## REMARKS BY

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WM. B. SPANN, JR. \*

PRESIDENT, AMERICAN BAR ASSOCIATION

To THE

LAW DAY LUNCHEON

UNIVERSITY OF GEORGIA SCHOOL OF LAW

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"TELLING 'RIGHTS' FROM WRONGS"

\* PARTNER: ALSTON, MILLER & GAINES ATLANTA, GEORGIA

## TELLING "RIGHTS" FROM WRONGS

<u>i:</u> ,

WHILE SITTING IN THE BARBER'S CHAIR THE OTHER DAY, IT OCCURRED TO ME THAT BARBERS NOW CHARGE ME ALMOST EIGHT TIMES AS MUCH FOR A HAIRCUT AS WHEN I BEGAN PRACTICE, AND I ONLY HAVE ONE-THIRD AS MUCH HAIR. THIS SEEMS HIGHLY UNFAIR, AND I WOULD CERTAINLY PROTEST IF IT WEREN'T FOR THE STIMULATING INTELLECTUAL ATMOSPHERE OF THE BARBER SHOP. NEEDLESS TO SAY, I WOULD NOT HAVE ENCOUNTERED THE PLAYBOY MAGAZINE ARTICLE IN WHICH RALPH NADER CALLS FOR A BILL OF RIGHTS FOR SPORTS FANS HAD IT NOT BEEN FOR THE BARBER CALLING IT TO MY ATTENTION. (PAUSE) I HOPE THAT LAST STATEMENT DOESN'T SERIOUSLY WEAKEN THE CREDIBILITY OF THE REST OF MY REMARKS.

ANYWAY, NADER'S BILL OF RIGHTS HAS, AS YOU MIGHT SUSPECT, TEN ARTICLES WHICH SEEM TO COVER MOST OF THE COMPLAINTS THAT FANS HAVE MADE RECENTLY AGAINST THE PEOPLE WHO RUN BOTH PROFESSIONAL AND AMATEUR SPORTS, AND POSSIBLY SOME THEY HAVEN'T MADE. FOR EXAMPLE, ARTICLE 4 OF MR. NADER'S BILL SEEKS TO INSURE "THAT FOOD SOLD AT (SPORTING) EVENTS IS REASONABLY PRICED AND WELL PREPARED." WELL, I THINK THAT'S FINE. I'M VERY MUCH IN FAVOR OF HAVING REASONABLY-PRICED AND WELL-PREPARED FOOD AT THE BALL GAME. WHAT I'M NOT ENTIRELY SURE OF, IS WHETHER OR NOT I HAVE A GOD-GIVEN, INALIENABLE RIGHT TO SUCH FOOD AND WHETHER THAT RIGHT IS PROTECTED BY THE UNITED STATES CONSTITUTION AND THE LAWS OF THE LAND. AND IF IT IS NOT SO GIVEN AND SO PROTECTED, WHAT MAKES IT A RIGHT?

THE QUESTION ISN'T AS FRIVOLOUS AS IT SOUNDS. THERE'S A GROWING TENDENCY IN THIS COUNTRY TO REGARD AS RIGHTS A VARIETY OF BENEFITS NEVER IMAGINED BY THE FOUNDING FATHERS. A HIGH SCHOOL STUDENT FELT SHE HAD THE RIGHT TO ATTEND HER GRADUATION CEREMONY. (This particular student had been barred by the school for disciplinary reasons after hitting a teacher in the face with a pie.) A man felt he had a right to damages from his former employer, charging that he was driven to alcoholism by his experience with the company. A 19-year-old girl who had injured herself five years earlier driving her car off a dock sued her parents for failing to warn her adequately.

WELL, MAYBE THESE ARE RIGHTS, MAYBE NOT. I ONLY KNOW THAT
THE TERM "RIGHT" HAS BECOME A VERY LARGE UMBRELLA OF LATE, SO BIG,
IN FACT, THAT IT IS INCREASINGLY DIFFICULT TO TELL A "RIGHT" FROM
A "WRONG." AND THAT COULD BE DANGEROUS. IN FACT, IT COULD
IRREPARABLY DAMAGE THE CIVIL RIGHTS MOVEMENT, WHICH UP TO NOW HAS
GIVEN US SOME OF THE MOST IMPORTANT SOCIAL ACHIEVEMENTS OF THE
TWENTIETH CENTURY.

CIVIL RIGHTS. TWENTY YEARS AGO THE PHRASE HAD A RING TO IT.

