDUAL AMERICANS AND THEIR CREATED INSTITUTIONS ACT RESPONSIBLY.

WHY HAS AMERICA AT THIS STAGE SEEMINGLY SHIFTED EMPHASIS FROM THAT WHICH IS RIGHT TO THAT WHICH IS LEGAL? HAS THE DEVELOPMENT OF A STRONG LEGAL PROFESSION IN THIS COUNTRY - UNPARALLELLED THROUGHOUT RECORDED HISTORY IN NUMBERS - INDEPENDENCE - INFLUENCE - AFFLUENCE - AND COMPETENCE - CONTRIBUTED TO THIS DEPLORABLE TREND? FOR MANY LAWYERS - IT DOES APPEAR THAT

BEING RIGHT FROM A LEGAL POINT OF VIEW MEANS THAT NOTHING MORE IS REQUIRED. I SURMISE THAT FEW LAWYERS TELL THEIR CLIENTS THAT MEETING MINIMUM LEGAL REQUIREMENTS MIGHT STILL NOT MAKE ONE ENTIRELY RIGHT - AND THEN URGE SELF-RESTRAINT - OR COUNSEL REPUDIATION BY THE CLIENT OF THE RIGHT SO TO ACT. INDIVIDUAL LEGAL VICTORIES VINDICATING THAT WHICH MEETS MINIMUM LEGAL DEMANDS - BUT NOT NECESSARILY THAT WHICH IS RIGHT IN THE CONTEXT OF THE LARGER SOCIETY - WHETHER WON IN THE COURTROOM OR IN THE LEGISLATURE - CAN SOMETIMES BE AS DISASTEROUS TO A LAWYER'S CLIENTS AS WINNING A BATTLE BUT LOSING THE WAR IS TO A DICTATOR. LAWYERS CANNOT DICTATE TO THEIR CLIENTS - BUT THEY CAN AND SHOULD ADVISE THOSE CLIENTS TO FIX THEIR OWN STANDARDS OF CONDUCT ABOVE THAT REQUIRED OF OR EXPECTED FROM THE LEAST OF US.

WHEN THE AMERICAN CONSTITUTION WAS WRITTEN - IT ASSUMED STANDARDS OF BEHAVIOR BASED UPON HISTORICALLY ACCEPTED TENENTS OF FAIRNESS AND EQUALITY TO ALL. WHILE THERE ALWAYS WERE BAD PERSONS WHO - THEN AS NOW - DID NOT ACCEPT MINIMUM SOCIETAL STANDARDS - AND WHILE THERE ALWAYS HAVE BEEN THOSE WHO CUSTOMARILY DID ONLY THAT REQUIRED BY LAW - THEN AS NOW - THE CONSENSUS AMONG THE FOUNDERS OF THIS NATION WAS THAT A CONSTITUTIONAL GOVERNMENT PREDICATED UPON THE INSIGHTS OF GREAT PHILOSOPHERS COULD SUCCEED - LEADING TO AN EXPERIMENT UNIQUE IN THE ANNALS OF GOVERNMENT. IN AMERICA FOR THE FIRST TIME INSTITUTIONS WERE PUT IN A HEALTHY CONFRONTATION - A CHECK AND BALANCE DIVISION OF THE THERETOFORE ABSOLUTE POWER OF THE SOVEREIGN. THE FOUNDERS ASSUMED THAT THERE WOULD BE GENERAL RESPECT - ALTHOUGH NOT ALWAYS AGREEMENT - BY THE PEOPLE

FOR THE PURPOSES OF EACH GOVERNMENTAL AND SOCIETAL INSTITUTION. IT HAS NOT ALWAYS WORKED OUT THAT WAY -- AND THE EVER-INCREASING PUBLIC TENDENCY IS TO MISTRUST - TO DISPUTE - AND TO DISRUPT. IT IS TIME TO FORGET SPECIAL PURPOSE - IT IS TIME TO CURTAIL GROUP SELFISHNESS.

AFTER A LONG ERA OF PUBLIC FUSSING AND FEUDING AND ACRIMONY - AMERICA IS IN NEED OF A REAFFIRMATION OF OLD-FASHIONED GOODNESS. ALL ELEMENTS OF GOVERNMENT - ALL ELEMENTS OF SOCIETY - THE OLD AND THE YOUNG - THE HAPPY AND SAD - THE GRAVE AND THE CHEERFUL - BUSINESS AND LABOR - RICH AND POOR - ALL RACES - BOTH SEXES - ALL ETHNIC GROUPS - EACH MUST TREAT THE OTHERS WITH COURTESY AND RESPECT - AT LEAST MORE THAN NOW. THE ESSENCE OF ANY SUCH UNDERSTANDING HAS TO BE A MEASURE OF

VOLUNTARY RESTRAINT - AN UNSPOKEN UNDERSTANDING THAT NONE WILL SEEK GOALS WITHOUT CONSIDERING THE LEGITIMATE ASPIRATIONS OF EACH OF THE OTHERS - AND THAT EACH WILL TREAT THE OTHERS RIGHT - WITHOUT REGARD TO A SIMPLE MINIMUM COMPLIANCE WITH LAW.

AFTER ALMOST TWO HUNDRED YEARS OF NATIONAL EXPERIENCE - EACH SOCIAL - ETHNIC - BUSINESS - CIVIC - RACIAL - RELIGIOUS OR CULTURAL GROUP SHOULD NOW UNDERSTAND THE INDUBITABLE CONTRIBUTION OF THE OTHERS TO ORDERLINESS AND PRIVACY - AND EACH SHOULD WORK TO INSURE THAT CONTRIBUTION BY THOSE OTHERS. NO ONE GROUP - INSTITUTION - NO GOVERNMENT - NO LEGISLATURE - NO JUDGE OR COURT - IS QUALIFIED TO SERVE AS THE PRIME KEEPER OF THE CONSCIENCE OF ALL HUMANKIND. LAWYERS - BOTH COLLECTIVELY AND INDIVIDUALLY - BEAR AN UNMET PART OF THE RESPONSIBILITY TO INSURE THAT THE

CONDUCT OF ALL OF OUR INSTITUTIONS IS BASED UPON ASPIRATIONAL GOALS FOR THE COMMON WELFARE AND WEAL. LAW - WHICH FIXES A MEASURE OF HUMAN PERFORMANCE BARELY TOLERABLE TO THE LOFTIER AIMS OF SOCIETY AS A WHOLE - MUST HENCEFORTH BE RELIED UPON LESS AND LESS IF OUR NATIONAL DESTINY IS TO BE AS SUCCESSFULLY REALIZED IN THE NEXT GENERATION AS IT HAS IN THE PAST. UNDER-STANDING OF THE ROLE OF OTHERS BY ALL AMERICANS IS THE ONLY PRODUCTIVE ROUTE TO THE HARMONIZATION OF THE FREEDOM AND THE ORDER WHICH I SEE AS THE KEY TO AN EFFECTIVE DEMOCRATIC RELATIONSHIP. WE NEED CITIZENS WHO LIVE FAR ABOVE THE LAW.

(THE END)

AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

CHESTERFIELD SMITH

on behalf of the

AMERICAN BAR ASSOCIATION

before the

1980 DEMOCRATIC PLATFORM COMMITTEE

June 13, 1980
Washington, D.C.

Mr. Chairman and Members of the Committee:

I am Chesterfield Smith, a practicing attorney from Bartow, Florida, and a former President of the American Bar Association. I have been asked to appear before you today by our current President, Leonard S. Janofsky, on behalf of the Association. The ABA is a voluntary, non-profit professional organization having more than 250,000 members. With better than half of the lawyers in the country as members, the Association reflects well the diversity and breadth of the legal profession in this country.

It is a great pleasure to appear before you today to express our concerns and interests on national matters. We do so at a time when there is a great national anxiety about the future of America. The problems of our economy -- inflation, rising unemployment, declining productivity, energy shortages -- have become, together with the Iran and Afghanistan crises, virtually the exclusive focus of national attention.

These problems and issues deserve our intense scrutiny. But it is vital that we not lose sight of other issues which affect our citizens in very real and substantial ways.

I would like to direct your attention today to the operation of the justice system, or, rather, systems -- federal, state and local, criminal, civil and regulatory. The swift and fair administration of justice in all its aspects was and is, in the words of George Washington, "the firmest pillar of government." Both as it affects the personal lives of citizens who become involved in the system, and as it affects general perceptions about the fairness and integrity of our system of government, the justice system must remain a vital national concern.

Regrettably, meaningful access to justice is not fully available to all our citizens. A comprehensive survey of the legal needs of the public which we commissioned a few years ago revealed that as much as two-thirds of our population has unmet legal needs. The law is intimidating in its complexity, and the procedures for resolving legal issues are often Byzantine. The costs of litigation are high and the delays in court proceedings are frequently intolerable. The justice one receives in this country is measured too often solely by the amount of money that an individual can afford to pay for legal services, investigative services, court costs and the like.

The American Bar Association is working hard to improve this situation. For example, President Janofsky has established an Action Commission to Reduce Court Costs and Delay. That Commission is now at work fostering the use of new techniques to enable our courts to resolve cases promptly and without undue expense. Such techniques include the hearing of motions by telephone conference call, rather than requiring the presence of all attorneys in the courtroom; sharp limits on the use of interrogatories and other pretrial discovery methods; better case management and judicial control of court calendars; and simplified trial and appellate procedures. We hope that the widespread use of such techniques will result in a substantial reduction of court costs and a dramatic shortening of the filing-to-decision process.

Many legal matters, of course, do not end up in our courts but are resolved through the assistance of lawyers. Wills and business incorporations are common non-adversarial legal services. Many adversarial legal

problems are resolved through out-of-court negotiation. In such matters, clients can realize substantial savings as a result of law office efficiencies. The use of paralegals, of standardized forms, of modern word-processing equipment, of computerized legal research systems and the like are revolutionizing what one of my predecessor ABA presidents described as "the last great cottage industry." Our Section of Legal Economics has been in the forefront of encouraging the development and widespread use of such cost-saving techniques, in both traditional law offices and in store-front legal clinics.

The opening of the door to more extensive advertising by lawyers in recent years also has provided our citizens with greater information about the availability and cost of legal services. Consumers are responding in a substantial way to advertisements by lawyers, and many believe that a good portion of the clients responding to the ads are persons who would have foregone obtaining legal advice and assistance in the absence of advertising.

All of these developments, however, do not improve access for the citizen who lacks the resources to retain an attorney, regardless of price. The private bar continues to provide countless hours of free legal services for individuals and groups unable to afford a lawyer. A poll reported in the October, 1978 American Bar Association Journal revealed that 60% of private lawyers contribute public interest legal services, and that among those contributing such services, the median number of hours contributed was in the 70-80 hours per year range.

To advance these efforts further, the Association has hired a full-time staff member whose sole purpose is to facilitate and encourage the contribution of "pro bono" legal services by attorneys. She is working primarily with state and local bar associations around the country, helping them to set up mechanisms by which a client in need of a particular type of legal service can be matched with a volunteer attorney having expertise in that legal field.

While there is a great deal more which the private bar can do to improve access, the nation cannot look solely to this one profession to solve the problems of the justice system. The Preamble of the U.S. Constitution lists "to establish justice" as a purpose of our nation second only to the establishment of the government itself. There is a public responsibility to ensure that the Constitution's promise of "equal justice for all" will be a reality.

In our current efforts to balance the federal budget, we must not overlook the very real needs of our citizens in the justice area. We believe various national efforts are essential to assuring access to justice. We call upon the Democratic Party to provide in its 1980 platform the following planks:

1. The federal government should ensure that adequate legal representation is provided for those too poor to pay for it in civil and criminal proceedings throughout the country.

2. The federal, state and local governments should greatly expand the limited efforts now underway to reduce court costs and delays.

3. Initiatives to provide simplified means of resolving disputes should be encouraged and increased.

A variety of specific steps need to be taken at the national level to implement these principles:

> ... The Legal Services Corporation is doing a laudable job of providing civil legal services to the poor with very limited resources. By the end of fiscal year 1980, it will have achieved the goal of providing the equivalent of two attorneys for every 10,000 poor persons. This compares with an attorney population generally of 20 attorneys for every 10,000 persons. While we do not expect that full parity with the private sector will ever be achieved, at present funding levels the program is severely strained and cannot adequately service the legal needs of the poor. Continued expansion of this program is desperately needed.
>
> ... The Sixth Amendment to the Constitution, as interpreted by the Supreme Court, mandates the provision of effective assistance of counsel in all criminal proceedings where an individual may lose his liberty. Yet national surveys have shown that as many as 75% of local jurisdictions fail to provide counsel in all such cases. Sixty-one percent of the jurisdictions surveyed reported both the lack of adequate funds and attorneys to handle indigent cases. A National Manpower Survey showed the average caseload for a public defender staff attorney to be 28% above nationally-recognized standards for caseload maximums for defense attorneys.

Yet there has been no meaningful national effort to address this problem. A federal program to provide supplemental funding, training, technical assistance, and other support services to improve and augment existing state and local efforts in this area is urgently needed. We recommend you support in your platform the creation of a national non-profit corporation, a Center for Defense Services, to serve as the vehicle for federal involvement.

... I have alluded above to the Association's efforts to establish programs to reduce court costs and delays. We ask you to call upon the governments of the 50 states and the Congress to review court structures and procedures and to give a high priority to implementing efforts to reduce these burdensome costs and delays. We ask you also to call upon Congress to enact key portions of the Federal Court Improvements legislation now pending before it.

... Many disputes do not require the full panoply of the court system for their resolution. These disputes often can be handled more satisfactorily -- more expeditiously and at less cost -- through simplified dispute resolution mechanisms, such as the three Neighborhood Justice Centers established by the Department of Justice. More experimentation with arbitration, mediation and other techniques for resolving disputes outside the traditional courtroom should be encouraged in our federal, state and local

court systems. We urge you to support in your platform implementation of the recently enacted Dispute Resolution Act.

... Regulatory proceedings frequently have as much or greater impact on our citizens as do legislative enactments or court decisions. The ability of citizens to participate in these proceedings is severely limited by cost and time problems similar to those in court cases. An expanded program of providing "intervenor financing" is needed, so that a citizen of limited resources and a small financial interest in a regulatory proceeding, but with an important view to express, will have the opportunity to communicate it to agency decision-makers.

... Similarly, in court proceedings when a private party substantially prevails against the federal government in an action which results in a substantial public benefit or enforces an important public right, the private party should receive reasonable attorneys' fees and other litigation expenses. We urge your support for federal legislation to permit the award of attorneys' fees in such cases.

... The 1976 Tax Reform Act provides that employees participating in employer-funded prepaid legal service plans receive comparable tax treatment to that provided with respect to employer-funded medical plans. This was a dramatic step forward in ensuring that middle-income citizens -- some 80% of the population -- would have access to legal

services, and we urge that these tax code provisions, which must be reviewed in 1981, be made a permanent part of the code.

This agenda for access to justice will, of course, result in some increased governmental costs. We believe, however, that in the longer range, these justice system improvements will permit the sound resolution of disputes, through legal means and at relatively modest cost, which might otherwise have far more costly consequences, both financial and societal, to our nation.

While our testimony has focused on the theme of access to justice, I would note that five other justice issues deserve your serious attention.

1. We have been very concerned with the failings of our federal regulatory process, the problems of which I would state in three points: first, we regulate too much; second, our regulatory procedures are too cumbersome; and third, regulatory schemes lack coordination and political and public accountability. The government's regulatory system must be structured to protect legitimate public rights and interests while preserving market incentives for growth and productivity. We have recommended a series of steps which should be taken to reform the regulatory process: deregulation to give the free market a chance to work, coupled with strong antitrust enforcement when it does not; establishing presidential authority to direct the evaluation of the impact of proposed regulations before they are adopted; enactment of a carefully drafted sunset bill to assure more agency accountability to Congress; enactment

of a modified Bumpers Amendment to enhance the court's authority to keep regulations within bounds set by law; and others. We urge your platform to specify these and other elements as part of a strong regulatory reform plank.

2. For more than a decade, Congress has struggled to put our nation's criminal laws into a rational, consistent, cohesive form -- a federal criminal code. We have supported, and continue to support, this effort. We fear that if the momentum for passage of code legislation is lost, and if the careful balancing of interests which has taken place thus far becomes unraveled, we may never achieve the important goal of codification. Your support in the Party platform is essential.

3. The Genocide Convention was adopted by the United Nations General Assembly, following the leadership of the U.S. delegation, in 1949. Eighty-three nations have ratified the Convention. Legal problems surrounding the Convention have now been adequately resolved. The United States should delay no longer in ratifying this important international treaty, which would aid immeasurably in our negotiations over flagrant human rights violations. Your platform should express the Party's support for ratification.

4. The Equal Rights Amendment has been ratified by 35 states. A recent Harris poll shows that a majority of people in those states which have not yet ratified the ERA favors ratification. Assuring that our nation's governing charter applies in all ways to women, who comprise a majority of our population, is a concept so obvious and so right that it

should be implemented as soon as possible. We urge your support for prompt ratification of the ERA by all remaining states.

5. The United States, primarily in the 19th century, entered into a series of treaties with various Indian nations. Since that time there have been breaches or abrogations of the United States' obligations under those treaties. We believe the federal government should follow a policy of strict adherence to Indian treaty obligations and should exercise powers of abrogation or modification only under the most compelling circumstances of national security or emergency. The platform should speak to this issue.

We believe we have the finest justice system in the world and that we can properly take great pride in it. It is vitally important that we preserve and better that system, which serves as the foundation of our entire system of government. We must move steadily forward to provide our citizens with access to a system of justice which is efficient, fair and faithful to our highest American traditions.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 226

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER BARTOW, FLORIDA
BEFORE:	ORLANDO ROTARY CLUB FIRST FEDERAL BUILDING FIFTH FLOOR, FRIENDSHIP ROOM MAGNOLIA AND CHURCH STREETS ORLANDO, FLORIDA
DATE:	WEDNESDAY, NOVEMBER 5, 1980 12:15 P.M.
TITLE:	RANDOM CURRENT THOUGHTS OF A TRIAL LAWYER ABOUT THE LAW - AND THE UNMET RESPONSIBILITIES OF LAWYERS AND OTHERS
TIME:	FIFTEEN MINUTES

PUBLIC AND PRIVATE PURPOSES EVERWHERE TODAY SHOUT IN THE LANGUAGE OF REFUGEES - TERRORISM - ASSASSINATION - HOSTAGES - GENOCIDE - INVASION - KIDNAPPING - ECONOMIC WARFARE - CRYING OUT LOUDLY AND CLEARLY FOR A WORLD-WIDE APPLICATION OF POLITICAL MODERATION AND SANITY. BUT AMERICANS - ALONG WITH THE PEOPLE OF MOST OTHER CIVILIZED NATIONS - CONTINUE TO RELY ON BIG GOVERNMENT - AND NEW LAWS - AS A CURE FOR ALL OF THOSE SOCIAL ILLS - OF BIGGER AND BETTER SOLUTIONS FOR ALL SUCH PROBLEMS THROUGH NEWLY ENACTED LAWS. THEY CONTINUE TO THINK OF MORE AND MORE LAW AS THE PANACEA. HOWEVER - MANY RESPONSIBLE AND REASONING PEOPLE - INCLUDING HOPEFULLY EVEN SOME OF THOSE IN CONGRESS AND THE FLORIDA LEGISLATURE - YEARN - OR AT LEAST ARE BEGINNING TO YEARN - FOR THE CONVENIENCE AND MANAGEABILITY OF SMALLNESS IN GOVERNMENT - AND SMALLNESS IN THE LAW - AN

EMBRYONIC TREND TOWARD LESS GOVERNMENTAL CONTROL OF INDIVIDUAL LIVES WHICH I BELIEVE WILL BE ACCELERATED.

