IMPRIMIS

Because Ideas Have Consequences
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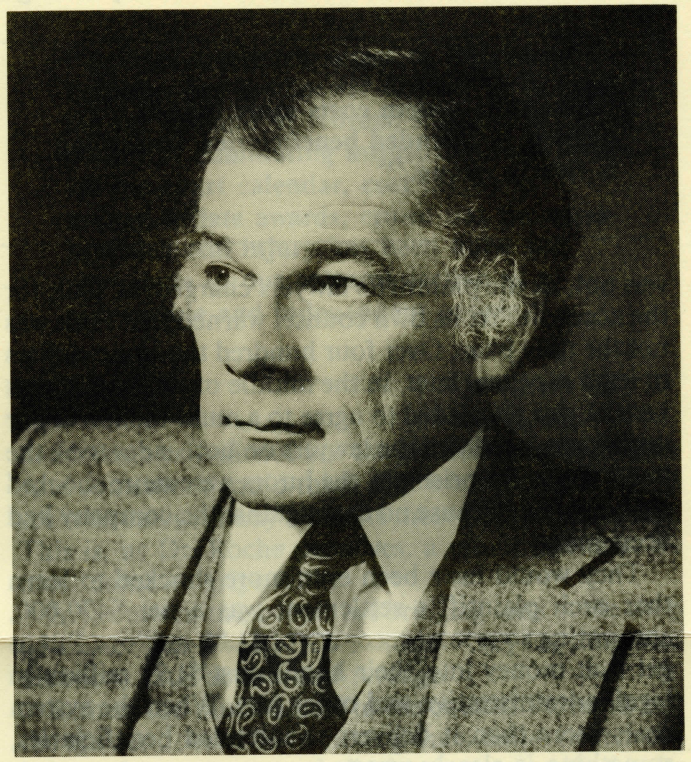
"The Defense Never Rests"

By F. Lee Bailey



Editor's Preview: Many American lawyers claim that the lawsuit crisis of the mid-80s was a manufactured event, one now over because the real culprit — insurance premiums — have stabilized. But while using the term "crisis" advisedly, well-known trial lawyer F. Lee Bailey warns that the U.S. legal system is indeed in serious trouble and that, alarmingly, more and more people "are bringing suits at the drop of a hat."

In these brief remarks drawn from Mr. Bailey's presentation at a March 13 Shavano seminar on the Hillsdale campus for an audience of Michigan and Ohio corporate presidents, he notes that lawyers should be considered partially responsible: "the civil law is big business." And like any business, the legal profession is far more likely to respond to incentives rather than arbitrary legislation to curb abuses. He suggests that many of the instruments required to reform the structural problems in the legal process are already in place and could effectively halt the growing litigiousness of our society.

The alleged "lawsuit crisis" has been a long time coming to the fore. The public has an insatiable interest in criminal law, even though it is civil litigation which is big business in America. My own law firm, despite public perception, devotes half of its energies to the latter. My experience representing plaintiffs and defendants alike, along with ten years spent manufacturing helicopters, has given me a unique perspective on the law.

There's a story that in the Old West a single lawyer was doomed to starve, but when a second lawyer arrived in town, their fortunes were assured. Not too much has changed. The law is a business and, not surprisingly, is fueled by money. When a potential client walks into an attorney's office with what may be sanguinely called a "good" injury, i.e. one which involves severe pain and disability, one of the attorney's first tasks is to estimate the dollar amount of the damages he will seek on that client's behalf. He also tries to ascertain who to sue and whether he can implicate the party with the "deepest pockets," even if that defendant is only marginally, if at all, responsible for the injury.

In a recent article I wrote for the Smithsonian magazine, *Air and Space,* I detailed one lawsuit which I found particularly egregious as a manufacturer. A Pennsylvania man was ferrying his new helicopter home when he decided rather than call the Erie control tower to alter his flight plan, he would simply land in a motel parking lot to wait out some low clouds. As he took off again, he went into the clouds, became disoriented, and crashed. He didn't get hurt, but his helicopter did. The engine from the helicopter was tested immediately after the accident at a nearby factory where it functioned perfectly. But the pilot filed a lawsuit, claiming that the engine had quit. Under the current statutes, the jury was able to declare that, since the cause of the

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accident was "unknown," the manufacturer was liable.

