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Book Review: The Litigious Society

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BOOK REVIEW

THE LITIGIOUS SOCIETY. By Jethro K. Lieberman.* Basic Books, Harper and Row Publications, New York, New York. 1981. Pp. 212. Reviewed by Alfred L. Scanlan, Jr.†

Jethro Lieberman has written a reflective and thought provoking book, the premise of which can be gleaned from its title, *The Litigious Society.* Lieberman, exploring the nature of litigiousness and tracing its causes, speculates upon its limits and the lessons which a democratic society might learn from its own increased propensity to litigate. Exhibiting an admirable grasp of the substantive law of products liability, medical malpractice, environmental protection, institutional reform of mental hospitals and prisons, and governmental immunity, Lieberman artfully blends them into his general premises regarding our litigious society.

The Litigious Society is an antidote to the apparent current perception that we are a society plagued by unnecessary and often baseless litigation and burdened by imperious and untouchable judges[1] who smite the mighty without regard for the consequences of their decisions. Lieberman concedes the presence of baseless suits and judges who exceed their authority. Yet he finds them to be among the lesser of the problems posed by modern litigation. The author believes that it is a far greater problem and perhaps a serious institutional defect that meritorious suits often drag on through delays and significant discovery skirmishes — perhaps discovery wars — until such time as the merits of the suit are sacrificed entirely. Thus, it is not the American penchant for going to court that bothers Lieberman; it is what happens to a meritorious case once it gets there that troubles him. He would disagree with St. Paul that "it is altogether a defect in you that you have lawsuits with one another."[2] Lieberman seems to fear that the fictional case of *Jarndyce v. Jarndyce,*[3] in which the lawsuit lasted for decades due to the greedy machinations of the attorneys, might, at the hands of modern practitioners of discovery abuses and delays, become a reality.

In a very cogent opening chapter, Lieberman ascribes the present atmosphere of litigiousness to the confluence of trends, an ever-expanding, more complex, and increasingly fragmented society, altering individual perceptions of accountability. A dramatic change has oc-

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1. *See* Stump v. Sparkman, 435 U.S. 349 (1978).
2. 1 *Corinthians* 6:7.
3. C. DICKENS, BLEAK HOUSE (1852-1853). Eventually, the merits of the case became unknowable and the potential ultimate recovery reduced to zero by the attorneys' fees incurred.

curred whereby human actors — whether known or unknown — have supplanted divine or natural causes as the perceived proximate causes of the woes of others. To put it less elegantly than Lieberman might, in much earlier times Mrs. Palsgraf[4] might well have attributed her unfortunate experience at the train station to a vengeful deity or the forces of nature beyond both her control and that of the railroad. But as generations of law professors have earned their livelihood explaining, Mrs. Palsgraf chose not to accept her fate meekly. She and others, like her soul mate Mrs. MacPherson,[5] were the harbingers of a change of seasons.

In Lieberman's view, we are in the midst of that season and moving toward a system of "total redress . . . , the proposition that no moral society can permit any injury to stand unredressed."[6] An attribute of a fiduciary social system, total redress has become far more important than fault. Recognizing this, Lieberman fails to accord adequate weight to the possibility that society's tendency toward total redress and removal of fault actually compels defendants to fight every battle and burn every bridge. For example, consider a typical products liability case in which the plaintiff sues both the manufacturer and the distributors of a piece of machinery. The original manufacturer has gone out of business, so plaintiff sues a company that purchased some of the manufacturer's assets three years after the sale of the machinery which injured the plaintiff. The purchasing company never manufactured or repaired the type of machinery at issue. Nonetheless, given the trend toward total redress, why should the defendant company take the chance that, precedent notwithstanding, the judge assigned to its case might extend strict liability in tort to anyone who acquires any asssets or the name of the prior manufacturer of the offending goods? Keep in mind that the Long Island Railroad Company may very well have taken Mrs. Palsgraf lightly, given the prior state of the law. It may be that some or even many worthy plaintiffs have their suits languish while the several skilled lawyers representing defendants manipulate every tactic of delay left open to them by the legal system. Yet, by undertaking the scorched earth defense, those defendants are reacting to the same societal trends as are the plaintiffs.