THROUGHOUT ITS HISTORY - AMERICA - MORE THAN ANY NATION - HAS BELIEVED THAT THROUGH AN ACTIVE AND BENEFICENT GOVERNMENT - JUSTICE AND GOODNESS AND FAIRNESS CAN BE GUARANTEED TO ALL PEOPLE. FAITH IN GOVERNMENT OVER TIME DEVELOPED TO SUCH A POINT THAT MANY AMERICANS PLACED LESS AND LESS RELIANCE UPON THOSE STANDARDS OF VALUE NOT MANDATED BY GOVERNMENT - A DIRECTION WHICH IN THE LONG RUN ALMOST INEVITABLY HAD TO BRING SOCIETY TO WHERE IT NOW IS.

GOVERNMENTS DO ACT THROUGH AND UNDER THE RULE OF LAW - AS PROPERLY THEY SHOULD - BUT MOST AMERICANS NOW RECOGNIZE THAT LAW ALONE AS THE ONLY STANDARD OF BEHAVIOR IS INSUFFICIENT. WHAT

HAS MADE SO MANY IN THIS STURDY LAND COME TO REALIZE THAT THERE NEVER CAN BE A FINAL RESOLUTION OF DAY-TO-DAY PROBLEMS IN ACTUAL LIFE THROUGH LAW ALONE - AND THUS TO YEARN FOR A DIFFERING MEASURE OF CONDUCT? PROPERLY TO ANALYZE THAT DESIRE - THE IMPORTANCE OF TWO PRIME TRADITIONAL AMERICAN VALUES NEED TO BE RECOGNIZED SIMULTANEOUSLY - TWO VALUES WHICH MAY SEEM TO SOME INCOMPATIBLE: FIRST - FREEDOM - FREEDOM FROM OVER-CONTROL BY OTHERS - THE INDIVIDUAL PRIVACY TO DO ONE'S OWN THING - WHATEVER THAT IS - ALONE OR IN SMALL AUTONOMOUS UNITS - AND SECOND - ORDER - ORDER WHICH CAN COME ONLY FOR SOCIETY AS AN ENTITY FROM LARGE-SCALE UNITY AND CO-ORDINATION - THE SOCIETAL ORDERLINESS WHICH PERMITS EFFICIENCIES AND PREVENTS ANARCHY.

THE DUALITY OF THESE TWO TRADITIONAL AMERICAN VALUES MUST BE EMPHASIZED ALWAYS WHEN WE SEEK THROUGH LAW TO RE-ORDER PUBLIC AND PRIVATE PURPOSES. YET AS A LAWYER - IT HAS SEEMED TO ME THAT THOSE WHO MAKE LAW OFTEN FAIL TO KEEP IN MIND THE DISPARATE PURPOSES OF BOTH PRIVACY AND ORDERLINESS. THEY ZERO IN ON ONE - IGNORING THE OTHER. PRIVACY BEGETS LITTLE LAW AND SMALL LEGAL SOLUTIONS - AND ORDER BEGETS BIG LAW AND MASSIVE LEGAL SOLUTIONS. YET - THOSE TWO COMPETING VALUES IN REALITY ARE NOT INCOMPATIBLE - AND ANY RE-ORDERED LEGAL PRIORITIES MUST RECONCILE THEM.

AMERICANS IN RECENT YEARS ROUTINELY HAVE ASKED THE LAW ALONE TO DETERMINE RIGHT FROM WRONG - THE ETHICAL FROM THE UNETHICAL - AND THE MORAL FROM THE IMMORAL - AN ACTIVITY WHICH

SEEMS TO ME TO BE PERSONALLY SELF-DEBILITATING BECAUSE IT INNATELY ABSOLVES OUR PEOPLE FROM ALL CONDUCT BEYOND THAT REQUIRED BY LAW. SADLY - PURPOSEFUL GOALS OF INDIVIDUAL PERSONAL RECTITUDE BEYOND THE MINIMUM SET BY LAW CURRENTLY RECEIVE LITTLE POPULAR SUPPORT. TO PERMIT LAW ALONE THUS TO CONTROL THE ENTIRE VALUE STANDARDS OF HUMAN BEINGS CAN ONLY RESULT IN A TOTAL ATROPHY OF SOCIETAL RESPONSIBILITY. AS CURRENT WORLD AND DOMESTIC EVENTS SHOW - A LEGALISTIC SOCIETY WHICH IGNORES ALL VALUES OTHER THAN LAW IS A SOCIETY IN WHICH ULTIMATELY BOTH ORDER AND PRIVACY WILL WITHER AWAY AND DISAPPEAR. INDEED- HISTORY HAS REPEATEDLY DEMONSTRATED THAT NO STATE CAN LONG SURVIVE IF ITS PEOPLE ASSUME THAT CONDUCT NOT FORBIDDEN BY LAW IS ACCEPTABLE CONDUCT. LAW SHOULD SET MINIMUM STANDARDS -

BUT NOT THE LOFTIER GOALS. IT CAN BE THE BOTTOM - BUT IT MUST NOT BE THE CEILING.

DURING MY OWN TIME AS A LAWYER - THIS EVER-ENHANCING RELIANCE ON THE LAW HAS LED TO A SHIFT IN THE RESPONSIBILITY FOR DEVELOPING THE MORES OF THIS NATION'S SOCIAL STRUCTURE. TO ACCEPT THE LAW AS A FLOOR FORGIVES INDIVIDUALS FOR ALL BEHAVIOR WHICH IS NOT PROHIBITED BY LAW - AND AS A NECESSARY COROLLARY - PERMITS THEM TO USE THOSE MINIMUM LEGAL STANDARDS TO ADVANCE THEIR OWN PURPOSES - SOMETIMES SELFISHLY SO.

WHAT ARE THE CHOICES FOR MITIGATING THIS TREND? IS IT JUST A MATTER OF DECIDING THAT HENCEFORTH ONLY MORALISTIC STANDARDS WILL BE UTILIZED TO ACHIEVE THE BETTER LIFE? I SUGGEST THAT THE MOST EFFECTIVE RESPONSE IS FOR INDIVUDUAL

AMERICANS TO TAKE STEPS TO ASSURE AND DEMONSTRATE THAT THEY THEMSELVES ARE CAPABLE OF INDIVIDUAL SELF-DISCIPLINE WHICH IS CONSISTENT WITH BOTH THE REALITIES OF THE DESIRED PRIVACY AND THE ESSENTIAL ORDER WHICH MUST BE PROVIDED UNDER LAW FOR THE GREATER PUBLIC INTEREST. IT IS UNREALISTIC TO IGNORE THE FACT THAT TO DATE INDIVIDUAL PERFORMANCE UNDER EXISTING LAW CAN BE IMPROVED - AND I DO NOT IGNORE IT. NOT ALL AMERICANS CURRENTLY ARE DISCHARGING PROPERLY THEIR ACKNOWLEDGED RESPONSIBILITIES - AND ADDITIONAL EFFORTS TO OBTAIN INDIVIDUAL ADHERENCE TO THE RULE OF LAW CLEARLY IS WARRANTED. BUT AN ENHANCED LEGALISTIC APPROACH - EVEN IF ACCEPTED - DOES NOT ASSURE THE PERMANENT SOLUTION WHICH CAN BE OBTAINED ONLY IF PEOPLE RESPOND SUBSTANTIVELY.

OF COURSE THERE ARE LARGER RISKS IN A LEGALISTIC APPROACH THAN THE INCONVENIENT AND VEXING IMPOSITION OF FURTHER GOVERNMENTAL RESTRICTIONS ON DAY-TO-DAY LIVING. THE LAW CANNOT AND SHOULD NOT PROVIDE A RESPONSE TO ALL SOCIAL OR ECONOMIC PROBLEMS. LAWYERS PERHAPS MORE THAN OTHERS BEAR A RESPONSIBILITY TO SEE THAT THE AMERICAN PEOPLE HAVE VIEWS LARGER THAN THE LAW. LAWYERS - EVEN MORE THAN THEIR CLIENTS - KNOW THAT THE LAW MORE OFTEN LAGS THAN LEADS. IMPLEMENTED THROUGH THE POLITICAL SYSTEM - THE PROPER ROLE OF LAW IS TO ARTICULATE PRE-ESTABLISHED NORMS OF A SOCIETY. THE ABSENCE OF AN OBJECTIVE MORAL ORDER INEVITABLY WILL LEAD TO A LEGALISTIC SYSTEM IN WHICH EACH PERSON ALWAYS SEEKS TO USE THAT SYSTEM IN A WAY TO SECURE THE MOST PERSONAL ADVANTAGE.

IF THE PRESENT LEGAL STRUCTURE DOES NOT PROVIDE THE PHILOSOPHY NEEDED - WHERE CAN IT BE FOUND? AS I SEE IT - THE ANSWER LIES BEYOND THE LAW. A SENSE OF RESPONSIBILITY - OF VALUES TRANSCENDING THOSE ARTICULATED BY THE LAW - SHOULD BE APPLIED TO DECISION MAKING. BUSINESS SHOULD CONTINUALLY BE REMINDED BY ITS LAWYERS OF THE ESSENTIAL ROLE OF ETHICS AND MORALITY - THAT THE PRIVATE SECTOR OF OUR ECONOMY SHOULD WANT AND SEEK HIGHER STANDARDS THAN THE MINIMUM. LAWYERS SHOULD COUNSEL ALWAYS ASPIRATIONAL STANDARDS FOR THEIR CLIENTS. A CORPORATION SHOULD NOT UNTHINKINGLY DESECRATE OR POLLUTE A RIVER SIMPLY BECAUSE THAT CORPORATION CAN THEN MEET THE MINIMUM DISCHARGE LIMITS PRESCRIBED BY LAW - NOR SHOULD A CORPORATION IMPOSE POOR PRODUCTS ON CONSUMERS SIMPLY BECAUSE THE LAW HAS NOT KEPT UP WITH THE MARKETPLACE. A LAWYER HAS A PROFESSIONAL

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 227

VOLUME XVI

ADDRESS OF:	CHESTERFIELD SMITH LAWYER MIAMI, FLORIDA
BEFORE:	CITIZENS' CONFERENCE ON THE GEORGIA JUDICIAL SYSTEM LUNCHEON FALCON INN SUWANEE, GEORGIA
DATE:	FRIDAY, FEBRUARY 20, 1981 NOON
TITLE:	A JUDICIAL SYSTEM MUST RESPOND TO THE PEOPLE'S NEEDS
TIME:	TWENTY-FIVE MINUTES

A PRIME RESPONSIBILITY OF ANY CIVILIZED SOCIETY IS THE PROMPT - EQUITABLE - EVEN-HANDED - AND EFFECTIVE ADMINISTRATION OF JUSTICE. FAIR RESOLUTION OF DISPUTES BETWEEN CITIZENS - AND BETWEEN CITIZENS AND THEIR GOVERNMENT - IS AT THE CENTER OF THE PROMISE OF DEMOCRACY. IF A NATION IS TO EXPERIENCE TRANQUILLITY - IF IT IS TO ENDURE WITHOUT CHAOS OR OPPRESSION - ITS CITIZENS MUST TRUST THE SYSTEM OF JUSTICE - TRUST IT TO ENFORCE THE LAW - TRUST IT TO RESOLVE DISPUTES IN AN EXPEDITIOUS WAY.

YET IN MANY PARTICULARS - THE AMERICAN JUSTICE SYSTEM DOES NOT TODAY MEASURE UP TO THAT STANDARD. SUBSTANTIAL SEGMENTS OF THE JUSTICE SYSTEM HAVE LOST THE CONFIDENCE OF LARGE MASSES OF OUR POPULATION. RICHARD

REEVES - THE COLUMNIST - RECENTLY SAID:

"AMERICAN CRIMINAL JUSTICE HAS BROKEN DOWN. THE FIRST THING THE COUNTRY NEEDS - AND THE HELL WITH THE COST - ARE MORE PRISONS AND MORE JUDGES WILLING TO SEND CRIMINALS THERE."

AND THAT BREAKDOWN NO LONGER IS MERELY APPLICABLE TO THE MINORITIES AND THE POOR. PEOPLE EVERYWHERE VIGOROUSLY EXPRESS THEIR DISSATISFACTION. AMERICA SIMPLY HAS NOT MAINTAINED NATIONWIDE RESPONSIVE - EQUITABLE JUSTICE SYSTEMS. THE INDICES OF FAILURE ARE ALL TOO APPARENT - THE RISING INCIDENCE OF CRIME - OVERCROWDED JAILS AND PRISONS - FLOODED COURT DOCKETS - THE HIGH RATE OF RECIDIVISM AMONG THOSE ALLEGEDLY "CORRECTED" - ALL INDICATE THAT SOMETHING IS TERRIBLY

PROTECTION - HUMAN COMPANIONSHIP - AND LATER FOR TRADE AND COMMERCE. BUT THE BASIC NEED WAS SECURITY - SECURITY OF THE PERSON - OF THE FAMILY - OF THE HOME AND OF PROPERTY. TAKEN TOGETHER - THIS IS THE MEANING OF A CIVILIZED SOCIETY.

TODAY - THE PROUD AMERICAN BOAST THAT WE ARE THE MOST CIVILIZED - MOST PROSPEROUS - MOST PEACE-LOVING PEOPLE SOMETIMES LEAVES A RATHER BITTER TASTE. WE HAVE PROSPERED. WE ARE - AND HAVE BEEN - PEACE-LOVING IN OUR RELATIONS WITH OTHER NATIONS. BUT LIKE IT OR NOT - TODAY WE ARE APPROACHING THE STATUS OF AN IMPOTENT SOCIETY -

WRONG. AND THE FAULT LIES PRIMARILY WITH US - WE THE ORDINARY PEOPLE ARE THE ENEMY - THE ENEMY OF JUSTICE. THE CURRENT STRUCTURE IS AS WE HAVE MADE IT. WE WANT JUSTICE - BUT WE - THE ORDINARY PEOPLE OF AMERICA - ARE NOT WILLING TO PAY THE ESSENTIAL PRICE FOR IT.

IN AN ADDRESS TO THE AMERICAN BAR ASSOCIATION LESS THAN TWO WEEKS AGO - CHIEF JUSTICE WARREN BURGER DESCRIBED OUR PRESENT SITUATION IN THESE WORDS:

"WHEN OUR DISTANT ANCESTORS CAME OUT OF CAVES AND RUDE TREE DWELLINGS THOUSANDS OF YEARS AGO TO FORM BANDS AND TRIBES AND LATER TOWNS - VILLAGES - AND EVENTUALLY CITIES - THEY DID SO TO SATISFY CERTAIN FUNDAMENTAL HUMAN NEEDS: MUTUAL

WHOSE CAPABILITY OF MAINTAINING ELEMENTARY SECURITY ON THE STREETS - IN SCHOOLS AND FOR THE HOMES OF OUR PEOPLE IS IN DOUBT."

WHEN THE CHIEF JUSTICE SPEAKS OUT ABOUT "AN IMPOTENT SOCIETY" THAT SHAKES AND QUAKES BEFORE THE CRIMINAL - MORE AMERICANS THAN EVER AGREE. INDEED - THERE IS AN ENTIRE GENERATION WHO DREAD THE CITY STREETS - WHO BECAUSE OF FEAR FOR PERSONAL SAFETY FEEL DEPRIVED OF ELEMENTARY RIGHTS.

THERE IS NOTHING IRRATIONAL ABOUT THAT FEAR AND RESENTMENT. THEY HAVE RISEN WITH THE CRIME RATE - AND WITH THE REALIZATION THAT THE JUSTICE SYSTEM IS NOT FUNCTIONING WELL. RIGHTLY OR NOT - MORE CITIZENS THAN EVER THINK THAT DEFENDANT'S RIGHTS ARE WELL CARED FOR WHILE THEIR OWN ARE NOT.

IT IS NOT MY PREMISE THAT THE PEOPLE WHO ADMINISTER THE CRIMINAL JUSTICE INSTITUTIONS - THE JUDGES - POLICE - PROSECUTORS - DEFENDERS - PRISON PERSONNEL - PAROLE AND PROBATION OFFICERS - HAVE THROUGH PERSONAL DERILICTIONS LED TO THAT FAILURE. THE OVERWHELMING MAJORITY OF THOSE IN PUBLIC SERVICE IN THE JUSTICE SYSTEMS HAVE WORKED BEYOND ALL REASONABLE EXPECTATIONS TO MAKE THE SYSTEMS FUNCTION. THE MAJOR PART OF THE PROBLEM IS NOT IN THOSE WHO ADMINISTER THE SYSTEMS. THE TROUBLE IS THAT THE SYSTEMS OPERATE AS WE THE PEOPLE HAVE CREATED THEM - AND AS WE HAVE WANTED - AND PERHAPS STILL WANT THEM TO OPERATE.

MOST OF OUR CITIZENS LOOK EXCLUSIVELY TO THE COURTS WHEN THEY THINK OF JUSTICE. THAT MAY WELL BE THE WRONG

DIRECTION IN WHICH TO LOOK - BUT WHEN THEY DO LOOK AT THE COURTS - THEY ARE CONFRONTED WITH RIDICULOUSLY CROWDED COURT DOCKETS - OVERWORKED AND UNDERPAID JUDGES - INORDINATE COURT DELAY - LONG WAITS IN JAIL - UNIMPRESSIVE AND DISCRIMINATORY PRACTICES IN INFERIOR COURTS - PLEA BARGAINING. THEY SEE A BENCH WHERE THE BEST TRIAL LAWYERS AVAILABLE OFTEN REFUSE TO BE JUDGES.

THEY SEE A SYSTEM WHERE SLOW-MOTION JUSTICE HAS BECOME THE RULE - AND NOT THE EXCEPTION. CRIME FLOURISHES BEST WHEN THE CITIZENRY - INCLUDING THE CRIMINAL - DOES NOT HAVE CONFIDENCE THAT THE COURTS PROMPTLY AND EFFECTIVELY WILL PUNISH THE LAWBREAKER - AND WILL PROMPTLY EXONERATE THE INNOCENT. INORDINATE COURT DELAY - THE SLOWNESS OF GOING

TO TRIAL - CAN ONLY WORK TO THE ADVANTAGE OF THE CRIMINAL.

CONVERSELY - QUALITY COURTS EFFICIENTLY MANAGED CAN ONLY BUILD THE TRUST AND CONFIDENCE OF CITIZENS IN THE FAIRNESS OF THE LAW ITSELF - AND THUS DISCOURAGE CRIME.

AGAIN TO QUOTE FROM THE RECENT REMARKS OF THE CHIEF JUSTICE:

"WHAT PEOPLE WANT IS THAT CRIME AND CRIMINALS BE BROUGHT UNDER CONTROL SO THAT WE CAN BE SAFE ON THE STREETS AND IN OUR HOMES AND FOR OUR CHILDREN TO BE SAFE IN SCHOOLS AND AT PLAY - TODAY THAT SAFETY IS VERY - VERY FRAGILE.

WE MUST NOT BE MISLED BY CLICHÉS AND SLOGANS THAT IF WE BUT ABOLISH POVERTY CRIME WILL ALSO DISAPPEAR.

A FAR GREATER FACTOR IS THE DETERRENT EFFECT OF SWIFT AND CERTAIN CONSEQUENCES: SWIFT ARREST - PROMPT TRIAL - CERTAIN PENALTY - AND - AT SOME POINT - FINALITY OF JUDGMENT.

