The Status of the Lawyer and the Justice System

By Aaron S. Podhurst

I am a lucky man. I like what I do. I am proud to be a lawyer.

Trial lawyer Daniel Webster said: "Justice is the great interest of man on earth; it is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures or contributes to raise its august dome still higher in the sky, connects himself in name and fame and character with that which is and must be as durable as the frame of human society."

I consider myself fortunate to be a trial lawyer, and I am proud to be associated with those who enter Webster's temple and strive mightily on behalf of their clients. What a noble undertaking!

Now is a time critical of lawyers and of the law, and particularly of trial lawyers and the adversary system. But it has always been this way and I suggest to you that it always will be. Criticism to the legal system is like fuel to the engine, milk to the newborn baby, and sunshine to the budding rose petal. We, as trial lawyers, cannot shy away from criticism; nor can we afford to ignore the winds of change.

Justice Holmes told us: "The law is not so much the result of logic as of the felt necessities of the times" It has also been said that the law is the lubricant of society. The trial advocate functions on the frontiers of society, advancing his perception of the felt necessities of the time - helping the law accommodate change in the society it serves and lubricates. In other words, because of what we do, we are always on the cutting edge of change. We are ourselves constant critics. We should thus welcome the challenges of our day, because those challenges force self examination, and ultimately, betterment.

In this the bicentennial year of our Constitution, is is particularly appropriate to reflect upon and critically evaluate our profession, ourselves and the validity of current challenges to the adversary system. We can handle the criticism, evaluate proposed change in the light of justice Holmes admonition that the law reflects "the felt necessities of the time" and preserve the bulwark of our democracy - the adversary system of justice. But to do these things, we must ensure that lawyers feel pride in themselves, in their profession and in the adversary system. 1, for one, know how much I owe for the opportunity to practice as a trial lawyer. But that opportunity comes with a price a price I am all too willing to pay, because it only requires that we, as mature trial lawyers, set an example for the younger lawyers who will be taking our places in the next generation. We owe it to ourselves, to our heritage, and to our love of the law to put something back. And we should be unafraid in this role to judge our performance as we would judge the conduct of a client's adversary.

Recently, the former Chief Justice of the Supreme Court of the United States[1] and the former Dean of one of the illustrious law schools in the country[2] have been critical of certain aspects of our profession. What makes this a significant phenomenon, different today than in the past, is the extent to which this critical view of lawyers is gaining acceptance in our society, and among our own brethren at large. Many of us have lost some of the pride in our profession that our predecessors felt. We see ourselves as part of a deteriorating profession. And because life teaches us that our image of ourselves mirrors what others see when judging us, we are in danger of being our own worst enemy. This self-deprecation is therefore destructive. We need to stop apologizing for our profession. We must recognize that we have nothing to apologize for, that we welcome critical but constructive examination of the Bar and the adversary system as a positive thing.

Our response to these challenges must be positive, grounded as it should be in those noble goals which originally motivated us to want to become lawyers. In the vast majority of cases, it was not the appeal of a high income that fed our interest in this profession. To be sure, many things combined to nurture our desire to be lawyers - among them, 1) a desire to lead; 2) a willingness to advocate sometimes unpopular causes; 3) a wish to perform a public service; 4) a fundamental belief in the rule of law and its intellectual challenge; and 5) a love of justice. I am confident that each of us was primarily motivated by one or more of these ideals of advocacy, leadership and justice. In my conversations today with young men and women just beginning their professional training, I find that they, too, share the same love of advocacy, leadership and justice that has historically drawn the best and the brightest to our profession.

Of course, all of us need to and want to make a comfortable living for ourselves and our families. But I suggest to you that the desire for financial gain, while important, is not our primary motivation. We know that with the talent and intelligence of the members of our profession we could make more money in much less time in business endeavors. In fact, it is still the belief in the capacity of the law to be an instrument of justice and social change that makes young people want to enter the profession.

