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The Litigious Society

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THE LITIGIOUS SOCIETY. By *Jethro K. Lieberman*. New York: Basic Books, Inc. 1981. Pp. xiv, 212. $13.95.

The widely held perception that "[o]urs is a law-drenched age" (p. xi) has provided the impetus for Jethro Lieberman's *The Litigious Society*. One need not be a scholar to realize the validity of this perception. Indeed, the judiciary has often been criticized for contributing to a "legal explosion."[1] Lieberman's effort is worthwhile, however, because he goes beyond mere criticism; the book is an interesting and valuable examination of the underlying causes and the consequences of America's increasing litigiousness.

Lieberman first discusses the "movement from contract to fiduciary"[2] and its effect on our legal system (p. 20). Our social philosophy once extolled "individual self-reliance," but today we are increasingly concerned for the welfare of others (p. 19).[3] The movement away from the classical liberal notion of caveat emptor, Lieberman argues, has profoundly altered the legal system. In particular, the simple rules that characterized contract law have been replaced by *fiduciary* rules. But these "fiduciary rules are far less capable of being translated into operationally precise terms. Standards, rather than rules, become the norm, and the resulting imprecision prompts litigation" (p. 21).

This movement toward standards, Lieberman notes, has also produced a new *type* of lawsuit. Increasingly, courts are faced with cases that differ dramatically from the "conventional"[4] lawsuit in-

1. Lieberman cites the following: Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Rosenberg, *Contemporary Litigation in the United States*, in LEGAL INSTITUTIONS TODAY 152 (H. Jones ed. 1977); Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Footlock, *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42; Tribe, *Too Much Law, Too Little Justice*, THE ATLANTIC, July 1979, at 25; *Those **** Lawyers*, TIME, Apr. 10, 1978, at 56; *The "Rights" Explosion: Splintering America?*, U.S. NEWS & WORLD REP., Oct. 31, 1977, at 29.

2. Lieberman uses the term "fiduciary" loosely. P. 20. In the strict sense, "fiduciary" is used to describe a special legally mandated relationship *(e.g.*, that of a trustee to a beneficiary). However, Lieberman feels that "it is possible to interpret much of the changing face of the law as an attempt to charge a variety of relationships with a fiduciary character." Pp. 20-21.

3. Lieberman is quick to point out that "[t]his change in the law does not repudiate individualism nor does it embrace wholesale a welfare state as that term is often employed." P. 19. Rather, in seeking the proper standards of care, we must determine "what set of guiding principles and what rules that flow from them will maximize both freedom to act and freedom from injurious consequences of those acts." P. 19.

4. Citing Professor Abram Chayes, Lieberman states that the "conventional" lawsuit has the following qualities: (1) it is bipolar; (2) it is retrospective; (3) the remedy sought depends on the right claimed; (4) the suit is self-contained; and (5) the judge is passive. P. 30. *See*

volving two distinct parties and a concrete wrong. The parties in this "new style"[5] of litigation "frequently number many more than two and are rarely precisely identifiable" (p. 30). Similarly, the notion of a past "wrong" has become much less concrete; suits often involve ongoing or even future activity. Lieberman asserts that the increasing use of this new type of suit evinces a judicial preference for "total redress": "In essence, total redress stands for the proposition that no moral society can permit *any injury* to stand unredressed" (p. 31).

Our courts, Lieberman admits, have not yet implemented a system of total redress (p. 32). He believes, however, that total redress will eventually predominate. To demonstrate just how far in this direction courts have gone, he briefly describes five areas where litigation has mushroomed in recent years: products liability, medical malpractice, environmental protection, public institutions, and governmental immunity. Although it is not possible to treat all of these areas comprehensively in so short a book, Lieberman successfully presents a critical and lucid overview of each.