THE SUPREME COURT HAD GIVEN US BROWN V. BOARD OF EDUCATION AND

BLACKS WERE USING IT AS A FULCRUM TO OBTAIN DUE PROCESS OF LAW.

IN THOSE DAYS THE ISSUES AT STAKE WERE THE RIGHT TO A FAIR TRIAL,

THE RIGHT TO VOTE, THE RIGHT TO THE EQUAL USE OF PUBLIC FACILITIES. I RECALL VERY WELL, AS I'M SURE YOU DO, HOW DIFFICULT

ATTAINMENT OF THOSE RIGHTS COULD BE. ONLY AFTER A GREAT DEAL OF

SUFFERING BY BLACKS AND THE CONCERTED EFFORT OF THE FEDERAL COURTS, THE ADMINISTRATION, AND OF VARIOUS SYMPATHETIC ORGANIZATIONS AND INDIVIDUALS WERE THE WORST OF THESE ABUSES OVERCOME. INCIDENTALLY, THE AMERICAN BAR ASSOCIATION WAS ONE SUCH ORGANIZATION. IN 1963 THE ABA, ENCOURAGED AND SUPPORTED BY PRESIDENT KENNEDY, HELPED TO ESTABLISH A LAWYERS' COMMITTEE FOR CIVIL RIGHTS. I'M PROUD TO SAY THAT I WAS A MEMBER OF THE EXECUTIVE COMMITTEE OF THAT GROUP.

LOCAL COMMITTEES WERE ORGANIZED IN SEVERAL CITIES AND, WITH THE COOPERATION OF THE MISSISSIPPI BAR ASSOCIATION, WE SENT INTO MISSISSIPPI LAWYERS FROM OTHER STATES TO DEFEND UNJUSTLY ACCUSED CIVIL RIGHTS WORKERS.

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THE ACHIEVEMENT OF CIVIL RIGHTS FOR BLACKS WAS ONLY A BEGINNING. IN SUCCEEDING YEARS SUPREME COURT DECISIONS EXTENDED PROTECTION OF THE LAWS AS DEFINED BY THE FOURTEENTH AMENDMENT TO INCREASING NUMBERS OF PEOPLE. IN 1962, Baker V. Carr required that "ROTTEN BOROUGHS" OF STATE LEGISLATURES BE REAPPORTIONED TO REFLECT POPULATION SHIFTS. IN 1966, FEDERAL POWER TO REGULATE STATE ELECTIONS WAS UPHELD. ALSO IN 1966 CAME MIRANDA V. ARIZONA, A NOTABLE ADVANCE IN JUDICIAL PROTECTION OF CRIMINAL DEFENDANTS.

WOMEN'S RIGHTS UNDER THE LAW WERE RECOGNIZED IN REED V. REED, 1971. "NO PERSON MAY BE DENIED EQUALITY BEFORE THE LAW BECAUSE OF SEX," SAID THE COURT. PRISONERS WERE GRANTED THE RIGHT TO LAW LIBRARIES IN 1973 AND TO VISITS FROM ATTORNEYS' ASSISTANTS IN 1974.

THE IMPORTANT DISTINCTION TO BE MADE BETWEEN, ON THE ONE HAND, MY "RIGHT" TO A HAIRCUT AT A PRICE COMMENSURATE WITH THE AMOUNT OF HAIR TO BE CUT AND THE "RIGHT" OF EVERY PERSON'S VOTE TO BE EQUAL IS THAT THE LATTER IS CLEARLY BASED IN THE CONSTITUTION AND THE FORMER IS NOT. AND ANY ATTEMPT BY ME TO EXPAND MY "RIGHT" TO A LOW-PRICED HAIRCUT THROUGH LITIGATION WILL CONTRIBUTE TO THE EVER INCREASING CONGESTION OF OUR COURTS. IT WOULD ALSO PUT MY "RIGHT" IN DIRECT CONFLICT WITH THE RIGHT OF THE BARBER TO A DECENT INCOME. I THINK AN ACID TEST FOR WHAT IS AND IS NOT A RIGHT SHOULD BE WHETHER THERE ARE ALTERNATE MEANS AVAILABLE TO RESOLVE THE DISPUTE? FOR EXAMPLE, I CAN ASK MY GOOD WIFE, TEDDY, TO TRIM MY HAIR, AND RALPH NADER CAN PACK HIS OWN LUNCH. IF ENOUGH PEOPLE DO THIS, I THINK THE MECHANISM OF THE MARKETPLACE MIGHT SOON BRING DOWN THE COST OF HAIRCUTS AND IMPROVE THE QUALITY OF FRANKFURTERS.