It is one of the great tragedies of our time, therefore, that this vision is frequently lost somewhere during the first several years of practice. This is not the fault of the young lawyers. The responsibility lies, as it always has, with the senior members of the profession. Every young lawyer looks for a role model and has a tendency to adopt the ethics and values of that model. Unfortunately, too often today, the role model is so busy answering the telephone, worrying about the overhead, trying to increase billable hours, in short, trying to make the most money possible, that the result is an impression that these are the most important aspects of the practice. The old adage, "Do what I say, not what I do," is apt, because we all know it doesn't work; it is what we do that molds a young person's character.

We senior lawyers are not spending enough time training and indoctrinating our young lawyers in the art, value and ethic of the practice. This is wrong. We should do something about it. If we don't, too many young lawyers will be "turned off" because they will feel that they are not realizing the original goals that motivated them to become lawyers. And once having lost sight of these original goals, it is all too easy to become defensive and apologetic about the practice of law. Indeed, if these goals are not part of the reality of the practice, then perhaps apologia is justified, because then the law is no longer a temple, as Webster described it, but a business. So I suggest to you that to the extent public perception of our work is negative, that perception in no small part mirrors our own attitudes and activities. In this regard, we are wholly in control of our own fate. I have always believed that losers are people of limited vision, while winners can see over the rainbow. As lawyers with a proud heritage rooted in a living, working common law, we must embrace our original motivations and nurture their existence in our successors. By so casting our gaze skyward - over the rainbow - we can at once feel better about ourselves, and so alter our public reflection for the better.

Let us now examine not ourselves, but the present status of the adversary system of justice itself, and particularly the status of the civil jury. No one can deny that the system is under attack. But it has always been under attack. The difference that troubles me now is the not so subtle attempt to take away individual rights under the guise of improving the system of justice. Thus, we are told, greedy lawyers and gullible jurors are the cause of the overloaded, malfunctioning civil justice system. I am not concerned about the criticism of lawyers. Perhaps it is in part justified. And if so, we have only ourselves to blame. In any event lawyers should be able to take criticism. What is shameful though, is how easily we have a owed this propaganda to neutralize our traditional role as champions of public rights and defenders against all those who would revoke those rights. As I have suggested, we have become defensive and in large part ineffective as a result.

The critics of the law today are not merely criticizing lawyers. They are denouncing and mocking the very fiber of our society, under the rubric of efficiency and improvement. They decry our jury system and, like the sellers of detergent, call for a "new and improved" system. The great danger to the public in all this is the doubt and distrust of our basic jury system and of our trial and appellate judges that it instills, for, as we all know, it is not lawyers but citizen juries and trial and appellate judges who render and approve the verdicts in our courts.

We have the finest system of justice in the world. The naysayers condemn the inefficiencies and concomitant expense of the system. And unfortunately, the public has begun to believe that those inefficiencies are bad, and that a more efficient system will necessarily be more just. In fact, we all know that it is the inefficiency of the jury process itself that allows it to be just. The jury system intimately involves the citizens of our democracy and has built within it checks, balances and the capacity for change. The Founding Fathers understood that juries were our protection against an unjust, and arbitrary, but efficient system. Nothing has changed in the two hundred years since the Constitution and Bill of Rights were ratified to change this most basic concept.

At the time the Bill of Rights was being considered, Thomas Jefferson stated: "I consider trial by jury as the only action ever yet conceived by man by which a government can be held accountable to the to the principles of the constitution."

[1] Warren Burger's speech to American Bar Association
[2] Derek Bok's address at Harvard

Patrick Henry declared: "Trial by jury is the best appendage of freedom" And Alexander Hamilton wrote: "We are told that the founding fathers at the Constitutional Convention concurred in the value they set upon the jury as a valuable safeguard of liberty, and the very essence of free government. All were satisfied of the utility of the institution."