DETERRENCE IS THE PRIMARY CORE OF ANY RESPONSE TO THE REIGN OF TERROR IN AMERICAN CITIES. DETERRENCE MEANS SPEEDY ACTION BY SOCIETY - BUT THAT PROCESS RUNS UP AGAINST THE REALITY THAT MANY LARGE CITIES HAVE EITHER REDUCED THEIR POLICE FORCES OR FAILED TO KEEP THEM IN BALANCE WITH DOUBLE-DIGET CRIME INFLATION."

IN RECENT YEARS - WE HAVE WITNESSED BEEFED-UP POLICE DEPARTMENTS - WE HAVE ADDED MORE COURTS AND MORE JUDGES -

WE HAVE IMPROVED PRISONS AND CORRECTIONAL FACILITIES - WE HAVE BEGUN TO INSERT MODERN MANAGERIAL TECHNIQUES IN OUR COURTS - AND IN THE OFFICES OF OUR PROSECUTORS - DEFENDERS - AND OTHER COURT SUPPORT PERSONNEL - WE HAVE INSTALLED COMPUTERS FOR CALENDAR CONTROL - WE HAVE DEVOTED MORE TAX DOLLARS TO THE JUDICIAL BRANCH OF GOVERNMENT THAN EVER BEFORE IN OUR HISTORY. THE FEDERAL GOVERNMENT HAS PROVIDED MASSIVE GRANTS IN AID TO STRENGTHEN STATE AND LOCAL ADMINISTRATIVE OPERATIONS IN CRIMINAL JUSTICE AND LAW ENFORCEMENT. BUT UNFORTUNATELY - THE COMBINED AND OFTTIMES IMPRESSIVE EFFORTS OF GOVERNMENT HAVE FAILED TO CURB RISING TIDES OF CRIME - OR TO ALLEVIATE WIDESPREAD INJUSTICES WHICH PREVAIL THROUGHOUT OUR LAND. CERTAINLY IT IS NOT ACCEPTABLE TO THE AVERAGE

CITIZEN SIMPLY TO POINT OUT THAT THOSE EXTENSIVE EFFORTS MAY HAVE MITIGATED THE RATE OF INCREASE IN SERIOUS CRIMES WHICH WOULD OTHERWISE HAVE OCCURRED - OR TO SAY THAT OUR CHANCES OF BEING THE VICTIMS OF CRIMINAL VIOLENCE AT THIS TIME ARE NOT AS GREAT AS SEVERAL YEARS AGO WE HAD FEARED THEY WOULD BE BY NOW. WE NEED TO BE ABLE TO TELL THAT CITIZEN THAT CRIMINAL VIOLENCE AND CRIMINAL ACTIVITY IS ACTUALLY DIMINISHING - BUT WE CANNOT DO SO. PERSONAL SAFETY TODAY IS A MOST FRAGILE RIGHT. CRIME AND CRIMINALS MUST BE BROUGHT UNDER CONTROL IF THE AMERICAN PEOPLE AGAIN ARE TO BE FREE - FREE FROM FEAR OF PERSONAL HARM - AND FREE FROM GROUP INTIMIDATION.

IT HAS BEEN DEMONSTRATED REPEATEDLY THAT PIECEMEAL

REFORM OF THE STRUCTURE NORMALLY WILL FAIL. INDIVIDUAL ACTORS AND SPECIFIC PROGRAMS CAN BE STRENGTHENED AND STILL NO MEANINGFUL PROGRESS BE OBTAINED. REFORM - IF IT IS TO WORK - MUST TAKE INTO CONSIDERATION ALL ASPECTS OF THE SYSTEM - SO AS TO CREATE ONE COORDINATED - WELL-MANAGED - UNIFORM - INTEGRATED UNIT. IN MANY AREAS - DIFFERING ELEMENTS IN THE JUSTICE SYSTEM - INSTEAD OF WORKING AS A TEAM - SEEM TO BE LISTENING TO A DIFFERENT QUARTERBACK - SEEM TO BE SCORNFUL OR SUSPICIOUS OF ITS TEAMMATES. THE POLICE ARE ANNOYED WITH WHAT THEY CALL LENIENT JUDGES - PROSECUTORS AND DEFENDERS POINT TO WHAT THEY CALL INEPT AND VINDICTIVE POLICE ENFORCEMENT - JUDGES COMPLAIN ABOUT WHAT THEY STYLE BAD LEGISLATION AND POOR CORRECTIONAL OR

REHABILITATIVE SYSTEMS - JAILERS AND PRISON OFFICIALS BLAME THE INADEQUACIES OF THEIR APPROPRIATIONS AND WHAT THEY CATEGORIZE AS NAIVE PAROLE AND PROBATION PERSONNEL - PROBATION AND PAROLE PEOPLE BLAME WHAT TO THEM ARE DISCRIMINATORY PRACTICES OF EMPLOYERS AND SOCIAL WORKERS. EVERYONE BLAMES SOMEONE ELSE. TO ANY OBJECTIVE AND DISINTERESTED OBSERVER - IT IS CRYSTAL CLEAR THAT INCREASED COORDINATION IS AN URGENT NECESSITY WITHIN THE ENTIRE SYSTEM. REAL COMMUNICATION BETWEEN THESE NECESSARY PARTNERS IN THE JUSTICE SYSTEM SIMPLY IS LACKING. SEPARATE LINES OF AUTHORITY - DIFFERENT APPOINTING EXECUTIVES AND BOARDS - ALL LEAD TO THE ABSENCE OF EFFECTIVE COOPERATION BY ALL AGENCIES - IN WHAT SHOULD BE ONLY ONE PROCESS - A UNIFIED - INTEGRATED

SYSTEM OF JUSTICE. IF TRULY AMERICA IS IN A WAR WITH ITS CRIMINALS - WE NEED A UNIFIED COMMAND - A FOUR-STAR COMMANDER.

IT IS OF COURSE INEVITABLE THAT INJUSTICE BE A BY-PRODUCT OF SUCH A FRAGMENTED SYSTEM. MANY EXISTING PROCEDURES AT THE NATIONAL - STATE - AND LOCAL LEVELS - OCCASIONED IN LARGE MEASURE BY EVER-INCREASING BURDENS - DO SMACK OF INEQUITY - THEY DO ATTACK THE PRESUMPTION OF INNOCENCE - THEY DO PRESSURE THE ACCUSED TO ADMIT GUILT - THEY DO REWARD THE GUILTY. OUT OF FEAR THAT THE JUSTICE SYSTEM MAY COLLAPSE BECAUSE OF THE TREMENDOUS VOLUME OF MATTERS WITH WHICH IT IS INVOLVED - PROCEDURES HAVE BEEN ACCEPTED WHICH THEMSELVES SERIOUSLY UNDERCUT REGARD FOR THE

INDIVIDUAL ACCUSED BY THE STATE - ADHERENCE TO THE RULE OF LAW - AND CONCERN FOR THE SAFETY OF SOCIETY. TOM WICKER - THE NEW YORK TIMES WRITER, CAUTIONS:

"A DEFENDANT COULD BE YOU - OR ME - OR ANY ONE OF US."

IT IS OBVIOUSLY UNJUST TO ASSUME THAT AN UNTRAINED PERSON WILL IN OUR HECTIC AND OVERBURDENED AND COMPLEX COURTS RECEIVE DUE FAIRNESS WITHOUT HAVING A QUALIFIED ATTORNEY TO DEFEND HER OR HIM. IT IS ALSO - I SUBMIT - THE RESPONSIBILITY OF THE JUSTICE SYSTEM TO INSURE THAT ALL COURT PROCEEDINGS INVOLVE ADVERSARY COUNSEL WHO ARE REASONABLY WELL MATCHED - THAT IS - REASONABLY EQUIVALENT IN EXPERIENCE - COMPETENCE - CASELOAD - AND COMPENSATION. IF THE LAWYER

FOR THE GOVERNMENT - OR THE LAWYER FOR CONTESTING PRIVATE PARTIES - IS INADEQUATE - THE ADVERSARY SYSTEM OF SEEKING THE TRUTH ABOUT THE GUILT OR INNOCENCE OF THOSE ACCUSED OF CRIME FALLS COMPLETELY APART. IN FACT - THE OBVIOUS UNFAIRNESS OF AN ADVERSARY JUSTICE SYSTEM WHICH MITIGATES AGAINST THOSE ILL-EQUIPPED TO DEFEND THEMSELVES - A SYSTEM WHICH ADVANTAGES THE STRONG OVER THE WEAK - IS - IN ITSELF - A MAJOR SOURCE OF THE LAWLESSNESS - DISORDER - AND ALIENATION WHICH IS PRESENT IN OUR NATION. THE BITTERNESS AND DISAFFECTION WHICH I DETECT IN SUBSTANTIAL SEGMENTS OF OUR PEOPLE STEMS - IN LARGE MEASURE - FROM THE WIDESPREAD CONVICTION THAT OUR LAWS - THEIR ENFORCEMENT - AND THE JUSTICE PROCESSES RELATED TO THEM ARE STILL TODAY UNFAIR - INEQUITABLE -

DISCRIMINATORY - AND UNJUST.

MANY MATTERS CALL FOR IMMEDIATE ATTENTION. CERTAIN POLICE PRACTICES - SOME REAL - SOME IMAGINED - HAVE AT LEAST CAUSED WIDESPREAD COMMUNITY SUSPICION. THE USE AND MISUSE OF CRIME STATISTICS BY GOVERNMENTAL OFFICERS AND LAW ENFORCEMENT PERSONNEL REQUIRES THAT THESE STATISTICS BE USED IN THE FUTURE WITH GREATER DISCRETION. INCONVENIENCES TO POTENTIAL WITNESSES - AND OPPORTUNITIES FOR INTIMIDATION OF THOSE POTENTIAL WITNESSES - BOTH OF WHICH MITIGATE AGAINST CITIZEN INVOLVEMENT IN CRIME PREVENTION AND REPORTING - MUST BE STUDIED AND ALLEVIATED. OVERCROWDED JAILS AND PRISONS WHICH ARE UNDERSTAFFED AND ILL-FINANCED SHOULD RECEIVE IMMEDIATE AND URGENT ATTENTION. ANTIQUATED SYSTEMS OF

BAIL MUST BE STUDIED AND SQUARED WITH MODERN REALITIES. SO LONG AS PLEA BARGAINING REMAINS A NECESSARY EXPEDIANT - IT MUST BE MORE CLOSELY SUPERVISED BY COURTS AND COUNSEL - REQUIRING BOTH KNOWLEDGEABLE AND HUMANE PROSECUTORS AND COMPETENT DEFENDERS. PROBATION AND PAROLE POLICIES AND PROCEDURES SHOULD BE GIVEN GREATER SIGNIFICANCE AND ATTENTION. THE CASELOADS OF PAROLE OFFICERS MUST BE BROUGHT WITHIN FAIR LIMITS. THE PROBLEMS OF JUVENILES WHO ARE EMESHED IN OUR CRIMINAL JUSTICE SYSTEM SHOULD RECEIVE COMPASSIONATE ATTENTION. SOME FORM OF APPROPRIATE POST-AUDIT OF THE ENTIRE JUSTICE SYSTEM MUST BE DEVISED AND IMPLEMENTED. TRAINED COURT MANAGERS MUST BE UTILIZED TO BRING TO OUR COURTS THOSE MODERN METHODS OF CONTROL WHICH

HAVE CONTRIBUTED SO MUCH TO THE EFFICIENCY OF OUR DYNAMIC BUSINESS INSTITUTIONS. ABOVE ALL - WE MUST INSURE THAT THE FINEST LAWYERS AVAILABLE ARE SELECTED AS JUDGES OF OUR COURTS - FREE FROM POLITICS AND THE PRESSURES OF PARTISANSHIP. WE SHOULD STRIVE FOR IN-SERVICE TRAINING OF ALL JUDGES - THE INTERPRETERS OF JUSTICE. JUDGES SHOULD BE PAID COMPENSATION COMPARABLE TO THAT WHICH THE JUDGE COULD RECEIVE IN PRIVATE LAW PRACTICE. ALL RESTRICTIONS OF CIVIL TRIAL COURT JURISDICTIONS SHOULD BE ELIMINATED SO THAT ALL OF OUR CIVIL TRIAL COURT JUDICIAL MANPOWER WILL BE AVAILABLE TO WORK WHERE THE WORK IS - THUS SIMPLIFYING THE ALLOCATIONS BETWEEN FORUM AND JUDGES WHICH NOW RESULTS IN AN UNEVEN DISTRIBUTION OF THE JUDICIAL BURDEN. IT SEEMS SO VERY CLEAR

TO ME THAT WE MUST HAVE EVERYWHERE AN INTEGRATED - CO-ORDINATED - UNIFORM SYSTEM OF TRIAL COURTS IN WHICH JUDICIAL MANPOWER AND COURT SUPPORT PERSONNEL FROM THROUGHOUT AN ENTIRE STATE ARE AVAILABLE FOR USE WHEREVER NEEDED WITHIN THAT STATE. IT IS AN IDEA WHOSE TIME HAS COME - TO CREATE IN GEORGIA AND IN ALL STATES - AND AS QUICKLY AS POSSIBLE - ONE COORDINATED - UNIFORM - FULLY INTEGRATED SYSTEM OF JUSTICE. IT IS ONLY THROUGH SUCH A CONCERTED EFFORT THAT YOU WILL EVER BE ABLE TO DELIVER THE "JUSTICE FOR ALL" ENVISIONED BY OUR FOREFATHERS.

LET ME SUGGEST TO YOU THAT AT SUCH A TIME AS THIS - ONLY THE MOST CONCERTED EFFORTS BY CITIZENS SUCH AS YOURSELVES TO REFORM OUR JUSTICE SYSTEMS CAN SUCCEED IN RESTORING THE

THE FAITH OF OUR PEOPLE. YOUR TASK IS NOT EASY - BUT COURT REFORM HAS ALWAYS BEEN A DIFFICULT TASK. THE FRUITS - HOWEVER - OF "JUSTICE FOR ALL" IS WORTH THE TOIL. YOUR JOINT ASPIRATIONS CAN ONLY BE ACHIEVED BY INTELLIGENT YET MAXIMUM EFFORT. IT IS NOT ENOUGH THAT YOU KNOW AND CARE ABOUT JUSTICE - ALL MEN AND WOMEN OF GEORGIA MUST BE MADE AWARE OF THE ROLE A MODERN JUSTICE SYSTEM CAN PLAY IN MAKING THIS HISTORIC AND VIGOROUS AND STURDY STATE AN EVEN BETTER PLACE TO WORK AND LIVE. IT IS A LONG ROAD TO TRAVEL - AND THE FIRST PART IS UPHILL. BUT A LARGE PORTION OF THE TRIP IS NOW BEHIND YOU - AND LIKE ALL ROADS AND ALL HILLS - YOU MAY WELL BE AT A POINT WHERE THE GOING IS EASIER AND THE DESTINATION NEAR. IN ALL EVENTUALITIES -

IT WILL BE MOST REWARDING TO THOSE WHO GO THE ENTIRE WAY.

I AM CONFIDENT THAT MOST OF YOU WILL COMPLETE THE JOURNEY.

INDEED - YOU HAVE NO CHOICE - SINCE FAIRNESS OF THE LAW TO

EVERY SINGLE PERSON IS THE CORNERSTONE OF DEMOCRACY.

(END)

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 228

VOLUME XVI

REMARKS OF:	CHESTERFIELD SMITH LAWYER BARTOW, FLORIDA
PLACE:	INVESTITURE OF CLINTON CURTIS CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA, BARTOW, FLORIDA
DATE:	FRIDAY, MARCH 6, 1981, 4:00 P.M.
TIME:	TEN MINUTES

THE CALIBER OF A STATE'S JUDICIARY IS A PRIME YARDSTICK OF ITS CULTURE. IN A SOCIETY AS SATURATED IN LAW AS OURS - IN A STATE WITH A BURGEONING POPULATION - IN A STATE AS LITIGIOUS AS FLORIDA HAS BECOME - THE CHOICE OF WHICH FLORIDA LAWYER IS TO SIT ON THE BENCH AT ANY LEVEL ASSUMES PARTICULAR IMPORTANCE - AND NOT SURPRISINGLY ALMOST ALWAYS AROUSES CONTENTION AMONG OTHERS - AMONG THOSE ALREADY ON THE BENCH - THOSE WHO COMPRISE THE TRIAL BAR - AND THOSE OF THE GENERAL PUBLIC WHO ARE TO BE JUDGED BY THE LAWYER SO SELECTED. AS THE ULTIMATE GUARDIAN OF OUR LIBERTIES AND AS THE FINAL ARBITER OF THE LAW - IT IS NOT SURPRISING IN ANY WAY THAT STRIFE SOMETIMES SURROUNDS THOSE WHO SIT UPON THE TRIAL BENCH.

LEARNED HAND - A GREAT FEDERAL JUDGE WHO WAS FOR DECADES AMONG THE MOST REVERED OF AMERICAN JURISTS - MADE A MOST RINGING STATEMENT OF THE LARGE VIEW THAT A JUDGE OUGHT TO BRING TO INTERPRETATION OF THE LAW WHEN HE SAID:

". . .IN SUCH MATTERS EVERYTHING TURNS UPON THE SPIRIT IN WHICH HE APPROACHES THE QUESTIONS BEFORE HIM. THE WORDS HE MUST CONSTRUE ARE EMPTY VESSELS INTO WHICH HE CAN POUR NEARLY ANYTHING HE WILL. MEN DO NOT GATHER FIGS OFF THISTLES - NOR SUPPLE INSTITUTIONS FROM JUDGES WHOSE OUTLOOK IS LIMITED BY PARISH OR CLASS."

THAT GLORIOUS STATEMENT - VISIONARY AS TO ANY JUDICIAL APPOINTMENT - HAS TO BE READ AGAINST OTHER REALITIES INSOFAR

AS A COURT WITH THE BURDENSOME WORKLOAD OF THE CIRCUIT COURT OF POLK COUNTY IS CONCERNED. ON POLK COUNTY'S BUSY TRIAL COURT - THE JUDGES SIMPLY MUST ALSO HAVE THE TECHNICAL TRAINING - THE LEGAL INTEREST AND EXPERIENCE - TO GET THROUGH ENORMOUS VOLUMES OF OFTEN HIGHLY COMPLICATED WORK. IN FACT - THE LIFE OF A FLORIDA CIRCUIT JUDGE DOES NOT NOW - IF IT EVER DID - CONSIST SOLELY OF THINKING IN THE ABSTRACT ABOUT GREAT PHILOSOPHICAL ISSUES. A CIRCUIT JUDGE'S REPUTATION TODAY IN BARTOW RESTS IN SUBSTANTIAL MEASURE ON ABILITY TO DO TECHNICAL LEGAL WORK - TO MOVE A CASE - TO ANALYZE A COMPLICATED FACTUAL SITUATION - TO DISSECT A STATUTE - TO DISTINGUISH APPELLATE COURT OPINIONS - AND PERHAPS ABOVE ALL - TO DECIDE NOW - TO DECIDE THE MATTERS UNDER JUDICIAL CONSIDERATION IN AN EXPEDITIOUS AND FAIR WAY.

THE IDEAL FOR WHICH THOSE LAWYERS WHO ACCEPT APPOINTMENTS TO THE TRIAL BENCH OUGHT IN THEORY TO STRIVE - THEN - IS A COMBINATION OF CRAFTSMANSHIP - WISDOM - PHILOSOPHICAL VISION - THE EXPERIENCE OF LIFE IN THIS STATE AND COUNTRY THAT BRINGS SOCIAL UNDERSTANDING - AND A WILLINGNESS TO LABOR LONG AND HARD IN A PROFESSIONAL WAY PROMPTLY TO DO THE ASSIGNED PUBLIC SERVICE. IT IS MY PERSONAL OPINION THAT CLINTON CURTIS HAS THE TEMPERAMENT - CHARACTER - AND INNATE ABILITY TO BE SUCH A PERSON.