In another case the Gates Learjet Company was sued by the families of two pilots and four passengers whose plane had crashed in the Rockies. The manufacturing firm was singled out because it had the deepest pockets. Now, Bill Lear was a good friend of mine and I know that while he was alive he went to great lengths to make his airplanes safe; but he never did learn how to make them fly through mountains! The company didn't take this suit seriously because it knew that cockpit design

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was not, as the plaintiff's lawyers charged, at fault for the accident. Yet its own counsel warned that fault was not the only issue. Over four hundred thousand dollars in legal expenses later, in the middle of the trial, Gates Learjet was persuaded to agree to a multi-million dollar settlement, of which the lawyers on both sides took the lion's share. Surprisingly, the jurors were more shocked than anyone because no case against the company had been made.

They would have been even more shocked to learn that each plaintiff's settlement was a net $470,000, amounting to a total recovery of $1.88 million. But to get that money into their hands cost $1.91 million in legal, administrative and other fees. When the system costs more than it delivers to intended beneficiaries, something is clearly wrong.

I've been looking at the alleged "lawsuit crisis" and its supposed escalation for a number of years now. I have doubts about the validity of some of the statistics used to support such a contention. However, rising insurance premiums and legal fees have been visible developments. The real problem is a structural one within our legal system. Every democratic nation, including our model, Great Britain, has given up the right to jury trial in most civil lawsuits. Were we to imitate them, we might see substantial reform. Yet we continue to expend tremendous amounts of effort and money in preserving a procedural nicety which no longer insures a fair and independent accounting. Juries, for instance, are helpless to decide in cases which call for expert witnesses and technical explanations. And often the jury selection process, because it calls for large time commitments away from one's work, discriminates against the most qualified candidates.

We are also the only country in the world which permits, at least openly, contingency fees allowing attorneys to take a percentage of the recovery in lieu of fees, usually 25 percent for settlement, 33 to 40 percent for trial and up to 45 percent if the case has to be appealed. All the risk is the attorney's; if he or she loses, then no fee is forthcoming. Contingency fees do give people with horrendous injuries an opportunity to gain compensation. Many would never make it to the courthouse if they had to pay up-front fees. Yet this advantage also makes it possible for people to file nuisance suits at no cost to themselves.

It is not the legality or advisability of contingency fees which ought to concern us most here, but the fact

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that their increasing use is one more reminder that the civil law is big business. Early in my career, I became tagged as a criminal lawyer—people began to think I wouldn't condescend to handling anything as menial as an injury suit. Yet even in those days, while the probable legal fee in a murder case was $7,500, broken leg cases ran $15,000.

Let's look for a moment at the plight of the ordinary individual today once he has been named as a defendant in a lawsuit. He doesn't select his defense counsel; his insurance company does, and that counsel is defending a fund of money with set limits, rather than him specifically. If damages from the suit are expected to exceed this amount, as they frequently do, he is duty-bound to advise the individual that there is a conflict. If the policy is a small one, then he has no motivation to help the plaintiff win, and if it is a large one, I

About the Author

F. Lee Bailey, one of the nation's foremost trial lawyers, has defended clients ranging from kidnapped heiress Patricia Hearst and Albert de Salvo (the "Boston Strangler") to U.S. Army Captain Ernest Medina, who was charged with the murder of civilians at My Lai.

After attending Harvard, Mr. Bailey served with the U. S. Marines from 1952 to 1956; and in 1960 graduated from Boston University Law School.

Mr. Bailey is a former co-chairman of the Criminal Law Section of the Association of Trial Lawyers of America. In addition, he has served as the co-chairman of the Foundation for the Advancement of Inmate Rehabilitation and Recreation (FAIRR).

be anxious to settle. Legal fees for everyone involved in a suit are expensive. Lest you think I am singling out insurance companies as the villains, let me add that it is not unusual for carriers to incur huge expenses. In the highly publicized case against Kidder Peabody recently, one defendant's insurance company spent in excess of one million dollars in legal fees.

We must reconcile the "money defenders", who have the interests of the insurance companies at heart, with the real defenders, who ultimately risk much more. We must reconcile lawyers and clients. Both should sit down and realistically discuss the merits and likely costs of going to court. Be warned, however, that this can't be accomplished by simply putting lawyers out of work, for it will only be temporary. When no-fault automobile insurance was instituted, lawyers dreamed up product liability, medical malpractice and all sorts of other fee-generating innovations.

"Lawyers are not the ones to remedy the serious problems which plague our legal system; it is simply too lucrative in its present disarray."

Lawyers are not the ones to remedy the serious problems which plague our legal system; it is simply too lucrative in its present disarray. Partners in major law firms earn at least one to two million dollars, and for relatively little work. Their job is to occasionally line up big clients, and if they manage to snare a few General Motors, Texacos and Pennzoils, the stakes are so high that it isn't worth quibbling over legal expenses, at least in the view of corporate executives.