Yet today it is fashionable to denounce trial juries as archaic, expensive and unnecessary. Have these critics forgotten history? Indeed have we lawyers forgotten our roots? Perhaps we should briefly review the origin of trial juries that led Jefferson, Henry and Hamilton to their well founded conclusions.

The antecedents of our jury trial in Anglo-Saxon history are interesting. The early methods of trial were compurgation or trial by ordeal or wager of law. The plaintiff usually took an oath, often without corroboration, that his claim was valid. The burden was on the defendant, and the number of compurgators that might be required of him would depend on his rank, and the gravity of the case. The compurgators did not have to know or swear to the matters in litigation. Their testimony was confined to the credibility of the oath taken by the party they supported. The penalty for perjury varied from the loss of a hand, to other, occasionally more dire consequences. Compurgation was not abolished by statute in England until 1833, but prior to that it had been supplanted by other forms of trial.

Trial by ordeal is one of the oldest forms of trial. It rested upon the belief in the intervention of the supernatural on the side of right and justice. God would protect the innocent. Every case was either right or entirely wrong. There was no middle ground. The tests by ordeal were presided over by the church, and water or flames were used at the trial. The burned member was immediately bound and examined three days later to determine if it was clean or infected.

Trial by ordeal of the Cross required that parties stand before a crucifix with outstretched arms. The one able to maintain this position the longest won. Sometimes, people say, lawyers still try their cases this way. In 1219 Henry III, directed that this method of trial be abandoned in England after Pope Benedict III had condemned trial by ordeal in 1214.

Wager of battle sprung from the belief that the Diety would assure victory to the right side. It, in effect, reduced self-help to an orderly procedure. Wager of battle was available in most criminal and civil suits. Generally the battle lasted until one combatant was dead or admitted defeat. The struggle might last for an entire day, but if the accuser was not the victor by nightfall he lost his case. Eventually champions were allowed, and when this happened the procedure gained disrepute.

By the beginning of the 13th century juries were being used in criminal cases where the accused asked for it. The jury was representative of the community. Its membership represented the honor and wisdom of the men in the community. At first, the jurors decided cases based on their personal knowledge of the facts, and could be punished for an erroneous verdict. Only later were jurors chosen for their lack of personal knowledge.

One could persuasively argue that the jury came of age in the trial of William Penn. The jurors there were initially fined by the trial judge for bringing in a verdict against the direction of the court. They were ultimately jailed for their refusal to rule as instructed, but still the jurors persisted. Ultimately, the jurors prevailed, perhaps finally establishing the jury as an independent, and ultimate, arbiter.

Development of the jury system continued in the Colonies. In 1735 John Peter Zenger of New York, the editor of a weekly newspaper, criticized the Colonial Governor, William Crosby. Zenger was arrested on a charge of criminal libel. The judge was influenced by the Governor to convict Zenger, and thus charged the jury that the published matter was libelous, and that truth was no defense. Since Zenger admitted publishing the statement, the instruction was tantamount to directing a verdict of guilt. Nevertheless, Zenger's lawyer asked the jury to consider the truth of the matter, and the jury returned a verdict of not guilty despite the judge's charge. This incident reputedly contributed to the inclusion of the right to jury trial in the United States Constitution. And to this day, the criminal jury has the power to nullify and temper the application of law to the facts. I, for one, think this is a good thing, no less than did the Founders, who, in the Declaration of Independence, described deprivation of the benefit of trial by jury as one of their grievances against King George III.

By the time of William Blackstone the jury system had developed into a deserved cornerstone for the protection of liberty. Blackstone's wonderful admonition in 1791 is still applicable today. He wrote:

> So that the liberties of England cannot but subsist so long as this cornerstone remains sacred and inviolate not only from all open attacks which none will be so foolhardy to make, but also from all secret machination which may sap and undermine it by introducing an arbitrary method of trial by justices of the Peace, Commissioners of the Revenue, and

> courts of conscience. And however convenient these may appear at first, as doubtless all arbitrary powers well executed are most convenient, yet let it be again remembered that delays and little inconveniences in the forms of justice are the price all free nations must pay for their liberty in more substantial matters. These inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution, and although begun in trifles the precedent may gradually increase and spread to the other disuse of juries on questions of the most momentous concern.