IT HAS BEEN SAID "A GOOD MAN IS HARD TO FIND." FOR MY PURPOSES - I WOULD RESTATE THIS MAXIM AND SAY THAT "A GOOD TRIAL JUDGE IS HARD TO FIND - AND EVEN HARDER TO KEEP." AS AN ACTIVE TRIAL LAWYER - I WELL KNOW THAT A TRIAL JUDGE LACKING TALENT OR CHARACTER CAN MAKE A SHAMBLES OF THE MOST FINELY

CONTRIVED JUDICIAL PROCESS. THE CITIZENS OF FLORIDA MUST ALWAYS BE ZEALOUS TO INSURE THAT LAWYERS OF WISDOM AND CONSUMMATE SKILL ARE SELECTED AND RETAINED AS TRIAL JUDGES IF THE FLORIDA JUSTICE SYSTEM IS TO FUNCTION PROPERLY. IN GENERAL - WE IN POLK COUNTY HAVE BEEN BLESSED IN THE MEN AND WOMEN WHO SERVE AS TRIAL JUDGES.

UNDER OUR SYSTEM OF GOVERNMENT - JUDGES OFTEN PASS ON THE MOST PROFOUND SOCIAL AND POLITICAL QUESTIONS. THE DUTY TO ENFORCE THE LAW WHATEVER IT MAY BE IN A PARTICULAR SITUATION - AFFECTS THE WHOLE ROLE OF ALL JUDGES - BUT ESPECIALLY THOSE ON THE TRIAL COURT - AND IT SUGGESTS THAT THEY SHOULD COME FROM A DIVERSITY OF BACKGROUNDS. AGAIN - IT IS MY BELIEF THAT CLINTON CURTIS CAN IN A MATERIAL WAY ADD DISPARATE TALENTS NOT NOW AVAILABLE TO THE QUALITY OF THE TRIAL BENCH IN

POLK COUNTY AND THE TENTH JUDICIAL CIRCUIT OF FLORIDA.

WE ALL KNOW WHAT WE WANT IN A TRIAL JUDGE; WE WANT A WISE AND GOOD PERSON WHO HAS DISTINGUISHED HIMSELF OR HERSELF BOTH IN THE FIELD OF LAW AND IN THE WIDER PUBLIC CONSTITUENCY - FOR THAT ESSENTIAL COMBINATION OF WISDOM - JUDGMENT AND FAIRNESS THAT MUST GOVERN A VIABLE LEGAL SYSTEM. WE KNOW THAT THE WORK OF A JUDGE IS BASICALLY REFLECTIVE AND THAT THE CASES TO BE TRIED ARE RARELY FLAMBOYANT. WE KNOW THAT THE DESIRABLE JUDICIAL QUALITIES INCLUDE MODESTY - SCHOLARSHIP - BALANCE - DIGNITY - RESTRAINT - AND REFLECTION.

BUT ALTHOUGH WE PRESUPPOSE THAT CLINTON CURTIS POSSESSES THOSE QUALITIES - WE ALSO KNOW THAT A LAWYER WHO ASSUMES THE PRESTIGIOUS OFFICE OF CIRCUIT JUDGE CAN NEVER BE WITH CONFIDENCE AS HE ENTERS OFFICE CALLED A GREAT TRIAL JUDGE. THAT IS A TITLE

WHICH CAN ONLY BE EARNED - EARNED BY YEARS OF DEDICATED SERVICE AS A JUDGE. IT THUS IS NOT APPROPRIATE NOW - AS CLINTON CURTIS BEGINS A JUDICIAL CAREER - TO CALL HIM A GREAT OR EVEN A GOOD TRIAL JUDGE. THAT IS A PREMATURE DECISION WHICH COULD NOT BE BASED ON FACT.

BUT IT IS BOTH PROPER AND APPROPRIATE THAT HE BE EVALUATED FOR HIS POTENTIAL. EACH OF US HERE TODAY HAVE OUR OWN IDEAS AND JUDGMENTS ABOUT CLINTON CURTIS AND HIS CAPACITY AS A LAWYER AND AS A PERSON - AND HIS POTENTIAL FOR EFFECTIVE AND HONORABLE SERVICE ON THIS COURT.

KNOWINGLY - WE THEN EACH PARTICIPATE IN HIS INVESTITURE AS A TRIAL JUDGE IN POLK COUNTY - BELIEVING THAT IN A UNIQUE AND MARKED DEGREE HE SEEMS TO US TO POSSESS THOSE RARE AND PRECIOUS QUALITIES WHICH CAN MAKE HIM A TRULY GREAT JUDGE.

BY EDUCATION - BY EXPERIENCE - BY APTITUDE - BY DEMONSTRATED CHARACTER - BY THE VERY NATURE OF THE MAN AND HIS BEING - CLINTON CURTIS APPEARS TO US TO HAVE THE HIGHEST POTENTIAL TO SERVE THIS COURT - AND THIS STATE - AND THIS CIRCUIT IN SUCH A WAY THAT HE WILL IN HISTORY JOIN THE MORE MAGNIFICENT OF THE GREAT TRIAL JUDGES WHO OVER THE YEARS HAVE GRACED THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA.

FOR A PERSONAL REFERENCE, I FIRST BECAME ACQUAINTED WITH CLINTON CURTIS WHEN HE CAME TO BARTOW FROM STETSON LAW SCHOOL IN 1958. IN THE PROCESS OF OPENING HIS OWN PRIVATE LAW OFFICE, HE AND FLO PURCHASED A HOME NEXT DOOR TO VIVIAN AND ME. THEY AND THEIR THREE THEN AND NOW YOUNG AND LOVELY DAUGHTERS, WHO WERE ALWAYS CALLED BY US COLLECTIVELY "THE GIRLS",

LIVED THERE FOR SEVERAL YEARS. AS OLDER PEOPLE SOMETIMES DO WITH A YOUNG COUPLE HAVING SIMILAR INTERESTS - THEY BECAME OUR SPECIAL CHARGE; INDEED - WE DEVELOPED A VERY SUBSTANTIAL PERSONAL FONDNESS FOR THE ENTIRE FAMILY. CERTAINLY WE BECAME CONVINCED THAT EACH OF THEM WAS A VERY NICE PERSON AND THAT THEY WERE AND ALWAYS WOULD BE OUR WARM FRIENDS. THAT NEIGHBORHOOD PROXIMITY CAUSED ME CAREFULLY TO WATCH THEREAFTER THE PROFESSIONAL DEVELOPMENT OF CLINTON CURTIS WHEN THE FAMILY MOVED TO LAKE WALES. BECAUSE I SO DEEPLY BELIEVE THAT ADVOCACY IS ONE OF THE NOBLEST CALLINGS OF MANKIND - IT WAS MOST PLEASING FOR ME TO WATCH THE DEVELOPMENT OF MY YOUNG LAWYER FRIEND INTO AN OUTSTANDING TRIAL ADVOCATE - ULTIMATELY A PEER OF THE BEST TRIAL LAWYERS IN FLORIDA. IT WAS WITH EVEN GREATER PERSONAL PRIDE THAT I SEVERAL YEARS AGO

WITNESSED HIS INDUCTION AS A FELLOW IN THE AMERICAN COLLEGE OF TRIAL LAWYERS - AN HONOR RESERVED FOR THE FEW. IT IS WITH PERHAPS EVEN GREATER SATISFACTION THAT I NOW OBSERVE CLINTON CURTIS - NO LONGER QUITE SO MUCH MY YOUNG LAWYER FRIEND BUT NOW A DISTINGUISHED TRIAL LAWYER AT THE TOP OF THE PROFESSIONAL HEAP GIVE UP A VERY LUCRATIVE PRIVATE PRACTICE TO EMBARK UPON WHAT SEEMS TO ME TO BE THE HIGHEST OF MANKIND'S PURSUITS - TO BE A TRIAL JUDGE WHO HENCEFORTH IS THE ARBITER OF DISPUTES BETWEEN PEOPLE AND THEIR NEIGHBORS - AND BETWEEN THOSE PEOPLE AND THEIR GOVERNMENT.

CLINTON CURTIS AS A TRIAL LAWYER HAS LONG AFFORDED ADVOCACY OF SUPERIOR QUALITY TO BOTH PUBLIC AND PRIVATE LITIGANTS. IT IS MY BELIEF THAT CLINTON CURTIS AS A TRIAL JUDGE WILL NOW BE A PRIME BULWARK AGAINST GOVERNMENTAL

OPPRESSION AND THAT CLINTON CURTIS AS A TRIAL JUDGE WILL MATERIALLY ENHANCE IN THIS AREA THE UNENDING BUT REWARDING SEARCH FOR EQUAL JUSTICE.

AS A FLORIDA LAWYER AND A FLORIDA CITIZEN - I AM PERSONALLY PLEASED TO BE A PARTICIPANT IN THIS INVESTITUTE.

THANK YOU.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 229

VOLUME XVI

LECTURE BY:	CHESTERFIELD SMITH LAWYER MIAMI, FLORIDA
BEFORE:	BARON DE HIRSCH MEYER LECTURE SERIES UNIVERSITY OF MIAMI SCHOOL OF LAW CORAL GABLES, FLORIDA FRIDAY, APRIL 3, 1981
TITLE:	DO LAWYERS HAVE AN AFFIRMATIVE DUTY TO THE PUBLIC BY REASON OF THEIR PROFESSIONAL STATUS TO DO SOME FREE SERVICE
TIME:	THIRTY MINUTES

SHOULD THERE BE AN ETHICAL RESPONSIBILITY ON A LAWYER FOR FREE PUBLIC SERVICE? DOES A RESPONSIBLE LAWYER HAVE AN AFFIRMATIVE DUTY TO GIVE SOME PORTION OF PROFESSIONAL TIME FOR FREE PUBLIC SERVICE? IS A LAWYER REQUIRED BY REASON OF PROFESSIONAL STATUS TO RENDER FREE SERVICE TO THE PUBLIC WITH THE SAME PROFESSIONAL DEDICATION AS IS OWED TO A LAWYER'S PAYING CLIENTS? MOST LAWYERS WOULD SLOWLY ANSWER THOSE QUESTIONS WITH AT LEAST A QUALIFIED "YES". THAT BEING SO - IS IT TIME FOR AN EVOLUTIONARY PROGRESS IN LAWYER ETHICS BY NOW IMPOSING PEER PRESSURE ON THOSE WHO UNREASONABLY IGNORE THOSE LOFTY OBLIGATIONS OF LAWYERS? SHOULD THOSE LAWYERS WHO AFTER NOTICE AND HEARING REPEATEDLY REFUSE TO ASSUME THIER PART OF THOSE PROFESSIONAL OBLIGATIONS

HENCEFORTH BE CHASTISED BY THE ORGANIZED BAR? MOST LAWYERS WOULD QUICKLY ANSWER THOSE QUESTIONS WITH AN UNQUALIFIED "NO".

THE AMERICAN BAR ASSOCIATION'S COMMISSION ON EVALUATION OF ETHICAL STANDARDS HAS IN ITS LATEST INTERIM WORKING DRAFT ADOPTED AN ASPIRATIONAL NONOBLIGATORY RULE WHICH DOES NOT SUBJECT THE LAWYER TO DISCIPLINARY SANCTIONS IF THE LAWYER FAILS TO MEET THOSE OBLIGATIONS. PROPOSED RULE 6.1 ON PRO BONO PUBLICO SERVICE READS AS FOLLOWS:

> "A LAWYER SHOULD RENDER PUBLIC INTEREST LEGAL SERVICE. A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY PROVIDING PROFESSIONAL SERVICES AT NO FEE OR REDUCED FEE TO PERSONS

OF LIMITED MEANS OR TO PUBLIC SERVICE OR CHARITABLE GROUPS OR ORGANIZATIONS - OR BY SERVICE IN ACTIVITIES FOR IMPROVING THE LAW - THE LEGAL SYSTEM - OR THE LEGAL PROFESSION."

ORIGINALLY - THE ABA COMMISSION HAD PROPOSED THAT EACH LAWYER MAKE AN ANNUAL REPORT CONCERNING PRO BONO SERVICE. THAT MODEST STEP TOWARD A MANDATORY PRO BONO SERVICE SYSTEM GENERATED SO MUCH OPPOSITION THAT IT THREATENED THE ADOPTION OF THE WHOLE OF THE MODEL RULES. EVEN MANY OF THOSE WHO STRONGLY URGE THAT IT IS A PROFESSIONAL OBLIGATION OF LAWYERS TO DO FREE PUBLIC SERVICE OPPOSED SUCH A REPORTING REQUIREMENT AS REFLECTING AN UNWARRANTED LACK OF CONFIDENCE IN LAWYERS. WHILE THE ABA

COMMISSION - AT LEAST FOR NOW - HAS ABANDONED ITS SUPPORT FOR A REPORTING REQUIREMENT - IT REITERATES AND STRONGLY AFFIRMS THE NEED FOR LAWYER DEDICATION TO PUBLIC SERVICE - EMPHASIZING THAT ALL LAWYERS UNDER ALL CIRCUMSTANCES MAY PROPERLY BE EXPECTED TO CONTRIBUTE SOME TIME AND EFFORT TO CIVIC UNDERTAKINGS IN GENERAL AND TO IMPROVEMENTS IN THE ADMINISTRATION OF THE LAW IN PARTICULAR.

WHILE I PERSONALLY SUPPORT THE ABA COMMISSION'S PRESENT PROPOSAL - I MYSELF WOULD GO MUCH FURTHER. INDEED - I PERSONALLY PERCEIVE THAT MANY INDIVIDUAL LAWYERS DO NOT DISCHARGE IN ANY SUBSTANTIAL WAY AN EXISTING PROFESSIONAL OBLIGATION FOR FREE PUBLIC SERVICE. THE GRANDIOSE LEGEND OFTEN VOICED AT BAR MEETINGS THAT LOCAL LAWYERS AS NEEDED WILL ROLL UP THEIR SLEEVES AND GIVE UNSELFISHLY OF THEIR TIME TO DO THAT WHICH LAWYERS OUGHT TO DO -

UNFORTUNATELY - IS A MERE FANTASY. WHILE MORE YOUNG LAWYERS BY THEIR GOOD DEEDS ADD LUSTER TO THE LAW THAN DO OLDER LAWYERS - LAMENTABLY AMONG THOSE LAWYERS LEAST CONCERNED WITH JUSTICE AS A MAJESTIC PART OF LIFE - AND LEAST

CONCERNED WITH THE PRACTICE OF LAW AS A GRAND AND EXALTED CALLING - ARE MORE THAN A FEW OF THOSE WHO IN THE PAST SEVERAL YEARS HAVE JOINED THE BAR. ESPECIALLY DOES THAT SEEM SO TO ME AMONG THOSE WHO PRESENTLY ARE BECOMING LAWYERS. IF INDEED THAT IS A TREND - IT IS ONE WHICH MUST BE REVERSED IF THE LEGAL PROFESSION IS EVER TO RECEIVE WIDER PUBLIC SUPPORT.

A GOOD LAWYER - AS A MEMBER OF A LEARNED PROFESSION - QUITE CLEARLY SHOULD CULTIVATE KNOWLEDGE OF THE LAW BEYOND ITS USE FOR PAYING CLIENTS - AND A GOOD LAWYER SHOULD EMPLOY THAT ADDED KNOWLEDGE IN THE BETTERMENT OF THE LAW. INDUBITABLY - AS THE ABA COMMISSION HAS RECOGNIZED - THAT TRUISM LONG HAS BEEN A PART OF LAWYERING. A GOOD LAWYER ALMOST BY DEFINITION MUST BE CONTINUALLY MINDFUL OF CURRENT DEFICIENCIES IN THE ADMINISTRATION

OF JUSTICE AND WITHOUT PERSONAL REWARD CONTINUALLY WORK FOR BETTER COURTS - MORE QUALIFIED JUDGES - AND FAIRER AND MORE EXPEDITIOUS LEGAL PROCEDURE. A LAWYER MUST TOO BE COGNIZANT THAT THERE ARE MANY PEOPLE WHO CANNOT AFFORD ADEQUATE LEGAL ASSISTANCE - AND THE LAWYER SHOULD NOW AS IN THE PAST DEVOTE TIME AND INFLUENCE IN THEIR BEHALF. BUT TODAY A LAWYER MUST BE EQUALLY AWARE THAT THERE ARE MANY OTHER AREAS WHICH CRY OUT IN EQUALLY LOUD VOICES FOR THE LAWYER'S DISTINCTIVE TALENTS - PLACES WHERE SOCIETAL LEGAL REQUIREMENTS PRESENTLY ARE NOT FULLY MET.

THE FACT THAT SOME LAWYERS HAVE PROVIDED LEGAL SERVICES TO THE POOR AT NO COMPENSATION - AS IN LEGAL AID - OR FOR REDUCED COMPENSATION - AS IN GOVERNMENT SPONSORED LEGAL SERVICE PROGRAMS -

CANNOT VALIDLY BE LONGER USED BY THE MASS OF LAWYERS NOT SO PARTICIPATING AS A SHIELD AGAINST THE RENDERING OF FREE PUBLIC SERVICE THEMSELVES. THE INDIGENT CLIENT - WHILE SIGNIFICANT - IS ONLY A PART OF THE PROBLEM - AND A PART IN WHICH THE GOVERNMENT QUITE PROPERLY HAS ASSUMED A FAR GREATER RESPONSIBILITY THAN THE LEGAL PROFESSION.

WORKING FREE PART-TIME IS NOT A GOOD WAY TO ACHIEVE LASTING ECONOMIC SUCCESS - EVEN IF SUCH FREE WORK BE LABELED "PUBLIC SERVICE". ADMITTEDLY - MANY MAGNIFICENT LAWYERS OVER THE YEARS WILLINGLY HAVE RENDERED TO THE PUBLIC SUBSTANTIAL SERVICE WITHOUT RECEIVING PECUNIARY COMPENSATION. BUT NOT ALL - OR EVEN MOST - HAVE. THUS - IT SEEMS TO ME SUITABLE - PROPER - SEEMLY - AND TIMELY - THAT THE ORGANIZED LEGAL PROFESSION FORMALLY

RECOGNIZE THAT EACH LAWYER HAS AN OBLIGATION FOR SOME FREE PUBLIC SERVICE WHICH IF UNREASONABLY IGNORED WARRANTS PROFESSIONAL SANCTIONS. I THUS DISAGREE WITH THE ABA COMMISSION - AND - OF COURSE - WITH WHAT APPEARS TO BE THE OVERWHELMING MAJORITY OF LAWYERS. I CONFIDENTLY ASSERT THAT MANDATORY PRO BONO SERVICE IS NOT DEAD; THE LEGAL PROFESSION ALMOST SURELY WILL HAVE ULTIMATELY TO ADOPT IT.