Instead of the Marketplace, many people have turned to the legislatures and Congress. And they have also helped to broaden the definition of "rights". For example, the environmental laws restricted the rights of businessmen in favor of the presumed rights of society as a whole. The consumer movement, which came to prominence with Ralph Nader's attack upon the auto companies, now extends to virtually every other kind of company as well. Here, too, the individual rights of businessmen to produce in their own way what they believed their customers wanted gave way to what came to be regarded as the overriding good of the majority.

THE BENEFITS OF REDUCING ENVIRONMENTAL POLLUTION, AND IN-CREASING CONSUMER PROTECTION, AND OTHER LEGISLATED "RIGHTS" CANNOT BE DENIED. BUT SOME OF THE SIDE EFFECTS HAVE BEEN UNFOR-TUNATE. ONE IS THE BURGEONING FEDERAL BUREAUCRACY NEEDED TO ENFORCE THE NEW LAWS, A BUREAUCRACY THAT IS BECOMING INCREASINGLY OPPRESSIVE, IF ONLY BECAUSE BUREAUCRACIES, ONCE ESTABLISHED, MUST ACT TO JUSTIFY THEIR EXISTENCE. AND SO WE HAVE HAD REGULATIONS SUCH AS THE ONE FROM OSHA REQUIRING THAT FARMERS PROVIDE PRIVATE TOILETS, WASHING FACILITIES AND DRINKING WATER WITHIN A FIVE MINUTE WALK OF ALL FIELD WORKERS. I BELIEVE THIS IS VULGARLY REFERRED TO AS "THE LITTLE HOUSE ON THE PRAIRIE" RULE. ANOTHER REGULATION LINKED UP AUTOMOBILE SEAT BELTS AND IGNITIONS, THEREBY PREVENTING THE CAR FROM STARTING UNLESS THE BELT WAS BUCKLED. NEXT, I'M TOLD, ALL TIRES MAY COME WITH SELF-MEASURING GAUGES TO PREVENT FLATS. AND AFTER THAT WE'LL PROBABLY HAVE THE BAG THAT INFLATES ON COLLISION. EVENTUALLY, PERHAPS, ALL AUTOMOBILES WILL BE NEARLY ACCIDENT PROOF, BUT NOBODY WILL BE ABLE TO AFFORD ONE. AND IF THAT HAPPENS, WILL WE NOT HAVE EFFECTIVELY DENIED MANY THE "RIGHT" TO THE TRANSPORTATION NEEDED TO GET THEM TO THEIR JOBS?

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A SECOND CONSEQUENCE OF THESE NEW MOVEMENTS IS EVEN MORE OMINOUS. IT IS A GROWING TENDENCY ON THE PART OF THE INDIVIDUAL TO DEMAND COMPENSATION FROM SOMEONE FOR ALMOST ANY KIND OF MISFORTUNE THAT BEFALLS HIM. ONE SOCIAL RESEARCHER CALLS IT THE PSYCHOLOGY OF ENTITLEMENT. FOR EXAMPLE, ONE MAN LOST A FINGER

OPERATING HIS POWER LAWNMOWER AND SUED THE MANUFACTURER. IT
DIDN'T MATTER TO HIM -- AND IT APPARENTLY DIDN'T MATTER TO THE
JURY, EITHER -- THAT HIS INJURY OCCURRED WHEN HE WAS USING THE
LAWNMOWER TO CUT A HEDGE. HE WAS ENTITLED TO COMPENSATION FOR HIS
SUFFERING.

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THE MOST OBVIOUS RESULTS OF THIS TREND TOWARD DROP-OF-THE-HAT.

LITIGATION ARE ECONOMIC. JURIES HAND DOWN LARGE JUDGMENTS, SEEMINGLY REGARDLESS OF BLAME. INSURANCE COMPANIES PAY THE JUDGMENTS, THEN RAISE THEIR PREMIUMS TO THE INSUREDS. FINALLY, THE INSUREDS PASS ALONG THE HIGHER PREMIUMS TO THE REST OF US IN THE PRICES OF THEIR PRODUCTS AND SERVICES. SO, IN A WAY, IT'S A KIND OF TAXATION, EVEN IF A HIGHLY INFLATIONARY AND INEFFICIENT KIND.