That our English brothers did not see fit to wholly follow this advice does not detract from its soundness. And the proponents of efficiency as a means to-enhance justice would do well to consider if their proposals do not give away more than they gain.

With this brief review of the history of trial by jury, it is frightening that today's critics can really believe what they say, or that they can convince our citizens of the merits of their position. We must not allow it to happen. Let us not forget that a right voluntarily given up is more lost than one violently taken away because there no longer burns the desire to regain it.

I find the simplest and most appropriate illustration of the current problems and dangers in an area of the law in which I have practiced for nearly 25 years: the tort and personal injury field.

During the past year, legislators in several states have been pressured by the business, medical and insurance communities to enact broad so called "tort reform" packages. I say "so called" because I do not believe the changes to be "reforms" in any event, the purported object of these legislative changes is the skyrocketing cost of liability insurance. The arguments advanced in support of the changes are well known. Proponents attempt to create a public perception of over-zealous lawyers who assert trumped-up or sham personal injury claims, and then prey on the sympathies of ill-informed and emotional juries to obtain outrageous and unwarranted money awards.

I think it is fair to state that many of those proposing these changes are attempting to accomplish them through the false development of a crisis mentality with the hope that a concomitant hysterical reaction by the public will make these proposals a reality. And unhappily, this modus operandi has been successful in several states. But the fact that problems exist is no justification for hysteria and, of course, no basis for attacking our fundamental system of justice and trial by jury. As lawyers, trained in the art of problem solving, we know that the best way to solve a perceived problem is first - to state the problem, then to marshal the facts, then - to evaluate the facts in light of the problem in order to reach an appropriate solution.

The danger of the present situation is that we are not following our problem solving procedure. We simply do not possess the empirical data necessary to reach a reasoned solution. As a result, many of the so-called reforms which are being adopted in a hasty and hysterical climate are proving not to be the promised solutions to the problems for which they were offered. In the meantime, individuals are losing valuable rights and burdens are being wrongly placed on those who can least afford it.

Take, for example, my home state of Florida. During the last legislative session, the State Legislature passed, and the Governor signed into law, a package of tort law changes intended to alleviate a perceived crisis in the state's liability insurance markets. The case for these changes was made by the state's medical, business and insurance industry associations, who, as is usual, blamed over-zealous plaintiffs' personal injury lawyers and misguided civil juries for their woes. What is disturbing to me is that the proposed reforms had little, if anything, to do with curbing either inappropriate practices by lawyers, or unprincipled decision-making by civil juries. Rather, the real and primary result of the tort changes enacted in Florida (like those elsewhere) was to drastically curtail the rights of the general public without any actual insurance premium relief. In fact, the Aetna Insurance Company, when required to advise the state insurance commissioner of the effect these changes would have on the premiums it charged, responded that the changes would not affect premiums at all.

Perhaps the most obvious example where rights were given up for nothing in return is the cap on pain and suffering damages. Florida enacted as part of this tort law package a four hundred fifty thousand dollar ($450,000) cap on how much money can be awarded to a personal injury plaintiff for non-economic losses. That is, no matter how severe the injuries sustained by an individual or how heinous and avoidable the negligence of the tort feasor, a court may not award more than that set amount for the victim's pain and suffering, physical impairment and emotional distress. More importantly, the jury is not even instructed about this cap. And thus, if a jury decides that this element of damage for the now quadriplegic plaintiff should be $1,000,000, the court is required to enter judgment only for $450,000. Thus the jury's judgment, no matter how justified, is simply ignored in the final analysis. No attempt is made by the new law to correlate the amount of the damages' cap to the severity of the injuries sustained.