HERETOFORE IT HAS PERHAPS BEEN PROFESSIONALLY ACCEPTABLE FOR SOME LAWYERS TO SERVE ONLY PAYING CLIENTS. IF SO - A NEW PROFESSIONAL STANDARD SHOULD BE ABORNING. THE SUBSTANTIAL RECOGNITION WHICH HAS BEEN AFFORDED IN YEARS PAST TO THOSE LAWYERS WHO HAVE GROUND AWAY AT THEIR CLIENTS' DEMANDS DAY AFTER DAY AND YEAR AFTER YEAR - TENDING TO THE STORE - NEVER LEAVING THE OFFICE - MINDING WHAT HAS BEEN TRADITIONALLY STYLED "THEIR OWN BUSINESS" - MUST UNDERGO SUBSTANTIAL CHANGE. NO LONGER CAN THE OLD LAWYER -

OR THE YOUNG - LOOK OUT ONLY FOR PAYING CLIENTS. NO LONGER CAN THE LEGAL PROFESSION MERIT PUBLIC APPROBATION UNDER A RANDOM AND HAPHAZARD STANDARD THAT LETS SOME LAWYERS DO GOOD AND SOME DO NOT SO GOOD. BECAUSE SOME LAWYERS STILL MAJESTICALLY DO WHAT GOOD LAWYERS OF A DIFFERENT DAY AND TIME DID AS A DISCHARGE OF THEIR THEN MORE RESTRICTED PROFESSIONAL ENGAGEMENTS CANNOT EXONERATE OTHER LAWYERS FROM FREE PUBLIC SERVICE. LAWYERS WHO WORK WITH NO COMPENSATION OR WITH SUBSTANTIALLY REDUCED COMPENSATION TO MITIGATE THE PROBLEMS OF THE INDIGENT IN OUR JUSTICE SYSTEM ARE - AND ALWAYS WILL BE - RENDERING VALUABLE PUBLIC SERVICE - BUT THE ENTIRE PROFESSION NEVERTHELESS STILL HAS A DUTY TO DO WITHOUT PECUNIARY BENEFIT THOSE OTHER EVEN MORE ESSENTIAL SOCIETAL ACTIVITIES BEST DONE BY LAWYERS. THE PRIME ONUS OF LAWYERS NOW MUST BE TO MAKE SOCIETY BETTER BY

UTILIZING THE LAWYERS' SPECIAL AND UNIQUE SKILLS IN THE PUBLIC INTEREST. THROUGHOUT HISTORY - JUSTICE - ALTHOUGH ALWAYS ELUSIVE - HAS BEEN THE GRANDEST ASPIRATION OF HUMANKIND. LAWYERS - THE PRIME ENVOY OF THE JUSTICE SYSTEM TO THE PEOPLE IT SERVES - HAVE IN MY MIND ALWAYS HAD AN EXALTED AND UNIQUE STATUS WHICH DEMANDED MORE FROM THEM THAN OTHERS. THUS UNDERSTANDABLY THE CIRCUMSTANCES OF SUCH FREE PUBLIC SERVICE ACTIVITY BY A LAWYER IN THE COMPLEXITY OF TODAY'S LEGAL SOCIETY NEVER AGAIN CAN BE SO EXCLUSIONARY AS SIMPLY LEGAL AID FOR THE POOR.

THE PARAMETERS OF LAWYER FREE PUBLIC SERVICE HENCEFORTH MUST BE AS BROAD AND FLEXIBLE AS THE MINDS OF THOSE WHO WILL DISCHARGE THAT RESPONSIBILITY. THAT OBLIGATION EXTENDS TO PROVIDING ESSENTIAL LEGAL NEEDS TO ALL AMERICANS - RICH OR POOR - YOUNG OR

OLD - MALE OR FEMALE - BLACK OR WHITE - HAPPY OR SAD - GRACIOUS OR SURLY - INDIVIDUALS OR GROUPS - ALL PEOPLE WHOEVER AND FOR WHATEVER REASONS. THAT IS THE LAWYER'S OBLIGATION - AND IF IT IS TO BE MET - EACH LAWYER MUST HELP.

FINANCIAL SUPPORT BY THE PRIVATE SECTOR OF THE LEGAL PROFESSION FOR PRO BONO ACTIVITIES OF COURSE PLAYS AN IMPORTANT ROLE NOW IN FACILITATING THOSE ACTIVITIES - BUT TO MY MIND - A LAWYER'S CONTRIBUTION TO THE PUBLIC INTEREST THROUGH FREE PUBLIC SERVICE CAN ONLY BE JUDGED BY THAT PRICELESS AND UNIQUE MEASURE OF PROFESSIONAL DEVOTION - CONTRIBUTED PERSONAL TIME. EVEN THOUGH FREE PERSONAL LEGAL SERVICE IS PARTICULARLY REWARDING AND INSTRUCTIVE FROM THE POINT OF VIEW OF THE INDIVIDUAL LAWYER - IT IS ALSO OF COURSE TRUE THAT A FINANCIAL CONTRIBUTION MAKING FREE LEGAL SERVICES

AVAILABE TO OTHERS CAN ALSO GIVE A LAWYER A WARM FEELING.

NEVERTHELESS - IT IS MY PERSONAL BELIEF THAT WHILE MONETARY CONTRIBUTIONS CAN BE A FACTOR IN THE DETERMINATION OF WHETHER UNDER PARTICULAR CIRCUMSTANCES A SPECIFIC LAWYER HAS DISCHARGED THOSE OBLIGATIONS OF FREE PUBLIC SERVICE - EACH LAWYER MUST WHENEVER FEASIBLE AND PRACTICAL PERFORM PERSONALLY HER OR HIS OWN UNMET DUTY - NO ONE ELSE CAN. FINANCIAL CONTRIBUTIONS - NO MATTER HOW EXTENSIVE - CANNOT ALWAYS DISCHARGE THE INDIVIDUAL LAWYER'S PROFESSIONAL OBLIGATION FOR FREE PUBLIC SERVICE. THE LEGAL PROFESSION IS NOT AN ELITIST ONE IN WHICH THE ECONOMICALLY SUCCESSFUL CAN BUY AMNESTY FOR NOT DOING WHAT ALL LAWYERS ARE OBLIGATED TO DO. INDEED IF THE LAW TRULY IS A VERY SPECIAL LEARNED PROFESSION - THOSE OBLIGATIONS MUST BE NON-TRANSFERABLE.

NOT ALL PRO BONO SERVICES MUST BE UNPAID. INDEED - THE DETERMINATION OF A LAWYER'S INDIVIDUAL PRO BONO OBLIGATION MUST GIVE WEIGHT TO THAT LAWYER'S SPECIFIC ECONOMIC CIRCUMSTANCES. THE LAWYER WHO IS PAID A SALARY TO REPRESENT THE INDIGENT OR PUBLIC SERVICE GROUPS OR ORGANIZATIONS OR WHO SERVES THE PUBLIC THROUGH GOVERNMENT EMPLOYMENT ADVANCES PROFESSIONAL GOALS IN VERY SIGNIFICANT WAYS. SUCH A LAWYER OF COURSE STILL HAS OBLIGATIONS FOR FREE PUBLIC SERVICE OUTSIDE THE SCOPE OF HIS OR HER EMPLOYMENT. FOR EXAMPLE - THERE IS AN OBVIOUS PUBLIC BENEFIT FOR SUCH LAWYERS TO PARTICIPATE IN LAW REFORM OR BAR ASSOCIATION ACTIVITIES.

OF COURSE - A MAJOR DIFFICULTY IN LAWYERS CONTRIBUTING TO THE PUBLIC FREE PROFESSIONAL SERVICE IS IN STRIKING THE PROPER BALANCE BETWEEN THAT PROFESSIONAL TIME DEVOTED FOR PUBLIC SERVICE

AND THAT PROFESSIONAL TIME NEEDED FOR MAKING A LIVELIHOOD.

EVEN THOSE MANY LAWYERS WHO LONG HAVE ACKNOWLEDGED SOME RESPONSIBILITY FOR FREE PUBLIC SERVICE - BOTH INDIVIDUALLY AND COLLECTIVELY - HAVE NO GUIDANCE AS TO THE TYPE OR EXTENT OF ACTIVITIES THAT WILL DISCHARGE THAT OBLIGATION. THAT LACK OF AFFIRMATIVE DEMARCATION HAS TO BE ONE REASON WHY MANY OF OUR MORE ECONOMICALLY SUCCESSFUL LAWYERS HAVE DONE LITTLE FREE PUBLIC SERVICE - LEAVING PRIMARILY THE FEW TO DISCHARGE THE LEGAL PROFESSION'S ENTIRE OBLIGATION.

THE COLLECTIVE RESPONSIBILITY OF LAWYERS MUST BE TRANSLATED INTO A DEFINED PROFESSIONAL DUTY THAT EACH LAWYER INDIVIDUALLY RENDER A SHARE OF FREE PUBLIC SERVICE. IF THAT ETHICAL DEMAND IS PLAINLY ENUNCIATED - WITHOUT EQUIVOCATION OR AMBIVALENCE - THE DECISIONAL PROCESS NOW UNIVERSALLY UTILIZED

BY THE ORGANIZED BAR IN ESTABLISHING ETHICAL BOUNDARIES WILL IN TIME EVOLVE DEFINITIVE GUIDELINES FOR ITS APPLICATION. THROUGH TRIAL AND ERROR - THROUGH EXPERIMENTATION - LAWYERS ULTIMATELY CAN INCORPORATE INTO DECISIONS INTERPRETING A REVISED CODE OF PROFESSIONAL RESPONSIBILITY THE WHO - HOW - WHAT AND WHEN OF THE FREE PUBLIC SERVICE THAT SOCIETY SHOULD RECEIVE IN EXCHANGE FOR ITS GRANT OF THE EXCLUSIVE PRIVILEGE TO PRACTICE LAW.

THERE ARE OF COURSE INHERENT DIFFICULTIES IN AN ADJUDICATION OF PROFESSIONAL PERFORMANCE INVOLVING SUCH SUBJECTIVE CONSIDERATIONS AS WORK HABITS - JOB REQUIREMENTS - ORGANIZATION AND SELF DISCIPLINE - INTELLIGENCE - EMPLOYMENT RESTRAINTS - PUBLIC RESPONSIBILITIES - INTEGRITY - PERSONAL CHARACTER - AND PROFESSIONAL KNOW-HOW. HOWEVER - PERPLEXITY IN ENFORCEMENT

HAS NEVER PREVENTED THE ORGANIZED BAR FROM ADOPTING EVER STRICTER STANDARDS.

CERTAINLY - LAWYERS HAVE INDIVIDUAL CHARACTERISTICS AND PRACTICE DEMANDS WHICH WILL PREVENT THEM FROM BEING "EQUAL" IN ALL PROFESSIONAL CONTRIBUTIONS. LAWYERS OF NECESSITY UNDER GENERAL ASPIRATIONAL GOALS TO BE OUTLINED BY THE ORGANIZED BAR MUST BE JUDGED ON THEIR SUBSCRIPTIONS TO FREE PUBLIC SERVICE WITH A FULL RECOGNITION OF THEIR DIFFERING CIRCUMSTANCES. IN SOME CASES - THOSE FREE PUBLIC SERVICE ACTIVITIES MIGHT EMBRACE EXTENSIVE WORK WITHIN THE ORGANIZED BAR ITSELF - SUCH AS DISCIPLINARY ACTIVITIES OR LAW REFORM. IN OTHERS - IT MIGHT MEAN WORKING WITH A PUBLIC INTEREST LAW FIRM - RENDERING LEGAL SERVICES TO THOSE WHO ARE UNABLE TO OBTAIN THOSE SERVICES THROUGH THE NORMAL MEANS OF DELIVERY -

OR REPRESENTING CHARITABLE ORGANIZATIONS. TO SOME LAWYERS - PERHAPS FREE PUBLIC SERVICE MIGHT WELL INVOLVE MAINTAINING AND ENHANCING THE LEGAL COMPETENCE OF OTHER LAWYERS - WORKING TO IMPROVE THE AVAILABILITY AND DELIVERY OF LEGAL SERVICES - HELPING WITH CIVIL RIGHTS LAW OR POVERTY LAW - WORKING AS A DEFENDER OF THOSE CHARGED WITH CRIME WHO ARE UNABLE TO SECURE COMPETENT COUNSEL - OR REPRESENTING DIFFUSED INTERESTS IN ADVERSARY PROCEEDINGS INVOLVING THE PUBLIC AT LARGE. ALMOST CERTAINLY - ETHICAL RECOGNITION OF PUBLIC SERVICE MUST ENCOMPASS AT LEAST A MODICUM OF ACTIVITY DESIGNED TO IMPROVE THROUGH CONSTITUTIONAL OR STATUTORY REVISION THE JUSTICE SYSTEM AS A UNIT. MANY INTERESTS IN FIELDS SUCH AS THE ENVIRONMENT - WELFARE - CONSUMER PROTECTION - CIVIL LIBERTIES - PRIVACY - AND THE POOR EITHER ARE NOT REPRESENTED OR

ARE UNDER-REPRESENTED BEFORE LEGISLATURES - EXECUTIVE AGENCIES - AND COURTS.

THE BEST WAY TO MEASURE THE INDIVIDUAL FREE PUBLIC SERVICE REQUIRED OF A LAWYER WILL VARY FROM AREA TO AREA AND PERHAPS FROM BRANCH OF THE LAW TO BRANCH OF THE LAW. ADDITIONALLY - THERE WILL BE MULTIPLE AREAS OF FREE PUBLIC SERVICE OTHER THAN THOSE FEW THAT I HAVE SUGGESTED - WHICH AS ALTERNATIVES OR SUPPLEMENTS - ARE BETTER SUITED TO BOTH SOCIETY AND THE LEGAL PROFESSION. ONLY A LAWYERS' PEER GROUP SHOULD DETERMINE WHETHER VARIOUS ACTIVITIES PERFORMED ON A RECURRING AND SUBSTANTIAL BASIS ARE AMONG THOSE THINGS WHICH A PARTICULAR LAWYER FREELY SHOULD CONTRIBUTE TO THE PUBLIC WEAL. IN ALL SUCH DETERMINATIONS - DIVERSITY AND EXPERIMENTATION MUST BE FOSTERED AND SUPPORTED. THERE IS NO

SINGLE APPROACH. THROUGH VARIETY - THROUGH TRIAL AND ERROR - THROUGH EVOLUTION - THE ORGANIZED BAR BEST CAN GAIN A PROPER UNDERSTANDING OF THE WAYS IN WHICH INDIVIDUAL LAWYERS MOST MEANINGFULLY MAY RENDER GENEROUS PUBLIC SERVICE.

WHILE THEY AGREE THAT THE LEGAL PROFESSION OWES TO SOCIETY A GREATER RETURN FOR ITS GRANT OF A PERSONAL SERVICE MONOPOLY THAN HAS EVER BEEN MADE - THERE ARE SOME LAWYERS WHO ARGUE THAT PRO BONO SERVICES SHOULD BE ONLY A MATTER OF PERSONAL PREFERENCE RATHER THAN AN OBLIGATION OR DUTY - THAT TO MAKE SUCH SERVICES MANDATORY OR OBLIGATORY WOULD SUBJECT LAWYERS TO INVOLUNTARY SERVITUDE - AND WOULD BE DEMEANING TO THE PROFESSIONAL STATUS OF LAWYERS. INDEED - THERE ARE MANY DEDICATED AND RESPONSIBLE LAWYERS WHO SINCERELY CONTEND THAT THE LEGAL PROFESSION HAS LITTLE FAULT -

AND THAT ETHICAL CHANGES ARE NOT NEEDED. THEY EARNESTLY PROCLAIM THAT LAWYERS WHO SEEK PROFESSIONAL RESTRUCTURING ARE AGITATORS CREATING MORE PROBLEMS THAN THEY SOLVE. THEY SOMETIMES ASSERT THAT ALL WHO DO NOT CHERISH THE LEGAL PROFESSION AS IT HAS BEEN SHOULD DO SOMETHING ELSE FOR A LIVELIHOOD.

I TOTALLY REJECT THAT CONCEPT. NO LAWYER SHOULD ACCEPT THE LEGAL PROFESSION AS IT IS. LAWYERS MUST ASPIRE FOR THE ELIMINATION OF IMPERFECTIONS IN THEIR CHOSEN PROFESSION AND IN THE LAW ITSELF. THOSE LAWYERS WHO CANNOT OVERLOOK THE SOCIAL ILLS OF THE JUSTICE SYSTEM - THOSE LAWYERS WHO CANNOT OVERLOOK THE LEGAL PROFESSION'S DEFICIENCIES - THOSE LAWYERS WHO CANNOT OVERLOOK ITS FAILURE TO MAKE ADEQUATE LEGAL SERVICES AVAILABLE

TO ALL - THOSE LAWYERS WHO CANNOT OVERLOOK THE INABILITY OF LAW TO RENDER JUSTICE AND FAIRNESS ALIKE TO RICH AND POOR - THOSE LAWYERS WHO REFUSE TO OVERLOOK THE WARTS EASILY FOUND IN THE COURTS - SEEM TO ME TO BE THE ONES WHO CHERISH THE LEGAL PROFESSION AS A SUBLIME CALLING. IT IS THOSE LAWYERS WHO PLACIDLY ACCEPT THE INEQUITIES - THE PERVERSIONS - THE INJUSTICES - THE CORRUPTIONS - THE INEFFICIENCIES - AND THE UNFAIRNESSES IN THE LAW WHO SEEM TO ME NOT TO HONOR THEIR CHOSEN CAREER. IN MY JUDGMENT - THERE IS A PRESENT NEED FOR A NEW DISCIPLINARY RULE TO MAKE "PRO BONO SERVICE" MANDATORY.

SOCIETY LONG AGO MADE A DETERMINATION THAT A FIERCELY INDEPENDENT AND UNSHACKLED LEGAL PROFESSION IS ESSENTIAL TO OUR SYSTEM OF GOVERNMENT AND TO THE INDIVIDUAL RIGHTS OF ITS

CITIZENS. IT PLACED LAWYERS IN A POSTURE TO BE BOTH FREE AND INDEPENDENT BY ESTABLISHING A MONOPOLY FOR THOSE WHO PRACTICE LAW. IN GRANTING TO LAWYERS THAT PRIVILEGE - THE NURTURING OF CERTAIN SKILLS UTILIZED EXTENSIVELY IN THE PRACTICE OF LAW - SUCH AS ADVOCACY - COUNSELING - NEGOTIATING AND DRAFTING - WERE CHILLED AND PERHAPS DENIED TO NON-LAWYER MEMBERS OF SOCIETY. THE GRANT OF MONOPOLISTIC PRIVILEGES BY SOCIETY TO A LIMITED NUMBER OF PEOPLE TO RENDER SPECIALIZED PROFESSIONAL SERVICES ALWAYS CREATES AN OBLIGATION TO MAKE AVAILABLE TO SOCIETY THOSE SPECIAL SKILLS NURTURED BY THAT MONOPOLY. IF THAT OBLIGATION IS NOT MET - THE PUBLIC AS A WHOLE INEVITABLY WILL HAVE NO CHOICE BUT TO PERMIT ENCROACHMENT BY OTHERS.

THE LEGAL PROFESSION CAN BEST PERFORM IF ITS MORES -

CUSTOMS - STANDARDS AND OFFICES ARE SELF-DETERMINED. IF A LEGAL MONOPOLY IS A VIABLE SOCIETAL INSTITUTION - LAWYERS IN ORDER TO SUPPORT THAT MONOPOLY - AND TO PRESERVE SELF-REGULATION - MUST FILL THOSE ESSENTIAL PUBLIC NEEDS WHICH WILL NOT OTHERWISE BE MET UNLESS LAWYERS MEET THEM - INCLUDING THE RENDERING OF THOSE DISTINCT SERVICES WHICH THE MONOPOLY ITSELF MAKES LAWYERS PECULIARLY QUALIFIED TO PERFORM.