Lieberman, not unmindful of the problems which litigiousness has caused the business community, nonetheless believes that the fiduciary ethic is validly applied to industry. Citing examples of companies that have responded rationally to the heavy volume of products litigation by self-insuring and pressuring employees to be safety conscious, Lieberman concludes that industry itself has the means to reduce the risks and

4. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
5. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The *MacPherson* case marked the demise of the privity of contract requirement in product liability cases.
6. THE LITIGIOUS SOCIETY at 31.

costs attributable to defective products and to eliminate excess litigation.

Lieberman is more sympathetic to the plight of doctors than he is to captains of industry. He notes that the requirement of safety and fitness of a single product is subject to clear definition through litigation; thus, through a succession of lawsuits, a definite duty to build crash-worthy cars might evolve. In contrast, medicine is as much an art as a science, and a progression of lawsuits setting standards of care cannot dictate what a doctor must do. Yet Lieberman would not offer doctors any greater protection from suit. He believes that perhaps the excessive tendency to sue physicians will not diminish "until the profession itself recognizes its longstanding obligation to clean up its own house."[7] As in the products field, his ultimate answer is a simplistic and not very satisfying one — Don't cry; just be more careful.

The most significant lesson taught in *The Litigious Society* is that there are limits to the perfectibility of our judicial system. Lieberman questions the effectiveness and even the ability of courts to deal with the current technological, political, and sociological problems. In a typical negligence case of yesteryear, the decision was a simple one: Did the defendant act reasonably under the circumstances and, if not, was the defendant's negligence the proximate cause of injuries to the plaintiff? Today, on the other end of the judicial spectrum, the question of whether IBM was violating the antitrust laws was one which IBM and the government spent millions of hours, hundreds of millions of dollars and ten years of a court's time to resolve. It is now history that the court never reached a decision because the parties chose, for multiple complex reasons, to end the dispute. The IBM-type controversies have led many to suggest that various aspects of the judicial system — specifically the jury trial — are totally inappropriate and obsolete tools for dealing with the technologically complicated problems of modern society. Lieberman does not touch in any detail upon that question, but it illustrates one of his principal points regarding the limitations of litigation.

Lieberman also raises profound questions about the ability of courts to perform what he describes as polycentric tasks. Defined simply, a polycentric task is one in which any single decision will have ramifications for each of the remaining decisions. A timely example is when a court attempts to adjudicate racial balances at public schools. Since the racial balance at any one school will affect the racial balances at all others, that is a polycentric task. Related to Lieberman's discussion of polycentric tasks is his inquiry into courts' limitations in dictating public policy.

While there was widespread opposition to the 1954 United States

7. *Id.* at 92.