To the contrary, the most terribly injured people are the only ones being asked to underwrite a promised, but now unlikely, reduction in insurance premiums. It appears doubtful after examining the limited empirical data available that there are enough such cases to significantly affect insurance premiums at all (as Aetna now predicts). The new law unilaterally extinguishes the right of all litigants to recover non-economic damages for injuries sustained - even if legitimate - beyond a certain dollar value. Rather than a carefully tailored remedy to a perceived problem, the legislatively enacted cap on pain and suffering is a clumsy and irrational abolition of individual rights.

Thus, the only real victims of the new law's damage caps are plaintiffs with valid claims of terrible proportions. The individual with trumped up injuries is not a likely candidate for a substantial pain and suffering award. It is the quadriplegic hurt in an agonizing accident who is unjustly denied adequate compensation that he would otherwise receive-and is justly entitled to - by a damage cap. The enacted changes, therefore, are not only illogical, they work perverse results. I suggest to you that the solution to any problems that exist in the civil justice system in this country should not be the abolition of individual rights except as a last resort.

Another example of an hysterical reaction to a perceived problem is the enactment in some states of an absolute statute of repose. An absolute statute of repose places an arbitrary cut-off in years, from the date on which a product was manufactured, by which time all claim for the negligent design or manufacture of the product must be brought. Such a statute is supposed to prevent perceived abuses that can exist when a product manufactured years before is measured by contemporary standards of safety and engineering, which almost always cast the original product design in an unfavorable light. This type of statute is also intended to circumvent, or overrule common law doctrines that toll existing statutes of limitation until such time as the injury giving rise to a claim can be discovered. The real effect, however, is to extinguish public rights before they can even mature.

Take for example the effect of an absolute statute of repose on aviation litigation. The useful life of most commercial jet planes is well over 20 years. That is, when these planes are designed, manufactured and marketed, they are expected to continue to fly - safely - for 20 plus In fact, many of you fly on commercial aircraft which were placed years. in service prior to 1970. The average length of proposed absolute statutes of repose is 10 years. That is, after 10 years from the date of manufacture of a product, no claim can be brought against the manufacturer for negligent design or manufacture of the product - regardless of how long the useful life of the product may be. In the case of commercial airplanes, this means that before even half the useful life of the plane has expired, all liability for negligent design or defective manufacture of the airplane would be extinguished. Notwithstanding the fact that the aircraft manufacturers, in marketing and selling their planes, benefit financially from the long useful life of their product, these manufacturers feel rationally and morally justified in proposing legislation which would absolutely extinguish liability after half the useful life for which their product was sold. More importantly, liability is cut off well prior to the time when many causes of actions based on defects in the product existing at time of manufacture or design could possibly have accrued.

How does one justify to the family of a 40-year-old businessman killed in an airline crash caused by faulty wiring design on a commercial aircraft manufactured in 1975 that- there is no claim against the manufacturer for his wrongful death in 1986? In addition, how does one explain that this outcome would have been different if the plane had been manufactured two years later, or the accident had occurred two years sooner? The fact is that there is no rational explanation.

Attempts by the trial bar to argue the illogic of the current attacks on the civil justice system are parried as being motivated by self-interest and greed. Nevertheless, we must continue to speak. The trial bar better than anyone else other than the judiciary (who are not free to speak), knows the strengths and weaknesses of our civil justice system. We should not be intimidated or deterred from telling the public the facts. The public has always had a right to expect that we, as those most knowledgeable, will participate in the debate and demand that facts be produced and change be accomplished only in a reasonable and proper manner.

We must restore public confidence in the profession in order to protect public rights. We have no better opportunity to justify public confidence in lawyers than to take the lead in defending the public's rights against the ongoing assault which threatens to prevail. If we align ourselves with the defense of individual rights we can perform our historical duty.