SOME ETHICAL RESTRUCTURING SHOULD OCCUR SOON - OR THE MULTIPLE WAYS IN WHICH LAWYERS PRESENTLY RENDER PROFESSIONAL SERVICES WILL PERHAPS BE CURTAILED. LAWYERS' PATRONS - THE POPULACE AS A WHOLE - MAY ALREADY BE NEAR A CONCLUSION THAT THEIR INTERESTS WILL BE BEST SERVED IF OTHER PROFESSIONALS - OR PARA-PROFESSIONALS - SHARE IN AT LEAST SOME OF THE WORK WHICH

TRADITIONALLY HAS BEEN PERFORMED ONLY BY LAWYERS. I CONCEDE THAT FURTHER EXAMINATION OF ALL ALTERNATIVES IS WARRANTED BEFORE SUBSTANTIAL REVISIONS OF THE ETHICAL CANONS OF THE LEGAL PROFESSION SHOULD FORMALLY BE UNDERTAKEN - BUT CLEARLY THE TIME FOR RE-ANALYSIS AND RE-EXAMINATION BY THE ORGANIZED BAR IS HERE.

WHILE LAWYERS DO OWE OTHER INDIVIDUAL LAWYERS COURTESY - AVOIDANCE OF SHARP PRACTICE - AND INTEGRITY IN THEIR DEALINGS - LAWYERS OWE INDIVIDUAL LAWYERS WHO ARE UNWORTHY ABSOLUTELY NOTHING. THE ORGANIZED BAR IS NOT AN EXCLUSIVE CLUB - AND ITS MEMBERS CANNOT BE MUTUALLY PROTECTIVE. THOSE WHO DO THEIR PROFESSIONAL PART CANNOT LONGER PROTECT THOSE WHO DO NOT. THE ORGANIZED LEGAL PROFESSION IS NOT AND CANNOT BE MERELY A TRADE GUILD - IT MUST BE AN ORGANIZATION OF LEARNED PROFESSIONALS BANDED TOGETHER

MORE EFFECTIVELY TO SERVE THE PUBLIC AS A WHOLE.

BUT THE INDIVIDUAL LAWYER DOES OWE A GREAT DEAL TO THE BAR AS AN ENTITY. EACH LAWYER SHOULD SO CONDUCT HERSELF OR HIMSELF AS CONTINUALLY TO ENHANCE THE REGARD IN WHICH THE LEGAL PROFESSION AS AN ENTITY IS HELD BY OTHERS. THAT - OF COURSE - PRESUPPOSES A PERSONAL STANDARD OF CONDUCT OF IMPECCABLE RECTITUDE. SELF-EVALUATION OF ETHICAL RESPONSE IS A PART OF EACH INDIVIDUAL LAWYER'S LIFE. BUT BEING A LAWYER MEANS MORE - IT INCLUDES THE AFFIRMATIVE DUTY OF COLLECTIVELY CLEANSING THE ORGANIZED BAR OF ITS SHYSTERS - ITS CROOKS - ITS EMBEZZLERS - ITS LIARS AND CHEATS - ITS INCOMPETENTS - ITS LAGGARDS - AND FROM NOW ON - THOSE WHO UNREASONABLY IGNORE THEIR PROFESSIONAL OBLIGATIONS AS LAWYERS - OF PURGING PROMPTLY AND EXPEDITIOUSLY FROM ITS RANKS ALL OF THOSE LEGAL PRACTITIONERS

WHO DO NOT ADD GLORY TO THE LAW BY BEING OF A HIGHER PROFESSIONAL CALIBER THAN ALL OF THOSE WHO FOLLOW OTHER PROFESSIONS. THOSE WHO DO NOT DO AS LAWYERS WHAT THEY OUGHT TO DO HARM THOSE LAWYERS WHO DO WHAT THEY OUGHT TO DO - AND THEY SHOULD NOT BE TOLERATED. DISCIPLINARY SANCTIONS SHOULD BE IMPOSED UPON THEM BY THEIR PROFESSIONAL PEERS.

THE CURRENT EPOCH OF EXTRAORDINARILY RAPID CHANGE IN ALMOST EVERY ASPECT OF LEGAL LIFE NOW DEMANDS A SOLEMN RECOGNITION BY THE ORGANIZED BAR THAT EVERY LAWYER WHO UNREASONABLY IGNORES THE PROFESSIONAL OBLIGATION FOR AT LEAST SOME FREE PUBLIC SERVICE WARRANTS PROFESSIONAL SANCTIONS. I REITERATE - "UNREASONABLY IGNORES" - BECAUSE THAT DUTY OF GENEROUS PUBLIC SERVICE BY EACH LAWYER OF NECESSITY MUST HAVE DIFFERING AND CHANGING DIMENSIONS -

DIMENSIONS WHICH CAN ONLY BE DETERMINED ON A CASE-BY-CASE BASIS BY THAT LAWYER'S PEER GROUP. FOR EXAMPLE - I PERSONALLY ENCOURAGE ARRANGEMENTS WHICH CONTEMPLATE THAT AT ANY PARTICULAR PERIOD SOME LAWYERS WILL BE HEAVILY - OR EVEN EXCLUSIVELY - INVOLVED IN MAJOR FREE PUBLIC SERVICE UNDERTAKINGS WHILE OTHER LAWYERS WITH WHOM THEY ARE ASSOCIATED ARE NOT THEN ACTIVELY PARTICIPATING IN SUCH PROGRAMS. SINCE SUCH ARRANGEMENTS QUITE OBVIOUSLY ARE ESSENTIAL IF SIGNIFICANT LITIGATION IS TO BE HANDLED ON A PRO BONO BASIS - THEY MUST BE ENCOURAGED. THE EXTENT TO WHICH A LAWYER MAY RELY ON HIS PRO BONO ACTIVITY BY HER OR HIS LEGAL ASSOCIATES WILL VARY WITH THE MAGNITUDE AND SCOPE OF THAT ACTIVITY. CERTAINLY A CONSCIENTIOUS INDIVIDUAL JUDGMENT MUST BE MADE AND RE-MADE PERIODICALLY BY EACH

LAWYER ON THE BASIS OF DETAILED INFORMATION OF PRO BONO ACTIVITIES SHARED BY LEGAL ASSOCIATES OVER TIME ON A STAGGERED BASIS.

THE ETHICAL PROGRESSION BY THE ORGANIZED BAR WHICH I HERE SUGGEST IS OBTAINABLE. IN MY OWN TIME - I HAVE SEEN DISCIPLINARY MEASURES FOR PARTICULAR ETHICAL VIOLATIONS EVOLVE FROM CLUCKING DISAPPROVAL TO DISBARMENT. INITIALLY - IN MY EXPERIENCES AS A BAR OFFICIAL - I JOINED WITH OTHERS IN REFUSING TO DISCIPLINE LAWYERS FOR NEGLIGENCE. THE PROFESSIONAL INCOMPETENCE OF A MEMBER OF THE BAR WAS NOT EVEN DISCUSSED THEN AS GROUNDS FOR DISCIPLINARY SANCTIONS. INDEED - IT WAS RATIONALIZED THAT TO DO SO WOULD BE CONTRARY TO THE SUPREME COURT ORDER CERTIFYING THAT LAWYER AS COMPETENT. ALL OF THAT HAS CHANGED - FOR ME AND FOR THE ORGANIZED BAR. IN MOST JURISDICTIONS - REPEATED OR GROSS

NEGLIGENCE BY A LAWYER NOW WARRANTS THE SEVEREST CENSURE. NO LONGER DOES THE PROFESSION ALLOW MARGINAL LAWYERS REPEATEDLY TO ACCEPT LEGAL MATTERS WHICH THEY CANNOT COMPETENTLY AND PROFICIENTLY HANDLE.

I BELIEVE THAT WHAT IS NOW NEEDED IS IN ESSENCE A REQUIRED CONTRIBUTION OF FREE PUBLIC SERVICE BY EACH LAWYER IN A DEFINITE - PRESCRIBED - AND RECURRING AMOUNT - AS FIXED FROM TIME TO TIME BY THE LAWYERS' PEERS - IN THE NATURE OF TITHING PROFESSIONAL TIME - BUT PERHAPS NOT TO EXCEED ONE-TENTH. SUCH A COMMITMENT BY THE LEGAL PROFESSION - WHILE SUBSTANTIAL - INEVITABLY WILL RESULT IN DISTRIBUTING THE EVER-BURGEONING BURDEN OF FREE PUBLIC LEGAL SERVICE MORE EQUITABLY AMONG ALL MEMBERS OF THE PROFESSION. THAT REQUIRED FREE PUBLIC SERVICE CAN BE PROVIDED BY THE HIGHLY

DIVERSIFIED LEGAL PROFESSION IN THE MULTIPLE FORMS REFERRED TO ABOVE - BUT QUITE OBVIOUSLY THE OVERALL OBLIGATION MUST BE SHARED BY EACH INDIVIDUAL LAWYER IF THE JOB IS TO BE WELL DONE.

MY THESIS THUS IS A SIMPLE ONE: IF THE LEGITIMATE ASPIRATIONS OF SOCIETY IN CREATING THE PROFESSION OF LAWYER ARE TO BE REALIZED - THE TITLE "LAWYER" MUST DENOTE TO ALL PEOPLE INTEGRITY - UNITY - COURAGE - SPECIALIZED COMPETENCE - AND UNSELFISH INVOLVEMENT IN ESSENTIAL PUBLIC SERVICE. IT DOES NOT NOW.

THE PUBLIC SHOULD KNOW THAT EACH LAWYER IS INTERESTED IN MORE THAN MAKING MONEY - IN MORE THAN PERSONAL AGGRANDIZEMENT - IN MORE THAN ACHIEVING PUBLIC RECOGNITION. THEY SHOULD KNOW THAT THE LEAST OF LAWYERS IS INTERESTED IN SERVING WELL THE PUBLIC

GOOD - IN FILLING THE PARTIAL VOID IN SPECIAL SKILLS CREATED IN SOCIETY LONG AGO WHEN THE LAWYER BY GOVERNMENTAL EDICT WAS GIVEN THE MONOPOLY FOR LEGAL SERVICES. THEY SHOULD KNOW THAT THE BAR - AS A QUASI-PUBLIC INSTITUTION - IS STALWART AND NOT SUPINE - THAT IT IS WILLING TO ELIMINATE FROM ITS RANKS THOSE LAWYERS WHO DO NOT DO THEIR PART.

I SUGGEST TO THE ABA COMMISSION A RULE SIMILAR TO THE FOLLOWING:

"EACH LAWYER SHALL PROVIDE FREE PUBLIC INTEREST LEGAL SERVICES. THAT OBLIGATION MAY BE DISCHARGED BY PROFESSIONAL ACTIVITIES ON BEHALF OF THE PUBLIC FOR IMPROVING THE

JUSTICE SYSTEM - THE LAW - AND THE LEGAL PROFESSION. A LAWYER MAY TAKE HIS OWN PARTICULAR AND SPECIAL CIRCUMSTANCES INTO ACCOUNT IN DETERMINING FOR ANY PERIOD COMPLIANCE WITH THAT OBLIGATION. WILLFUL AND CONTINUED FAILURE BY AN INDIVIDUAL LAWYER UNREASONABLY TO DISCHARGE THAT OBLIGATION SHALL RESULT IN APPROPRIATE DISCIPLINARY SANCTIONS!"

THE ETHICAL CODES OF LAWYERS - BEING ASPIRATIONAL STANDARDS OF PROFESSIONAL PERFORMANCE AT THE TOP AND BEING DISCIPLINARY RULES GOVERNING LAWYER CONDUCT AT THE BOTTOM - HAVE DEVELOPED BY USAGE TO REQUIRE EVER MORE OF THOSE PERSONS

WHO WEAR THE LEGAL MANTLE - AND SO THEY SHOULD. THE MANDATORY RULE I SUGGEST IS NOT TOO MUCH. LAWYERS ALWAYS SHOULD - INDEED THEY MUST - AS THEY TRADITIONALLY HAVE - LIVE NOBLY IN THE LAW.

THANK YOU.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 230

VOLUME XVI

REMARKS OF: CHESTERFIELD SMITH

LAWYER

CORAL GABLES, FLORIDA

BEFORE: RETIREMENT CEREMONIES FOR

JUDGE WINSTON E. ARNOW

PLACE: FEDERAL BUILDING

PENSACOLA, FLORIDA

DATE: THURSDAY, MAY 7, 1981

10:00 A.M.

UNITED STATES DISTRICT JUDGE WINSTON ARNOW - "BO ARNOW" - IS TO ME A COMPLETE MAN - TRULY A RENAISSANCE MAN WITH A MYRIAD OF INTERESTS AND ABILITIES. WHILE HE HAS REVELED IN CHALLENGING INTELLECTUAL CONVERSATION AND DEBATE THROUGHOUT HIS LEGAL CAREER - HE IS - AND HAS BEEN - TRULY IN LOVE WITH THE OUTDOORS. IF JUDGING IS HIS WORK - HUNTING AND FISHING ARE HIS PLEASURE. BO ARNOW ADORES LIFE - AND HE CONTINUES DAILY TO DISCOVER ITS FELICIFIC MYSTERIES. ALWAYS HE HAS APPROACHED THE LAW WITH ENTHUSIASM - WITH AN UNPARALLELED ZEST AND CONTINUOUS QUEST FOR EXCELLENCE. HE IS A PERFECTIONIST. HE SETS OFTEN IMPOSSIBLE STANDARDS FOR HIMSELF - INDEED - IT HAS BEEN SAID BY ONE NON-DISCERNING TRIAL LAWYER FROM THE NORTHERN DISTRICT OF FLORIDA THAT HE IS NEVER REALLY SATISFIED WITH ANYTHING THAT HE - OR ANYONE ELSE - DOES.

ONE THING I WELL KNOW - JUDGE BO ARNOW IS A GREGARIOUS MAN. A TALKER - HE REQUIRES - HE MUST HAVE - AT LEAST PART OF THE TIME - AN AUDIENCE. AS A TRIAL LAWYER - I HAVE NOTED DURING HIS TENURE A THOROUGHGOING PRAGMATISM. BUT - EVEN MORE SIGNIFICANTLY - HIS DEVOTION TO JUDICIAL RESTRAINT NOTWITHSTANDING - WHEN THE DUTY TO ACT IS CLEAR - JUDGE BO ARNOW HAS NOT BEEN DETERRED BY PUBLIC CRITICISM - OR EVEN THREATS.

AS I SEE HIM - JUDGE BO ARNOW REALLY IS AN HUMBLE MAN WHO BELIEVES THAT ONE WHO DOES HIS BEST CAN ENLIST THE SUPPORT OF OTHERS - AND SUCCEED. HE IS AN OPTIMISTIC PERSON - TRUSTING IN THE INHERENT GOOD OF ALL MEN. AND I FEEL THAT HE EVEN TO THIS DAY AND THIS MOMENT CONTINUES TO BELIEVE THAT RIGHT - AND GOODNESS - AND JUSTICE - ULTIMATELY WILL PREVAIL. DURING ALL OF HIS JUDICIAL SERVICE -

HE HAS CARRIED THE COMMON TOUCH - A LOVE FOR THE AVERAGE PERSON - AND A FEELING THAT EQUALITY AND UNIFORMITY ARE THE PRINCIPLES THAT A JUDGE MUST STRIVE TO PROMOTE. HE IS COMPASSIONATE AND UNDERSTANDING - CONSCIENTIOUS AND FAIR-MINDED. HE IS NOT LOCKED IN - REASON ALWAYS PREVAILS. VERILY - "BO" ARNOW LOVES - AND HAS LOVED - THE LAW IN ALL OF ITS RAMIFICATIONS ALL OF HIS ADULT LIFE.

BO ARNOW IS A FLORIDIAN - ALWAYS WILLING TO SERVE OUR STATE AND ITS INSTITUTIONS. HE HAS LED ACTIVITIES AT THE STATE UNIVERSITY FROM WHICH HE GRADUATED. HE AS A TRIAL LAWYER WAS A GOVERNOR OF THE FLORIDA BAR. IN GAINESVILLE AND PENSACOLA - HE IS - AND HAS BEEN - ACTIVE IN COUNTLESS CIVIC AND SERVICE ORGANIZATIONS. IT CAN HONESTLY BE SAID THAT BO ARNOW HAS GIVEN TO OUR STATE AND NATION MORE THAN HE HAS RECEIVED.

HE - OF COURSE - HAS HIS FAULTS - BUT ON BALANCE I PERCEIVE HIM AS ONE OF THE TRULY GREAT TRIAL JUDGES EVER PRODUCED IN FLORIDA. IT IS RARE INDEED FOR ANY ONE PERSON TO COMBINE THE JUDICIAL SKILLS AND HUMAN VIRTUES WITH WHICH HE IS ENDOWED. HE IS - AS IS EVIDENCED HERE - BLESSED WITH FRIENDS.

JUDGE WINSTON ARNOW IS AN ILLUSTRIOUS MAN - INELUCTABLY - HE IS A NOBLE SON OF FLORIDA.

SPEECHES OF CHESTERFIELD SMITH

SPEECH NUMBER 231

VOLUME XVI

PRESENTATION BY:	CHESTERFIELD SMITH LAWYER MIAMI, FLORIDA
TO:	SOUTHEASTERN CLAIMS ASSOCIATION SEMINAR JUNE 10-12, 1981 DAYTONA HILTON HOTEL DAYTONA BEACH, FLORIDA
TOPIC:	FUTURE OF TORT LITIGATION
DATE:	THURSDAY, JUNE 11, 1981 10:30 A. M.
TIME:	THIRTY MINUTES

THE LAWS OF TORTS IS LAW IN TRANSITION. THE PRESENT LAWS SURROUNDING TORT LIABILITY ARE LIKE THE TRAFFIC ON AN INTERSTATE AT RUSH HOUR; THEY CAN APPEAR CONFUSING - CAPRICIOUS - AND - AT TIMES - AT A COMPLETE STANDSTILL. EACH STATE'S COURTS AND LEGISLATURES CONSTRUCT DIRECTIONAL SIGNS WHICH MAY - OR MAY NOT - CORRESPOND WITH THE LIMITS OF OTHER STATES. NATURALLY - AS MORE ENTER THE TRAFFIC - PROGRESS SLOWS DOWN. THE MORE BURDENED THE ROADS - THE GREATER THE NEED FOR REPAIR - MODIFICATION - AND STREAMLINING. THE SOLUTION MAY BE TO REDUCE THE TRAFFIC (OR CLAIMS) - TO WIDEN THE ROADS (OR JUDICIAL SYSTEM) - OR TO DIRECT SOME OF THE TRAFFIC ONTO OTHER ROUTES TOWARD THE SAME DESTINATION. CHANGES HAVE BEEN MADE TO MEET THESE GOALS - AND TORT LAW WILL CONTINUE TO

CHANGE IN THE FUTURE IN RESPONSE TO THE NEEDS AND GOALS OF THE SOCIETY IT SERVES.