BUT THERE IS ANOTHER, MORE SERIOUS CONSEQUENCE OF OUR INCREASING LITIGIOUSNESS, ONE THAT SHOULD MAKE US ASK OURSELVES WHETHER AS A SOCIETY WE CAN CONTINUE TO AFFORD MUCH LONGER THE LUXURY OF BELIEVING WE HAVE A RIGHT TO FULL SOCIAL AND ECONOMIC PROTECTION WHATEVER THE CIRCUMSTANCE. OUR GOVERNMENT COMMISSIONS, AND ESPECIALLY OUR COURTS, ARE OVERBURDENED. COMPLAINTS TO CIVIL RIGHTS COMMISSIONS IN THE PAST THREE YEARS HAVE DOUBLED. THE US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS A BACKLOG OF 130,000 CLAIMS AND IS YEARS BEHIND IN PROCESSING THEM. IN LOCAL COURTS, ACCORDING TO A NEW SURVEY OF TWENTY-ONE MAJOR CITIES, THE MEDIAN TIME BETWEEN FILING AND THE START OF JURY TRIALS ON CIVIL CASES RANGES FROM 403 TO 1,361 DAYS. IN COOK COUNTY ALONE (CHICAGO), THE CIRCUIT COURT'S BACKLOG OF PERSONAL INJURY CASES WAS 55,000

LAST NOVEMBER, UP 6,000 FROM THE PREVIOUS YEAR. THE FEDERAL COURTS ARE IN TROUBLE, TOO. THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS REPORTS A "STAGGERING" YEAR-TO-YEAR INCREASE IN CASES FILED UNDER THE CIVIL RIGHTS ACT OF 1964 AND SUBSEQUENT STATUTES. ONE FEDERAL JUDGE HAS BEEN QUOTED AS SAYING DISCRIMINATION CASES ARE ALL HE SEES. AND U.S. ATTORNEY GENERAL GRIFFIN BELL GOES SO FAR AS TO SAY "THE QUALITY OF JUSTICE DISPENSED BY OUR FEDERAL COURT SYSTEM IS BEGINNING TO DETERIORATE."

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AND THAT IS SERIOUS INDEED. IF WE AS A SOCIETY PERSIST IN BELIEVING THAT ANY PROBLEM AT ALL CAN BE RESOLVED BY GOVERNMENT UKASE OR JUDICIAL FIAT, THE BURDEN ON OUR GOVERNMENT AND OUR JUDICIAL SYSTEM CAN ONLY INCREASE. If WE PERSIST IN BELIEVING THAT SOMEWHERE THERE IS A MYSTERIOUS "THEY" WHO WILL PAY FOR EVERYTHING, THEN EVENTUALLY THAT BURDEN MUST BECOME INTOLERABLE. FOR THE SOCIETY WE LIVE IN IS A PRECARIOUSLY BALANCED AND DELICATE INSTRUMENT, FOUNDED UPON THE BELIEF THAT RIGHTS AND WRONGS ARE DISTINGUISHABLE, AND THAT IN THE END FAIRNESS AND HONESTY WILL PREVAIL. FAIRNESS AND HONESTY ARE FINDING IT INCREASINGLY HARD TO PREVAIL IN A JUDICIAL SYSTEM CLOGGED WITH FRIVOLOUS LAWSUITS.

I'LL GIVE YOU AN EXAMPLE. A BUSINESSMAN RECENTLY BRAGGED TO A FRIEND OF MINE IN A LARGE CITY HOW A VERY WEALTHY, BUT UNSCRUPULOUS ACQUAINTANCE OF HIS MAKES USE OF THE TERRIBLE GLUT IN HIS CITY'S COURTS. THE MAN, A BUILDER, BUYS PRODUCTS AND SERVICES FROM SMALL COMPANIES WITHOUT PAYING FOR THEM. INSTEAD, WHEN THEY FINALLY CALL FOR THEIR MONEY, HE SAYS, "SUE ME." HE KNOWS THAT EVEN

IF THE PERSON DOES SUE HE WILL UNQUESTIONABLY SETTLE FOR LESS THAN THE FULL AMOUNT -- OFTEN ONE HALF OR ONE THIRD -- RATHER THAN WAIT THREE TO FIVE YEARS FOR A RESOLUTION OF THE CASE. THIS KIND OF CHICANERY IS INCREASING. IT COULD RESULT IN A BACKLASH OF PUBLIC FERVOR SO INTENSE THAT NOT ONLY FRIVOLOUS RIGHTS BUT HARD-WON GENUINE RIGHTS AS WELL COULD BE ERODED.

LOOK AT IT THIS WAY. THE THEME FOR LAW DAY THIS YEAR IS:
"THE LAW: YOUR ACCESS TO JUSTICE." IF THESE TRENDS CONTINUE, THIS
WILL BECOME A MOCKERY. IT ALREADY IS FOR THOSE VICTIMIZED BY THAT
WEALTHY BUILDER.