Despite these recent changes in the style of litigation, Lieberman ultimately concludes that litigation continues to serve a vital function in today's society. This conclusion, however, is not reached lightly; Lieberman appreciates the limitations and the excesses of our judicial system. For example, he lists six products liability cases where courts ignored traditional limits by reading into "the defectiveness standard their ultimate preference for total redress" (p. 45). Unfortunately, such examples of judicial excess are not uncommon, and Lieberman's more difficult task is to examine critically the reasons behind such opinions and the feasibility of alternative solutions.[6] In short, he believes that consumer lawsuits have been necessitated by industrial indifference to safety. He acknowledges that reforms may lessen the need for products litigation, but concludes that, in the final analysis, "reduction in litigation can come only from a substantial change in the methods of industry and a public perception that business is devoting major attention to safety" (p. 64). Until the public's demand for safety is met, Lieberman predicts, litigation will continue unabated and "in the great run of cases for quite good reason" (p. 65).

Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

5. The "new style" of lawsuit has, in part, these qualities: (1) it may involve an abstract collection of people or a nonidentifiable person; (2) it may concern future or ongoing acts; (3) it may involve intangible harm and the relief is not necessarily deducible from the nature of the harm; and (4) the court's involvement may continue indefinitely. P. 31.

6. In the area of products liability, for example, Lieberman notes that possible alternatives to litigation include a return to a market standard, no-fault insurance, workers' compensation, government regulation, overhauling certain aspects of tort law, and reforming industry. Pp. 52-65.

Lieberman's analysis of other areas of judicial expansion yields similar results. In each case, he concludes that litigation satisfies essential societal needs that have been inadequately met by other public and private institutions:

> The controversies in which the judges have been the most roundly condemned for overreaching — racial equality, reapportionment, prison and mental hospital reform — are precisely those areas in which the institutional breakdown was the greatest. If it was overreaction, the judicial response was directed to vast wrongs. [P. 183.]

Clearly, litigation is not the *ideal* solution to these problems. Lawsuits impose considerable burdens on the parties, burdens that are not necessarily justified by the end result. A lawsuit, moreover, often can provide only a piecemeal solution to a problem that may require a more expansive approach.[7] As Lieberman rightly points out, though, it is too easy to condemn lawsuits without looking at the broader picture. After examining the alternatives to litigation and their limitations (pp. 171-75), he concludes that, in general, lawsuits are a valid and necessary attempt to achieve justice in an imperfect world: "Until the day when our institutions can be trusted to serve us as fiduciaries . . . litigation will remain the hallmark of a free and just society" (p. 190).

In all, *The Litigious Society* is a much-needed investigation of a perplexing problem. It does, however, have its limitations. First, since Lieberman's intended audience is the general reader, his book will not satisfy law students or legal scholars.[8] Second, as Lieberman himself points out (p. xi), it is only a preliminary inquiry into a largely unexplored phenomenon: "Indeed, even so rudimentary a statistic as the total number of lawsuits filed in court each year is unknown" (p. xi). The unknown frequently invites dispute, and this book will be no exception; not all will agree with Lieberman's observations and conclusions. Nonetheless, his work offers valuable insights in an area where careful analysis does not always precede vocal criticism.[9]

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7. But litigation is not an ideal means of building community: its procedures and its impact do much to sow mistrust, and its limited successes may blind us to the need for reforms that lie outside the ceaseless cycle of plaintiff and defendant. As long as people are being harmed by human activites, litigation remains at best a short-term answer. P. 186.

8. Other specialists may also be less than satisfied. For example, Lieberman's analysis of the medical malpractice "crisis" appears too conclusive for an area so fraught with controversy. One suspects that some members of the insurance industry or medical profession would take issue with much of his analysis in this area.

9. *The Litigious Society* is also reviewed by Johnston, *In America Suing Seems to Work*, N.Y. Times, Apr. 5, 1981, § 7 (Book Review), at 13; Glazer, *Is the Litigation Explosion Good for the U.S.?*, Wall St. J., Oct. 1, 1981, at 26, col. 3.