RECENT MODIFICATIONS IN TORT LAW REFLECT REACTIONS TO PRESSURE ON EMPLOYERS - MANUFACTURERS OR OTHERS TO BECOME MORE RESPONSIBLE TO THOSE INJURED. COMPARATIVE NEGLIGENCE HAS REPLACED CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK. CONTRIBUTION AMONG TORTFEASORS HAS BECOME MORE WIDELY ACCEPTED. MANY OF THE DEFENSES ONCE AVAILABLE TO DEFENDANTS HAVE BEEN REPLACED BY A DUTY TO A PLAINTIFF OR AN IMPOSITION OF STRICK LIABILITY. INDEED - STRICT LIABILITY OF MANUFACTURERS AND SELLERS HAS REPLACED NEGLIGENCE AND FAULT. SOVEREIGN AND SPOUSAL IMMUNITY ARE ON THE WANE. THE LIABILITY OF PROFESSIONALS IS BEING DELINEATED AND ENLARGED TO INCLUDE CERTAIN PROFESSIONAL RESOURCES - SUCH AS COMPUTERS. IN 1981 -

THE CONSUMER IS ARMED WITH MORE PROTECTION AGAINST FAULTY GOODS AND SERVICES THAN EVER BEFORE. IN GROWING NUMBERS - ACCIDENT VICTIMS CAN LOOK TO THE COURTS FOR LARGER AWARDS FOR LOST WAGES - COSTS OF MEDICAL CARE - PAIN AND SUFFERING - AND EMOTIONAL HARM. WHILE SOCIETY MAY NOT BE ABLE TO DISTRIBUTE THE COSTS OF ALL INJURIES AND ILLNESSES - IT IS GENEROUSLY EXPANDING THE BOUNDARIES OF LIABILITY AND COMPENSATION IN MOST TYPES OF CLAIMS. AS SOCIETY FEELS MORE RESPONSIBLE FOR ITS WEAKER MEMBERS - FOR WHATEVER REASON - THE TORT SYSTEM BECOMES MORE PROTECTIVE OF THEM.

HOWEVER - THE GROWTH IN THE TORT SYSTEM WHICH REACHES TO COMPENSATE MORE ALSO AGGREVATES PROBLEMS COMMON TO THE JUSTICE SYSTEM. FAMILIAR PROBLEMS INCLUDE OVERCROWDED DOCKETS - HIGH COSTS OF ADJUDICATION AND ATTORNEY FEES - LENGTHY DELAYS BEFORE

FINAL ADJUDICATION - NECESSITY OF LEGAL COUNSEL - AND LACK OF ENFORCEABLE ALTERNATIVES TO ADJUDICATION. UNCERTAINTY AND UNPREDICTABILITY ARE OFTEN THE RULES IN DAMAGE AWARDS. OFTEN UNDER THE EXISTING TORT SYSTEM - THOSE WHO ARE MOST IN NEED ARE UNDERCOMPENSATED OR ARE NOT COMPENSATED - WHILE THOSE WHO HAVE LEAST NEED ARE OVERCOMPENSATED.

BEFORE AN INJURED PERSON CAN BE FULLY COMPENSATED - THOUGH - THE PLAINTIFF MUST USUALLY EMPLOY A VERY COSTLY MECHANISM - THE JUSTICE SYSTEM - FOR RESOLUTION OF DISPUTES - NO MATTER HOW LARGE OR SMALL THAT INJURY MAY BE. THE JUDICIAL MODEL OF DISPUTE HAS BEEN DESCRIBED AS "LONG ON PROCESS - PROCEDURAL FAIRNESS - THE ADVERSARY SYSTEM - AND WRITTEN JUSTIFICATIONS FOR THE LEGAL CONCLUSIONS WHICH ARE REACHED" WHILE "EXTRAORDINARILY COSTLY IN

TERMS OF EXPENSE AND EXTRAORDINARILY TIME CONSUMING." JUDGE LEARNED HAND - ONCE COMMENTED THAT - BASED ON HIS NEARLY 50 YEARS OF EXPERIENCE - IF HE WERE A CLIENT HE WOULD DREAD MAJOR LITIGATION SECOND ONLY TO SERIOUS ILLNESS OR DEATH.

EVEN IF THE PLAINTIFF PREVAILS IN THE CASE - HE OR SHE STILL LOSES THE TIME - RESOURCES - AND ENERGY EXPENDED IN LITIGATION. ONE STUDY ON PRODUCTS LIABILITY CASES FOUND THAT ONLY 28% OF THE PLAINTIFFS WHOSE CLAIMS WERE ADJUDICATED ACTUALLY RECEIVED AWARDS FOR DAMAGES. THE STUDY ALSO REVEALS THAT - ON THE AVERAGE - IT TAKES 75¢ OF LITIGATION EXPENSES TO TRANSFER EVERY DOLLAR OF BENEFITS.

IT IS EASY TO PREDICT SUBSTANTIAL CHANGE IN THE TORT SYSTEM WILL CONTINUE TO EVOLVE SO LONG AS PERSONAL INJURY LITIGATION

REMAINS THE MOST LUCRATIVE - IF NOT SENSATIONAL - AREA OF LEGAL PRACTICE IN THE UNITED STATES. THANKS TO CONTINGENCY FEES RANGING UP TO ONE-HALF OF THE PLAINTIFF'S RECOVERY - THE TRIAL BAR IS AND WILL BE ZEALOUS IN ITS PROTECTION OR EXTENSION OF THE EXISTING SYSTEM. THE HIGH STAKES OF THE ATTORNEYS' INVESTMENTS IN TORT CASES FUEL SKYROCKETING CLAIMS AS WELL AS PROTRACTED LITIGATION - OCCASIONALLY UNSCRUPULOUS LAWYERING - AND REPEATED APPEALS.

IT IS NOT SURPRISING THAT THE POTENTIAL DEFENDANT IN A TORT CLAIM IS THUS TRAPPED IN A JUDICIAL JUNGLE. WHEN TRYING TO PROTECT THEIR PRODUCTS AND ACTIVITIES FROM POTENTIAL SUIT - DEFENDANTS HAVE TO TRY TO PREDICT WHAT THEY SHOULD INSURE - WHEN THEY SHOULD INSURE - AND WHAT THE SCOPE OF THEIR LIABILITY WILL

BE REGARDLESS OF THEIR INSURANCE COVERAGE. JUDICIAL PRECEDENTS CONFLICT WITH ONE ANOTHER AND KEY TERMS USED IN TORT DISPUTES ARE NOTORIOUSLY VAGUE. COURTS DEMONSTRATE INCONSISTENCY IN PUTTING PRICES ON HARM DUE TO THE TRADITIONAL CASE-BY-CASE METHOD OF RESOLUTION. ILL-DEFINED PHRASES SUCH AS "DANGEROUS ACTIVITY" - "HAZARDOUS ACTIVITY" - AND "ULTRAHAZARDOUS ACTIVITY" LEAVE MUCH TO THE DISCRETION OF THE COURT. ALL TOO OFTEN THE AWARD OF EVEN MEDICAL PAYMENTS MAY DEPEND ON THE INFLAMMATORY SKILLS OF AN ATTORNEY AND THE RECEPTIVITY OF THE JURY OF THE DAY.

THE PROBLEMS SURROUNDING TORT LAW ARE FREQUENTLY RECOGNIZED - CRITICIZED - AND ANALYZED. A TYPICAL RESPONSE TO THE PROBLEMS IS A PROPOSAL AIMED AT SIMPLIFYING THE LEGAL PROCESS SURROUNDING ONE TYPE OF TORT. FOR EXAMPLE - SOME

JURISDICTIONS HAVE EXPERIMENTED WITH SPECIAL REVIEW BOARDS CREATED TO SCREEN MALPRACTICE CASES BEFORE THEY REACH THE COURTROOM. A FEDERAL UNIFORM PRODUCT LIABILITY ACT IS UNDER CONGRESSIONAL STUDY. STATUTES HAVE BEEN ENACTED TO CURTAIL THE CURRENT TREND OF INCREASINGLY LARGE DAMAGE AWARDS IN THE AREAS OF MEDICAL MAL-PRACTICE - AND STRICT LIABILITY. WORKERS' COMPENSATION HAS DEVELOPED TO WHERE IT PROVIDES FIXED AMOUNTS TO INJURED EMPLOYEES AND NO-FAULT AUTOMOBILE INSURANCE PROVIDES ASSURED COMPENSATION WITHIN STATUTORY LIMITS. ARBITRATION FOR SMALL CLAIMS IS BECOMING ACCEPTED IN SOME JURISDICTIONS - BUT - ALL IN ALL - THE CURRENT RESPONSES ARE A TENTATIVE - CAUTIOUS - AND PIECEMEAL APPROACH TO AN OVERLOADED AND COMPLICATED SYSTEM. EVENTUALLY - COURTS AND LEGISLATURES WILL BE FACED WITH THE FACT THAT THE

SOCIAL AND ECONOMIC COSTS OF THE CURRENT METHOD OF RESOLVING CONFLICTS - COMBINED WITH THE LEVEL OF UNCERTAINTY INHERENT IN THE SYSTEM - WILL OUTWEIGH ITS BENEFITS AND PREVENT THE SYSTEM FROM SERVING ITS GOALS. THE LESSONS LEARNED FROM PREVIOUS EXPERIMENTS AND RESPONSES CAN OF COURSE AID IN REFORM. WITH FORESIGHT - I BELIEVE THAT THE FUTURE TORT SYSTEM MAY COMBINE THE BEST ELEMENTS OF ARBITRATION AND MEDIATION - NO-FAULT PROTECTION - AND LIMITED AWARDS AND ATTORNEY FEES. THE IDEAL RESULT IS A UNIFORM - EVENHANDED - AND PREDICTABLE SYSTEM ON A NATIONAL SCALE. THE ALTERNATIVE IS AN INCREASINGLY COMPLICATED WEB OF INDIVIDUALIZED APPROACHES TO TORT LAW.

ONE STARTING POINT TO DATE IN REFORMING THE TORT SYSTEM HAS BEEN TO REGULATE SOME DISPUTES OUT OF EXISTENCE. NO-FAULT

AUTOMOBILE COVERAGE IS AIMED AT THIS GOAL. NO-FAULT WAS DESIGNED TO RELIEVE OVER-BURDENED COURTS OF THE MYRIAD CASES INVOLVING SUITS FOR PAIN AND SUFFERING WHERE THE INJURED PARTY HAD INCURRED APPARENTLY MINOR ECONOMIC INJURIES. THE REASONING BEHIND NO-FAULT CONCLUDES THAT IF A PERSON WITH LESS SERIOUS INJURIES WERE OFFERED MONTH-BY-MONTH PAYMENT FROM HIS INSURANCE COMPANY FOR OUT-OF-POCKET LOSS - REGARDLESS OF FAULT - AND WAS CONCURRENTLY REQUIRED TO WAIVE HIS OR HER TORT CLAIM BASED ON THE FAULT OF ANOTHER - COURTS WOULD BE FREE TO HANDLE SERIOUS CASES AND THE SAVINGS OF LEGAL FEES WOULD PROVIDE A LARGER POOL OF INSURANCE FUNDS FOR PAYMENT TO MORE VICTIMS.

AT THE SAME TIME - THE VICTIM INJURED BY A MANUFACTURED PRODUCT - BY A FALL IN A STORE - OR IN THE COURSE OF MEDICAL

TREATMENT DOES NOT HAVE NO-FAULT UPON WHICH TO DEPEND. THE AREA OF PRODUCTS LIABILITY - TOGETHER WITH MEDICAL MALPRACTICE - PROBABLY ACCOUNT FOR THE LARGEST LOSSES AND THE LARGEST NUMBER OF SERIOUSLY INJURED VICTIMS OUTSIDE OF AUTOMOBILE ACCIDENTS. YET - IN FLORIDA AND PERHAPS ELSEWHERE - MALPRACTICE AND PRODUCTS LIABILITY LITIGATION CONSUMES GREATER AMOUNTS OF LAWYERS' TIME AND INSURANCE DOLLARS WITH FAR GREATER INEFFICIENCIES THAN AUTOMOBILE ACCIDENT REPARATIONS CLAIMS. INELUCTABLY - MILLIONS OF CONSUMERS ARE INJURED ANNUALLY WITH A COST TO THE PERSONS AND THEIR FAMILIES IN THE BILLIONS. WE DO KNOW THAT ONLY ABOUT ONE-FIFTH OF THE PRODUCT LIABILITY INSURANCE PAYMENT COVERS THE MEDICAL COSTS OF INJURIES; THE BULK OF THE PREMIUMS COVER ADMINISTRATIVE COSTS - AND WE DO KNOW THAT THOSE WHO ARE VICTIMS OF ACCIDENTS STILL FACE

THE CUMBERSOME FAULT SYSTEM AND A NUMBER OF INEXPLICABLE LEGAL BARRIERS TO AN INTELLIGENT AND HUMANE RESOLUTION TO PLAINTIFF COMPENSATION. I SUGGEST THAT THE PRESENT TORT SYSTEM DOES NOT PAY AUTOMATICALLY PEOPLE FROM ACCIDENT INSURANCE POOLS AFTER ACCIDENTS. INSTEAD - IT PROVIDES A FRAMEWORK FOR HOSTILE AND EXPENSIVE COMBAT OVER PAYMENT FROM THOSE INSURANCE POOLS.

THUS - CHANGES IN THE CURRENT SYSTEM PROBABLY WILL FIRST DEVELOP IN AREAS OF TORT LAW THAT ALREADY HAVE COMPENSATION SYSTEMS WHICH ARE NOT WORKING IN THE MOST EFFICIENT - COST-EFFECTIVE WAYS. BILLIONS OF DOLLARS NOW GO INTO THE TORT LIABILITY SYSTEM SIMPLY TO MEET THE COSTS OF INSURANCE OVERHEAD AND LEGAL FEES - ON BOTH SIDES. AN INITIAL MOVE TO CUT BACK ON THESE EXPENSES MAY BE DIRECTED AT PRODUCT LIABILITY SUITS INVOLVING WORKERS COMPENSATION.

IT HAS BEEN ESTIMATED THAT 85% OF ALL PRODUCTS LIABILITY SUITS COME FROM PRODUCTS EMPLOYED IN WORK-RELATED SITUATIONS. ALTHOUGH THE ACCIDENTS ARE INITIALLY COVERED BY SOPHISTICATED AND EFFICIENT INSURANCE SCHEMES - THEY LATER BECOME THE SUBJECT OF LENGTHY - INEFFICIENT - FAULT-BASED CLAIMS. THE INSURANCE PROCEEDS END UP BEING LARGELY SPENT ON OVERHEAD AND LEGAL FEES.

I SUGGEST THAT MANY CLAIMS COULD BE AVOIDED BY A PROVISION IN WORKERS COMPENSATION LAWS MAKING WORKERS' COMPENSATION THE SOLE REMEDY FOR INDUSTRIAL ACCIDENT VICTIMS AND ABOLISHING ALL VICTIMS' THIRD-PARTY TORT RIGHTS AGAINST MANUFACTURERS. THE EMPLOYEE WOULD HAVE THE ABSOLUTE RIGHT TO WORKERS' COMPENSATION BENEFITS - REGARDLESS OF HIS OR HER OWN FAULT OR LACK OF FAULT ON THE PART OF THE EMPLOYER. AFTER DISTRIBUTING THE NO-FAULT BENEFITS TO THE EMPLOYEE - AN EMPLOYER COULD CLAIM OVER AGAINST ANY THIRD PARTY

CAUSING INJURY TO HIS OR HER EMPLOYEE FOR A CONTRIBUTION IN PAYMENT OF THE WORKERS COMPENSATION BENEFITS ON THE BASIS OF COMPARATIVE NEGLIGENCE. IF THE EMPLOYER'S NEGLIGENCE HAD CONTRIBUTED TO THE ACCIDENT - THE RECOVERY AGAINST THE THIRD PARTY WOULD BE REDUCED BY THE PERCENTAGE OF HIS OR HER NEGLIGENCE AS COMPARED TO THAT OF THE THIRD PARTY. THE COST COULD ALSO BE APPORTIONED BETWEEN THE EMPLOYER AND ANY RESPONSIBLE THIRD PARTY ACCORDING TO DEGREES OF FAULT - BECAUSE UNDER THAT PROCESS LITIGATION WOULD TAKE PLACE BETWEEN THE EMPLOYER AND ANY RESPONSIBLE THIRD PARTY ACCORDING TO DEGREES OF FAULT. BECAUSE UNDER THAT PROCESS LITIGATION WOULD TAKE PLACE BETWEEN COMMERCIAL PARTIES - ARBITRATION - SETTLEMENTS - AND CONTRACTUAL AGREEMENTS MIGHT EASILY BE APPLIED. THE PARTIES MIGHT EVEN AGREE ROUGHLY TO CALCULATE IN ADVANCE TO ALLOCATE A

PORTION OF WORKERS COMPENSATION PREMIUMS TO A THIRD PARTY PRODUCT - INSTEAD OF LITIGATING EACH CASE ONE AT A TIME.

UNDER SUCH A METHOD - THE NEED TO LITIGATE ISSUES OF NEGLIGENCE - PRODUCT DEFECT - AND PAIN AND SUFFERING ON A CASE-BY-CASE BASIS COULD BE AVOIDED. ADMITTEDLY - IN MOST INSTANCES - THE EMPLOYEE WOULD LOSE HIS TORT CLAIM. HOWEVER - OVERALL - THE EMPLOYEES AS A GROUP WOULD LOSE VERY LITTLE AND RETAIN ASSURANCE OF PROMPT - FULL PAYMENTS FOR MEDICAL BILLS. AT THE SAME TIME - WORKERS' COMPENSATION BENEFITS MIGHT INCREASE THANKS TO DECREASED NEED FOR LITIGATION AND IMPROVED LOSS-SHIFTING.

A NEXT LOGICAL STEP WOULD BE TO EXPAND NO-FAULT COVERAGE TO NON-WORK-RELATED ACCIDENTS AND POSSIBLY - TO MALPRACTICE CLAIMS. NO-FAULT BENEFITS EQUIVALENT TO NO-FAULT AUTO COVERAGES COULD BE

EXTENDED BY A CASUALTY OR DISABILITY OR HEALTH INSURORS TO THEIR INSUREDS FOR NON-AUTO AND NON-INDUSTRIAL ACCIDENTS. TO FINANCE THE NO-FAULT PAYMENTS - THE VICTIM'S TORT CLAIM WOULD PASS TO THE INSURANCE COMPANIES WHO WOULD GUARANTEE THE OUT-OF-POCKET LOSS TO THE INSURED. THE COMPANY - IN TURN - COULD PRESS THE FAULT-BASED CLAIM WITHOUT OBLIGATION TO PAY BACK TO THE VICTIM ANY OR ALL OF THE RECOVERY FROM THE THIRD PARTY. LIKE COMMERCIAL CLAIMS - CLAIMS BETWEEN TWO INSURANCE COMPANIES WOULD - IN ALL LIKELIHOOD - BE SETTLED EXPEDITIOUSLY BY INFORMAL MEANS AND WITHOUT EXPENSIVE LITIGATION. A LARGER PERCENTAGE OF THE PREMIUM DOLLAR MIGHT WELL END UP MORE PROMPTLY IN THE POCKETS OF VICTIMS INSTEAD OF AS NOW IN THE HANDS OF THOSE WHO PROCESS AND ADMINISTER THE CLAIM.

NO-FAULT LIABILITY WOULD SPREAD LOSSES OVER SEVERAL

SOURCES OF PAYMENT AND OBVIATE WASTEFUL ARGUMENT OVER FAULT AND THE VALUE OF PAIN AND SUFFERING. DUPLICATION OF PAYMENTS FROM COLLATERAL SOURCES WOULD BE A THING OF THE PAST. ONCE IMPLEMENTED - SUCH A NO-FAULT SYSTEM PROBABLY WOULD NOT ALTER THE CONDUCT OF PROSPECTIVE PLAINTIFFS OR DEFENDANTS. IT SEEMS TO ME THAT THE PLAINTIFF STILL WOULD RATHER AVOID BEING HURT THAN RECEIVING ANY MEDICAL EXPENSES AND LOST WAGES. DEFENDANTS STILL WOULD STRIVE TO REDUCE ACCIDENTS AS LONG AS COSTS OF ACCIDENTS REMAINED HIGH.