Supreme Court decision of *Brown v. Board of Education,*[8] today virtually everyone would acknowledge that the narrow issue of whether a racially dual school system violated the fourteenth amendment was a proper one for the court to consider. Nor would there be many today who would contend that it was improper in *Swann v. Charlotte-Mecklenburg Board of Education*[9] for the Supreme Court to order affirmative and rather detailed types of relief in order to implement the *Brown* decision of some seventeen years previous. But the success of the courts to make public policy through these constitutional adjudications has been limited. Lieberman suggests that "a quarter century after the celebrated *Brown v. Board of Education* case, the courts are still seeking effective remedies to the seemingly simple violation of children's rights not to be compelled to attend segregated schools."[10] In that regard, Lieberman has missed the operative fact that it has now been over a quarter of a century since *Brown.* The world in 1982 is comprised of a more transient population whose attitudes have undergone significant changes. Remedies which may have been appropriate in 1954 are currently out-dated. Indeed, it may be impossible for courts to effectively dictate enduring public policy for this ever-changing public. Consider for a brief moment the case of *Pasadena City Board of Education v. Spangler.*[11] There, in a brief and subtly worded opinion, the United States Supreme Court seemed to be admitting the limits of even its own authority to remedy past wrongs. The Pasadena City Public Schools, as a result of litigation in the United States District Court for the Central District of California, had been under an order that there was to be no school "with a majority of any minority students."[12] The defendant school board submitted a desegregation plan that was approved by the district court. Years later, the defendants filed a motion with the district court to modify its 1970 order by eliminating the "no majority" requirement. The defendants alleged that they had complied with the original court order and that, apparently because of racial trends in the demographics of the area, it was no longer possible to keep minority enrollment under fifty percent at a substantial number of the Pasadena schools. In vacating a district court order denying the defendants' motion for a modification of the plan, the Supreme Court noted that "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations . . . , the District Court ha[d] fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."[13] Cognizant of the exhortations in *Brown* and *Swann* that the vestiges of prior discrimination must be eliminated "root and branch," the Supreme Court

8. 347 U.S. 483 (1954).
9. 402 U.S. 1 (1971).
10. THE LITIGIOUS SOCIETY at 30.
11. 427 U.S. 424 (1976).
12. *Id.* at 427.
13. *Id.* at 437.

quietly, but decisively, concluded that there were limits to the power and ability of courts to determine what the vestiges were and to deal with demographically reflected choices of private citizens. Whether that type of sound judicial logic becomes a bellwether or not remains to be seen. It is not addressed by Lieberman in any detail.

Lieberman's defense of political social change through litigation is troubling. He strains to represent the federal judiciary as a more democratic institution than it is. He goes even further to argue that even if the courts are not democratic institutions, then neither is Congress. However, Lieberman mystically fashions the courts as the flamekeepers of the American democratic tradition. Thus, according to Lieberman, when a court is forced to enter a dispute there lies proof that the other institutions of democracy have not adequately performed their tasks. He fails to consider that non-intervention by the legislature is just as much an expression of choice as is intervention. The fact that legislative inaction is at least decided by elected representatives of the people, whereas judicial intervention reflects individual choice of a non-elected official, does not strike Lieberman as significant. The current proposed anti-busing legislation which has passed the Senate proves Lieberman wrong in that regard. That proposed legislation shows that elected representatives of the people have reacted to the often misplaced, excessive, and muddling meddlesomeness of those least democratic institutions — courts.

It would be fitting if Lieberman's book had the effect of giving a much needed perspective to the debate over the possible limitations of the courts' jurisdictions and powers. Two things appear to this writer to be indisputable: (1) Congress has the right, in some circumstances, to contain the Supreme Court and the lower federal courts;[14] and (2) all previous changes and attempts to change the jurisdiction and the powers of the federal judiciary have been motivated, not out of a sense of jurisprudential concern, but rather out of partisanship of the rankest kind.[15] Perhaps in his next book Mr. Lieberman will bring his objective and well-reasoned perspective to that present and not always uplifting debate.

Lieberman's apparent belief that "litigiousness may be viewed . . . as a clarion of social health"[16] is unique. His supporting arguments are cogent, if not always persuasive. The true value of Lieberman's book lies in the fundamental political and jurisprudential questions that he

14. The relevant language of art. III, § 2 of the United States Constitution provides: "The Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions and under such regulations as the Congress shall make."

15. *See* Meserve, *Limiting Jurisdiction and Remedies of Federal Courts,* 68 A.B.A.J. 159 (1982); Williams, *Congress and the Supreme Court,* Nat'l Rev., Feb. 5, 1982, at 109. *See also* 2 G. HASKINS & H. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES; FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815, at ch. 5 (1981); H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 119-24 (1981).

16. THE LITIGIOUS SOCIETY at 8.

weaves from the book's fabric. For its provocation of thought, *The Litigious Society* merits attention.