Legislating the problems away will not work either. Right now, many state legislatures are experimenting with caps on damages and fees. While superficially attractive, these reforms are not necessarily just, or even particularly practical. Inevitably, exceptions will be carved out by the courts, but it is a cumbersome way to go and one which is antithetical to the free market. The first thing to do about litigation is to stop it.

President George Roche of Hillsdale College has emphasized that it is a lack of moral values that is at the root of the litigious society. Supreme Court Chief Justice Warren Burger once commented on the problem by observing that it seems people want to be compensated for every single thing that goes wrong in life. Is it any wonder then that business for lawyers is so good?

Aside from people's tendency to overuse the courts, there is another serious moral concern. Perjury has become a national pastime. Yet rarely is this crime punished, largely because it goes undetected. We have no Perry Masons, sadly enough, who can consistently unravel witnesses' testimony and make them writhe upon the floor in an agony of confession. It is safe to assume that 90 percent of what lawyers litigate is not documents or evidence but the credibility of witnesses. And sometimes you'd think that trials are held just to see who can get away with the most ridiculous stories. This is, as Dr. Roche perceives, a moral dilemma we must come to grips with.

"Is there too much access to the courts? Perhaps, but the answer doesn't lie in closing the avenues of redress; it is, rather, a matter of eliminating unjustified suits which fill the court calendar, cost taxpayers money, inflate awards, crowd out the cases in which real injury has been done and contribute to our cultural decline as a responsible and independent people."

In the meantime, people are bringing suits at the drop of a hat. Many are not after money: they are after vindication, satisfaction and revenge.

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We don't necessarily need new legislation to achieve this. We can make more frequent use of malpractice and countersuits against lawyers and plaintiffs who bring frivolous suits or abuse the legal process. We can streamline the court system itself with outside arbitration, fewer jury trials, and technical changes which do not harm the integrity of the law.

We can also begin to teach our youth that life is a compromise, that all injuries cannot be compensated or laid at someone else's door. We're not going to accomplish this by preaching to adults alone, or by getting temporarily worked up over a "crisis," or advocating "quick fix" solutions.

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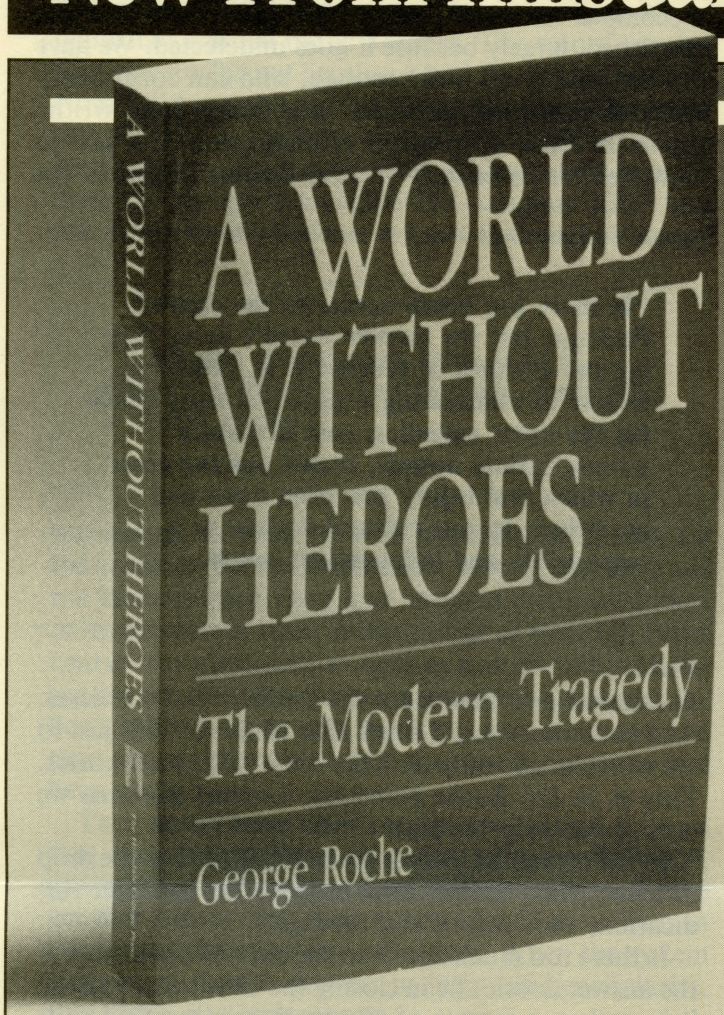

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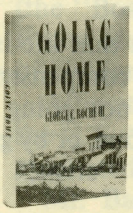

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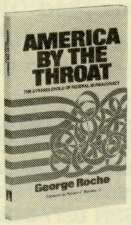

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