EXTENSIVE APPLICATION OF THE NO-FAULT THROUGHOUT THE TORT SYSTEM MIGHT WELL PERMIT A MORE EQUITABLE ALLOCATION BY SOCIETY OF DAMAGE AWARDS TO THE VICTIMS OF PREDICTABLE RISKS. CERTAINLY - IT WOULD BYPASS THE TIME AND EXPENSE INVOLVED AT PRESENT IN PROTRACTED LITIGATION TO DETERMINE FAULT AND THE VALUE OF PAIN

AND SUFFERING. ALSO - IT MAY PROVIDE A MORE EVEN DISTRIBUTION OF RISK OF LOSSES AMONG VARIOUS SOURCES OF COMPENSATION. SUCH A NO-FAULT SYSTEM COULD BE TAILORED TO HANDLE DIFFERENT TYPES OF ACCIDENTS AND CLAIMS. IT COULD ALSO WORK TO SIMPLIFY PROCEEDINGS BY LIMITING THEM TO A SMALL NUMBER OF PARTIES AND PARTICULAR TYPES OF CLAIMS.

BUT - NEVERTHELESS - THERE ALWAYS WILL REMAIN A NEED FOR SOME ADJUDICATION IN PROVING CAUSATION AND APPLYING THE FEATURES OF NO-FAULT COMPENSATION. ARBITRATION MAY BE THE ANSWER TO AVOIDING OR SHORTENING LITIGATION - AT LEAST WITH SMALLER CLAIMS. THE IDEA OF ARBITRATION IS NOT NEW. IT HAS LONG BEEN IMPLEMENTED IN UNION AND CONTRACTUAL DISPUTES. TORT ARBITRATION METHODS EMULATING THESE SETTLEMENT TECHNIQUES HAVE BEEN PROPOSED -

STUDIED - AND ADMINISTERED IN DOZENS OF CITIES THROUGHOUT THE UNITED STATES.

IN NEW YORK - A SYSTEM OF ARBITRATION FOR NO-FAULT INSURANCE DISPUTES HAS BEEN IN USE SINCE 1974. WITHIN THREE YEARS AFTER THE PASSAGE OF A COMPREHENSIVE AUTOMOBILE INSURANCE REPARATION ACT AND ITS ACCOMPANYING ARBITRATION SYSTEM - 12,000 CASES A YEAR WERE PROCESSED AND CONGESTION OF COURT CALENDARS WAS SUBSTANTIALLY RELIEVED. THE LENGTH OF TIME FOR AN ARBITRATION AVERAGED FOUR MONTHS FROM THE DATE OF SUBMISSION OF A DEMAND FOR ARBITRATION TO THE DATE OF RESOLUTION. TIME AND AGAIN - TORT PROBLEMS ARE SOLVED MORE RAPIDLY AND AT A LESSER COST THAN UNDER THE TRADITIONAL ADJUDICATION PROCESS.

ALTHOUGH THE NEW YORK STATUTE IS LIMITED TO AUTOMOBILE

ACCIDENTS - THE PROVISIONS IT GENERATED COULD BE EXPANDED TO INCLUDE TORTS OF ALL VARIETIES. ALREADY - MANY STATES HAVE EXPERIENCED SUCCESS WITH ARBITRATION. I AM TOLD THAT STATES WITH COMPULSORY ARBITRATION HAVE FOUND THAT 85 TO 95% OF THE CASES REFERRED TO ARBITRATION HAVE BEEN RESOLVED IN THAT TRIBUNAL.

IN VIEW OF THE SUCCESS WITH ARBITRATION (IN STATES SUCH AS ARIZONA - CALIFORNIA - MICHIGAN - NEW YORK - OHIO - AND PENNSYLVANIA) - SEVERAL PROPOSALS HAVE ALREADY BEEN INTRODUCED INTO CONGRESS SEEKING TO ESTABLISH THE ROUTINE USE OF COMPULSORY NONBINDING ARBITRATION AS A SUPPLEMENT TO PRESENT FEDERAL DISTRICT COURT RESOURCES. THESE ARE AIMED AT RELIEVING THE DEMANDS UPON THE COURT'S AUTHORITY AND EROSION OF LITIGANT FUNDS. THE PROVISIONS COMMAND THAT CERTAIN ACTIONS IN FEDERAL COURT PRAYING

FOR RELIEF SOLELY IN THE FORM OF LIMITED MONEY DAMAGES - GROUNDED UPON A NEGOTIABLE INSTRUMENT - CONTRACT - PERSONAL INJURY OR PROPERTY DAMAGE CLAIM - SHALL BE DETERMINED BY ARBITRATION.

CERTAINLY MANY PEOPLE SUFFER IN THIS NATION. OF COURSE WE SHOULD NOT - WE CANNOT - BE CALLOUSED TOWARD THEIR GRIEF. BUT WE SHOULD NOT TRY TO TRANSLATE ALL SUFFERING INTO DOLLARS AND SHOVEL HUGE SUMS TO THE FEW WHO THROUGH CHANCE - AND SOMETIMES A VERY GOOD LAWYER - CAN PROVE NEGLIGENCE - AND DEMONSTRATE TO AN EVER-CHANGING JURY STANDARD - PAIN AND SUFFERING.

LESTER SHARP'S THREE-YEAR-OLD DAUGHTER DIED BECAUSE BURTON WINNER DROVE HIS CAR CARELESSLY.

SHARP SUED WINNER TO RECOVER FOR HIS PAIN AND SUFFERING. THE PINELLAS COUNTY JURY AWARDED SHARP $5,500.

THE FLORIDA SUPREME COURT RULED THE VERDICT WAS NOT EXCESSIVE.

"WHEN THE WRITER OF HIS OPINION WAS ADMITTED TO THE BAR - $5,000 MIGHT HAVE BEEN AN EXORBITANT VERDICT IN A CASE LIKE THIS" - WROTE JUSTICE J. TERRELL. "BUT THE MIND HAS BEEN EXPLORED AND SO MUCH LEARNED OF ITS PATHOLOGY THAT DAMAGE TO IT MAY NOW MERIT MUCH LARGER VERDICTS THAN THEY HAVE IN THE PAST."

THAT WAS IN 1949.

TWENTY-ONE YEARS LATER - A DADE JURY AWARDED $1.8 MILLION TO THE PARENTS OF A 15-YEAR-OLD BOY KILLED IN A PLANE CRASH.

ON APPEAL - THE PAIN AND SUFFERING VERDICT WAS UPHELD.

DURING THE PAST DECADE - PAIN AND SUFFERING LAWSUITS HAVE BECOME A BIG BUSINESS FOR ATTORNEYS AND THEIR CLIENTS.

IT'S A BUSINESS THAT THRIVES ON TRANSLATING THE PRICELESS INTO DOLLARS - OFTEN HUNDREDS OF THOUSANDS - EVEN MILLIONS OF DOLLARS. IT'S A BUSINESS THAT HAS NO LIMITS. IT'S A BUSINESS WE CAN'T AFFORD.

THE BIG VERDICTS MAKE NEWS - BUT PAIN AND SUFFERING DAMAGES ARE CLAIMED IN PRACTICALLY EVERY PERSONAL INJURY CASE FILED.

A MAN SLIPS AND FALLS. HE WANTS COMPENSATION FOR HIS SUFFERING AS WELL AS FOR HIS MEDICAL BILLS AND HIS TIME AWAY FROM WORK.

A WOMAN LOSES AN ARM IN A CAR ACCIDENT. SHE WANTS MONEY FOR HER ANGUISH AS WELL AS FOR MEDICAL EXPENSES - REHABILITATION AND HER INABILITY TO KEEP HER OLD JOB.

A CHILD DIES. THE PARENTS WANT COMPENSATION FOR

THEIR ANGUISH.

UNFORTUNATELY - NO ONE REALLY KNOWS THE COST OF PAYING FOR PEOPLE'S MENTAL AND PHYSICAL SUFFERING. JURIES IN ALMOST ALL STATES - INCLUDING FLORIDA - USUALLY DO NOT SPECIFY HOW MUCH IS AWARDED FOR PAIN AND SUFFERING AND HOW MUCH IS AWARDED TO COMPENSATE FOR LOST WAGES - MEDICAL COSTS AND REHABILITATION.

IN CASES INVOLVING THE SUDDEN DEATH OF A CHILD - WHERE THE AWARDS ARE LIMITED TO COMPENSATION FOR MENTAL ANGUISH AND NEGLIGIBLE LOSS OF SERVICES - THE BUCKS-FOR-TEARS TRADE IS CLEAR.

EVERYONE SUFFERS TRAGEDY AT SOME POINT IN LIFE. RELATIVELY FEW RECOVER COURT AWARDS.

THE KEY IS NEGLIGENCE. A PERSON IS ENTITLED TO MONEY FOR HIS SUFFERING ONLY IF THAT SUFFERING IS CAUSED BY SOMEONE'S

NEGLIGENT ACT.

A 30-YEAR-OLD MAN DYING OF CANCER CAN'T SUE GOD FOR HIS MALIGNANCY AND WIN.

REVENGE LIES BEHIND NEGLIGENCE AS THE BASIS FOR RECOVERY. BECAUSE SOMEONE IS AT FAULT - SOMEONE WILL HAVE TO PAY. IF NO ONE IS AT FAULT - IT'S TOUGH LUCK FOR THE PERSON WHO SUFFERS.

BUT THE REVENGE IS TURNED UPON OURSELVES.

ANYONE CAN MAKE A MISTAKE. FOR PROTECTION - PEOPLE WITH SOMETHING TO LOSE BUY INSURANCE. THIS EFFECTIVELY BARS REVENGE IN MOST CASES. A NEGLIGENT PERSON IS COVERED. WE ALL PAY FOR HIS MISTAKE.

JURIES KNOW INSURANCE COMPANIES WILL PAY THE DAMAGES. THEY KNOW THAT IF THEY DECIDE TO HELP A PERSON OUT WITH A BIG

AWARD - NOBODY WILL REALLY SUFFER THE CONSEQUENCES. INSURANCE WILL TAKE CARE OF IT.

BUT GETTING BACK AT GREEDY INSURANCE COMPANIES WITH BIG VERDICTS ACTUALLY HAS THE OPPOSITE EFFECT. THE INSURANCE COMPANIES ABSORB THE IMMEDIATE LOSSES AND RAISE THEIR RATES. THEN THE FIRMS SELL MORE INSURANCE AS PEOPLE GAIN AWARENESS OF THEIR VULNERABILITY TO LAWSUITS. OUR SYSTEM OF PAYING PEOPLE FOR THEIR SUFFERING MAKES THE INSURANCE INDUSTRY GROW.

ANOTHER GROUP CASHES IN ON THE BIG VERDICTS. PERSONAL INJURY LAWYERS COLLECT ANYWHERE FROM 33 TO 45% OF THE AWARDS AS THEIR CONTINGENCY FEES - WHICH THEY COLLECT IF THEY WIN. THE MORE THEIR CLIENTS SUFFER - THE FATTER THEIR WALLETS.

THE PUBLIC WINDS UP WITH THE BILL. HIGHER INSURANCE

PREMIUMS ARE NOT THE ONLY EXPENSE. GIANT VERDICTS TO COMPENSATE SUFFERING SUBTLY WEAKEN THE SOCIAL FABRIC BY ERODING COMMONLY SHARED CONCEPTS OF THE VALUE OF LABOR. A MAN WHO WORKS HARD AND MAKES - SAY - $25,000 EACH YEAR REALIZES HIS WAGE IS NOTHING COMPARED TO A $1-MILLION VERDICT FOR SUFFERING. THE INTEREST ON THAT TAX-FREE BONANZA ALONE WOULD DRAW MORE THAN $150,000 YEARLY.

SOMETIMES IT IS ARGUED THAT PAIN AND SUFFERING AWARDS ARE NEEDED TO INSURE THAT THE SAME ACCIDENT DOESN'T HAPPEN AGAIN. PEOPLE WILL NOT BE SO NEGLIGENT IF THEY KNOW THEY WILL HAVE TO PAY FOR THEIR MISTAKES.

BUT PEOPLE DON'T TRY TO BE NEGLIGENT. THEY MAKE MISTAKES. AND THEY WILL CONTINUE TO MAKE MISTAKES NO MATTER

HOW MUCH IT COSTS THEM.

WHEN THE NEGLIGENCE IS PURPOSEFUL OR GLARING - LEGAL REMEDIES EXIST. CRIMINAL PROSECUTION MAY BE UNDERTAKEN. OR - CIVIL JURIES CAN AWARD PUNITIVE DAMAGES WITHOUT REGARD TO THE INJURY. HOPEFULLY - THE PUNISHMENT WILL PREVENT REOCCURRENCE OF THE WRONGDOING.

WITH PUNITIVE DAMAGES - A JURY DECIDES WHAT THE PROPER MONETARY PUNISHMENT WILL BE. THE JURY CONSIDERS THE EXTENT OF THE WRONGDOING AND THE DEFENDANT'S ABILITY TO PAY.

WITH PAIN AND SUFFERING - A JURY DECIDES HOW MUCH A PERSON'S SUFFERING OR LOSS IS WORTH.

THE PROBLEM IS THAT SUFFERING - AND HUMAN LIFE - IS PRICELESS.

HOW MUCH MONEY WOULD COMPENSATE YOU FOR LOSS OF YOUR DAUGHTER? THE ANSWER COULD BE $10 MILLION OR $10. BOTH ARE ABSURD.

JURIES SHOULD BE GENEROUS IN AWARDING ENOUGH MONEY SO A PERSON CAN MAINTAIN HIS OR HER STANDARD OF LIVING - STAY INDEPENDENT AND TAKE ADVANTAGE OF ANY REHABILITATION PROGRAM OR DEVICE THAT WILL HELP HIM OR HER DEAL WITH SUFFERING.

INSURANCE COMPANIES ALSO SHOULD BE GENEROUS TO HELP THOSE WHO SUFFER. THE HELP SHOULD BE BASED ON NEED - NOT NEGLIGENCE.

BASED ON THE EFFORTS OF CONGRESS AND THE EXPERIENCES OF SEVERAL STATES - IT IS CLEAR THAT THE EXPANDED NO-FAULT LIABILITY AND ARBITRATION COULD DEVELOP INTO A SYSTEM TO BETTER

COMPENSATE VICTIMS WHILE PROMOTING EFFICIENT CLAIM ADMINISTRATION. PERHAPS TODAY'S SOCIETY DOES REQUIRE FASTER - SIMPLIER - MORE EFFICIENT MEANS TO RESOLVE TORT DISPUTES: IF SO - ARBITRATION COULD PROVIDE THE EFFICIENCY AND NO-FAULT COULD BE THE SIMPLIFIER. OTHER REMEDIES HAVE BEEN PROPOSED TO MAKE THE COURTS MORE ACCESSIBLE TO EACH CITIZEN - SUCH AS INCREASES IN THE NUMBER OF JUDGES OR SMALL CLAIMS COURTS - INSTITUTING A PRIVATE LEGAL INSURANCE SYSTEM - AND THE NATIONALIZATION OF THE LEGAL PROFESSION. NONE OF THESE REACH THE HEART OF THE PROBLEMS; THEY MERELY REFLECT THE TYPE OF "TINKERING" THAT CHIEF JUSTICE BURGER REJECTED AS INEFFECTIVE IN HIS CALL FOR FUNDAMENTAL CHANGE TO OUR SYSTEM OF CONFLICT RESOLUTION.

THE TRENDS TODAY HAVE EVOLVED OUT OF NECESSITY AND

FOR THE SAME REASON MUST CONTINUE TO EVOLVE. THE TORT CLAIMS OF THE FUTURE VERY LIKELY WILL BE SUBMITTED TO A MANDATORY ARBITRATION BOARD COMPRISED OF SPECIALISTS IN THE FIELD OF THE ISSUE OR A MULTI-DISCIPLINARY PANEL - AS AN ADJUNCT TO THE COURTS. UNDER THE ARBITRATION SYSTEM - EXPLICIT RECOGNITION WILL BE GIVEN TO THE UNIQUENESS OF EACH SITUATION AND SOLUTIONS WILL BE FLEXIBLE TO MEET THE NEEDS OF THE PARTIES. ARBITRATORS WILL NOT BE BOUND BY PREVIOUS CASELAW OR PRECEDENT. EACH PARTY MUST PARTICIPATE IN THE SELECTION OF THE ARBITRATORS - AND IF THE TRIBUNAL'S DECISION IS TOTALLY DIVORCED FROM RATIONALITY - STATE LAWS SHOULD PROVIDE THAT A COURT MAY SET IT ASIDE. A SCHEDULE OF AWARDS FOR DIFFERENT TYPES OF HARM - SIMILAR TO THAT USED IN WORKER'S COMPENSATION CLAIMS - COULD BE COMPILED AND ADHERED TO NATIONALLY -

SO THAT UNEVEN JURY AWARDS WOULD CEASE. FOR EXAMPLE - THE VALUE OF THE LOSS OF A HAND SHOULD BE PREDETERMINED NATIONWIDE AND SUBJECT TO CHANGE ONLY TO COMPENSATE FOR INFLATION - FOR AN UNUSUAL ECONOMIC ENVIRONMENT - OR IN EXTRAORDINARY CIRCUMSTANCES - A MAXIMUM LIMIT ON INCREASES - MIGHT BE STATUTORILY PRESCRIBED.

SIMILARLY - CONTINGENCY FEES WOULD BE RESTRAINED BY CEILINGS DETERMINED PRIOR TO THE ARBITRATION - OR THEY PERHAPS MIGHT EVEN BE TOTALLY ABOLISHED AND REPLACED BY A STANDARD SET OF FEES OR A MAXIMUM HOURLY WAGE. THE ROLE OF THE ATTORNEY WOULD BE REDUCED TO THAT OF PROVING THE HARM AND ITS CAUSE WITHOUT REGARD TO THE WILLFULNESS - NEGLIGENCE - OR FAULT OF THE DEFENDANT. HENCE - THE ADVERSARY SYSTEM IN THE FUTURE IN TORT LAW WOULD BE SUBJUGATED TO THE NO-FAULT SYSTEM; THE OPPORTUNITY FOR LITIGATION

WILL ONLY ARISE IF THE INSURER AND THE THIRD-PARTY TORTFEASOR FAILED TO REACH AN AGREEMENT THROUGH ARBITRATION. THE ARBITRATOR IN TURN WILL BALANCE SOCIAL AND ECONOMIC FACTORS IN EACH CASE BEFORE DISTRIBUTING AWARDS AND ALLOCATING LIABILITY BETWEEN INSURERS.

TO SUM UP - IN RECENT TIMES - VARIOUS AREAS OF TORT LAW HAVE DEVELOPED IN AWKWARD - INCONSISTENT DIRECTIONS. NEVERTHELESS - FRUSTRATION OF OUR CITIZENS HAS LED TO EXPERIMENTATION BY THE SEVERAL STATES PRODUCING SEVERAL INNOVATIVE AND EFFICIENT PATHS TO TORT SETTLEMENT. IF LONG RANGE REFORM IS MADE WITH THESE EXPERIENCES IN MIND - A GOAL OF LARGE-SCALE - ACROSS-THE-BOARD CHANGE - AND AN EYE TO FORTHCOMING DEMANDS ON THE JUDICIAL SYSTEM - THE FUTURE TORT DAMAGE AWARD SYSTEM MAY BE BETTER EQUIPPED

TO MEET SOCIETAL NEEDS. INDEED - I CONFIDENTLY PREDICT THAT THE TORT PLAINTIFF AND THE TORT DEFENDANT OF THE FUTURE WILL TRAVEL AN EASIER ROAD AND REACH A DESTINATION SOONER - MAKING THE ROUTE AVAILABLE FOR THE NEXT GENERATIONS OF TRAVELERS THROUGH THIS NATION'S TORT SYSTEM.