AS LAWYERS, WE ARE RESPONSIBLE FOR PROVIDING ACCESS TO THE JUSTICE SYSTEM. WE CAN ONLY DO IT BY PREVENTING ABUSE OF THE SYSTEM.

DOES THIS MEAN WE SHOULD DISCOURAGE CLIENTS FROM BRINGING
SUIT? YES - IF THE SUIT IS FRIVOLOUS OR IF THERE ARE ALTERNATE
MEANS OF RESOLUTION AVAILABLE OR IF THERE IS NO SIGNIFICANT LEGAL
PRINCIPAL TO BE ESTABLISHED.

BUT WE MUST DO MORE THAN THAT. WE MUST MAKE A CONCERTED EFFORT TO INCREASE PUBLIC UNDERSTANDING OF OUR JUSTICE SYSTEM, AND WE MUST CONTINUE TO WORK TO SEE THAT PEOPLE WHO NEED THE PROTECTION OF THE COURTS MOST HAVE ACCESS TO THEM.

These goals are being actively pursued by the American Bar Association. To increase public understanding of the role of the

LAWYER IN OUR JUSTICE SYSTEM, FOR EXAMPLE, THE ABA RECENTLY PUBLISHED A NEW BOOKLET CALLED, "THE AMERICAN LAWYER: How to Choose and Use One." And we have done major work on minor dispute resolution, for example - Helping provide the means for keeping your irritation over your neighbor's barking dog out of the courtroom while still giving you justice.

To continue the meaningful progress that has been made over THE LAST TWENTY YEARS, THE ABA HOUSE OF DELEGATES IN NEW ORLEANS RECENTLY RECOMMENDED LEGISLATION THAT WOULD PERMIT COURTS AND ADMINISTRATIVE AGENCIES TO AWARD REASONABLE ATTORNEYS' FEES TO PRIVATE PARTIES WHO BRING SUIT AGAINST THE GOVERNMENT, PROVIDING A SUBSTANTIAL PUBLIC BENEFIT RESULTS OR AN IMPORTANT PUBLIC RIGHT IS ENFORCED. ALSO AT NEW ORLEANS THE ABA BOARD OF GOVERNORS VOTED TO ESTABLISH A FIVE-MAN TASK FORCE ON LEGAL RIGHTS OF THE ELDERLY AND AUTHORIZED IT TO PREPARE RECOMMENDATIONS FOR A PUBLIC-SERVICE PROGRAM ON BEHALF OF THE ELDERLY. PREVIOUSLY, THE BOARD OF GOVER-NORS HAD ENDORSED THE WORK OF THE LEGAL SERVICES CORPORATION, A FEDERALLY FUNDED AGENCY THAT FOR THE PAST FOUR YEARS HAS BEEN SEEKING WAYS TO INCREASE LEGAL SERVICES FOR THE POOR. THE ABA IS ALSO ENCOURAGING INCREASED EMPHASIS UPON LAWYER REFERRAL SERVICES BY LOCAL BAR ASSOCIATIONS, AND SPECIFICALLY ENDORSES APPOINTMENT OF LAY PERSONS TO THE SUPERVISORY COMMITTEES FOR SUCH SERVICES AND THE PUBLISHING OF BIOGRAPHICAL INFORMATION ABOUT PANEL LAWYERS.

THE LAW: Your Access to Justice. This stirring Law Day theme will only have meaning if we unclog the courts so that cases

CAN BE HEARD PROMPTLY. IT WILL ONLY HAVE MEANING IF THE AMERICAN PEOPLE KNOW WHEN AND HOW TO AVAIL THEMSELVES OF LAWYERS. I SUGGEST THAT EVERYONE'S ACCESS TO JUSTICE IS DENIED WHEN WE TRY TO GRATIFY EVERY PERSONAL DESIRE THROUGH LITIGATION. I SUBMIT THAT WE MUST MORE CAREFULLY SEPARATE "RIGHTS" FROM "WRONGS" AND THAT THE CONSTITUTION IS ONE WAY TO DO THIS, LEGISLATIVE RESTRAINT IS ANOTHER, AND LETTING NON-LEGAL INSTITUTIONS RESOLVE MANY CONTROVERSIES IS A THIRD. UNLESS WE DO, YOUR INSISTENCE UPON YOUR "RIGHTS" WILL DENY BOTH OF US ACCESS TO JUSTICE AND WRONG EVERYONE.