Most lawyers have not fought this fight or performed their historical role to this point. They've been too busy managing their firms and making money, and have not meaningfully and personally participated. More importantly, many of us have become defensive and unnecessarily apologetic.

How many of us are willing to offer ourselves or encourage one of our partners or lawyers to run for election to the State Legislature where laws are made and the battle is being fought? It's not much different than our spouses saying "somebody has to take the garbage out" The somebody is us. We have to participate. There is no one else. It will make a difference. Remember, the cobweb is as strong as the steel fence until pressure is put on it. So too will the proposers of irrational change fail- like the cobweb - when enough pressure and the logic of true public debate is fostered.

This year I turned 50years of age, and as a result, have begun to give increasing thought to the legacy I am leaving in the wake of my years not only to my children and family, but also to the younger members of my firm and to my profession. I wish them to know the law as I have known it - an exciting profession dedicated to bettering the lives of others. I wish for them the respect and admiration of their peers. I hope to leave them an adversary system and trial by jury as I have known it - fully intact. But for the system to survive, intellectual honesty coupled with progressive activism must be fostered. We cannot be intimidated, quieted, or worse - falsely persuaded - by the naysayers who with empty rhetoric and no facts predict economic doom unless we give up our common law rights of redress.

I urge young lawyers to realize that the long term success of a lawyer, and of the law, depends not on a short term accumulation of verdicts and fees, but on establishing a reputation for ethical and effective advocacy. Above all, I hope the legacy I pass on will be one of wholistic involvement with one's clients and community. A lawyer is more than a tradesman or gladiator for his client's cause. Ideally, he is a counselor and fiduciary, as ready to compromise or negotiate as to fight. His prime intent should be to maximize his client's rights, not his professional fees. Finally, he should be well-rounded and fully involved in the community. Thus, his obligation extends beyond the case at hand, and re quires his positive participation in the public forum where juries and the law are themselves on trial. Our clients are not only individuals, partnerships, and corporations, but the adversary system itself. We owe no apologies for that fact because the bitter irony here is that the system, as inefficient as it may be, works, and works wonderfully. And while we are free, of course, to haphazardly tinker in our legislatures with a common law that has slowly and surely developed over hundreds of years, we do ourselves no favor by doing so on the massive scale that has been suggested . Of course, I am not so reactionary as to be opposed to change per se. The law is a living and breathing instrument and should change. But where change in the common law is necessary, the court of social justice courts will make it as inexorably as the sun rises. And while court made change is a slow process, it is ultimately quite responsive to societal needs. Any failure of the public to understand this fact is our failure. We are champions for the system as much as we are for our individual clients. We owe it to ourselves, our children, and the adversary system to act like it. No more than that is needed, but no less is required.

I would like to end this address with the sage wisdom of a former Past President of this illustrious organization. Frances Hare put it this way: "There is something different and special about the trial lawyer. You can tell it whenever you go in a courtroom and see any lawyer, old or young, good or bad, when his time comes to stand up and speak in behalf of his client, white or black, right or wrong. Then something happens that's unlike anything else on earth. It is like the touch of Midas that turns dust into gold, or the miracle of electricity that turns a few strips of metal into a glowing flame of light. There is a touch of everything wonderful in the advocacy of a lawyer for his client, in his effort to make the worst appear the better, or in his effort to defend the right. There is a dash of love in it, and there is a little of the effect of bourbon whiskey; there is a little sex appeal and more than a little magic. I have seen a shabby old lawyer that almost literally slept in the street come to court unshaved and disheveled rise before a jury that came to scoff, and remained to pray. Every man who has lived the life of a lawyer knows what I mean and knows there must be a source of this transformation of personality and power that touches an ordinary man with the pentecostal fire of an advocate."

Let us as seasoned trial advocates help our young lawyers light this fire.

Postscript: On April 23, 1987, the Florida Supreme Court voided as unconstitutional the legislatively imposed $450,000 cap on non-economic damages.