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Suing as a First Resort (reviewing Marks, The Suing of America: Why and How We Take Each Other to Court and Lieberman, The Litigious Society)

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Review Article

Suing as a First Resort: A Review of Marks's *The Suing of America* and Lieberman's *The Litigious Society*

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A 24-year-old Colorado man sought $350,000 damages in a suit against his mother and father for improper parenting. He claimed that his parents willfully and wantonly neglected his need for food, clothing, shelter, and psychological support. Among the "wanton" incidents on his parents' part he cited as proof: after he was suspended from school for smoking and selling marijuana, his parents punished him by making him cut weeds in the back yard; after he quit tenth grade and subsequently was expelled from a private school, his parents conditioned any further support on his either attending school or seeking employment.[1]

Press coverage of cases like this have led to the popular perception that we have become a suing society. Jerold S. Auerbach, professor of history and law at Wellesley College has commented: "Few Americans, it seems, can tolerate more than five minutes of frustration without submitting to the temptation to sue."[2]

And indeed, some of the suits that are brought seem to support Auerbach's accusation. In Washington, football fans sued a referee after his disputed call on a touchdown pass.[3] A man who left a lottery ticket as a tip for a bartender sued to claim the proceeds when the ticket won $10,000 in prize money.[4] And the Italian Historical Society sought to enjoin the U.S.

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1. Hansen v. Hansen, 608 P.2d 364 (Colo. App. 1980). See also 64 A.B.A.J. 961 (1978); Lori B. Andrews, Kids vs. Parents: What Makes Johnny Sue? Chicago Sun-Times, Mar. 14, 1981, at 67.
2. Jerold S. Auerbach, A Plague of Lawyers, Harper's, Oct. 1976, at 42.
3. *Id.*
4. Marlene Adler Marks, The Suing of America: Why and How We Take Each Other to Court 113 (New York: Seaview Books, 1981).

Postal Service from issuing an Alexander Graham Bell stamp on the ground that Antonio Meucci, rather than Bell, invented the telephone.[5]

The perception that people are bringing more lawsuits today than they ever had in the past, are going to court for more trivial matters, and are asking for outrageously large judgments is not just the subject of popular press articles. Whole industries and professions express these attitudes. Manufacturers decry what appears to be the mushrooming product liability litigation, and doctors practice defensive medicine in response to the perceived medical malpractice litigation crisis. Even members of the legal profession have begun to complain about litigiousness. Chief Justice Burger has stated, "we may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated."[6] And a former deputy attorney general of the United States, Laurence H. Silberman, has said, "The legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy."[7]

These statements are based on the premises that there has been a per capita increase in the number of lawsuits, that this is a modern phenomenon unparalleled in American history, and that this is due to the substantive law changes regarding who can sue, whom they can sue, and what they can sue about. But the validity of each of the premises is far from obvious and each deserves careful empirical research.

Two new books, Jethro K. Lieberman's *The Litigious Society* and Marlene Adler Marks's *The Suing of America: Why and How We Take Each Other to Court*, pose a number of questions that could serve as a starting point for research on litigiousness. Neither book was written for lawyers, and each takes a slightly different approach to the issue. Marks's book is written in a breezy style, including references to lawsuits that seem to have been mentioned solely due to celebrity litigants (thus, she discusses the suit, after comedian Freddie Prinze's suicide, by his mother against his doctor; Doris Day's suit against her manager; Jean Seberg's libel suit against *Newsweek*; Jane Fonda's suit against Richard Nixon). In most instances, Marks concentrates on the human interest angle of the suit, describing in detail the personalities of the parties. Governor Jerry Brown, for example, is described as a "former Jesuit student (and later boy friend of rock star Linda Ronstadt)."[8] Her focus on the parties is re-

5. Jethro K. Lieberman, The Litigious Society 4 (New York: Basic Books, 1981), *citing* N.Y. Times, Feb. 27, 1976, at 35.
6. *Id.* at 8, *citing* Time, Apr. 10, 1978, at 56.
7. *Id.*, *citing* Will Lawyering Strangle Democratic Capitalism? Regulation, Mar./Apr. 1978, at 15.
8. Marks, *supra* note 4, at 103.

flected in the fact that she organizes her inquiry around the individual motivations behind each lawsuit; almost every chapter deals with a single reason why people bring lawsuits—such as protest, political and social change, money, vindication, and harassment.

Lieberman's book takes an alternative tack. Perhaps because he is a lawyer,[9] he delineates his chapters according to legal concepts, such as product liability, medical malpractice, and environmental lawsuits. His concern is with principles rather than personalities. His arguments and the material he cites in footnotes indicate that he has read more widely in the legal literature than has Marks.

Both Marks and Lieberman attempt to analyze the current attitude that Americans are litigating too much. They agree that any discussion of litigiousness should not focus on number (of lawsuits, of large awards) but rather, as Jethro Lieberman puts it, on "the underlying right of redress, its exercise, and its consequences."[10]

The Suing of America and, on a more sophisticated level, *The Litigious Society* attack some myths about the current use of litigation in the United States. They raise many questions about litigiousness that deserve further study by legal scholars and sociologists. These questions will be dealt with in the following three sections.

Has there been a significant increase in the number of lawsuits filed and the amount of damages awarded?

There is no doubt that there has been an increase in federal lawsuits, by 84 percent, from 1965 to 1975.[11] Since statistics on the total number of lawsuits filed per year on a state level are not maintained (estimates range from 5 million to 12 million),[12] it is more difficult to analyze state trends. Even states that maintain general statistics about filings may not have them categorized sufficiently to allow analysis.

Because of the paucity of reliable statistics on the types of litigation that account for the growth, various groups for their own purposes have made hard-to-verify claims about the increase in litigation. In 1977, an insurance company ran a full-page advertisement stating that one million product liability suits were being filed annually.[13] Industry fears of large

9. Although Marks is not a lawyer, the jacket of her book notes that her husband is. I certainly hope that tag line was forced upon her by an editor, rather than written by her to try to capture credibility for an osmosis-like familiarity with law. Believing her legal analysis because she is married to an attorney would be like undergoing a brain operation done by the husband of a neurosurgeon.
10. Lieberman, *supra* note 5, at xi.
11. *Id.* at 5.
12. *Id.*
13. *Id.* at 33.

verdicts were rampant. But an extensive investigation by the federal Interagency Task Force on Product Liability turned up only 84,000 product liability suits per year.[14] Rather than being forced to pay consistently large damages, as insurance companies claimed, manufacturers actually won three-quarters of the cases and paid out an average of $4,000 in those that they lost.[15]

In addition to needing better statistics about the incidence of particular types of lawsuits, data are needed on the potential liability of various enterprises. Eighty-four thousand product liability suits per year may seem excessive until it is noted that fewer than 1 percent of the people who incur product-related injuries file suit.[16] Similarly, close attention needs to be paid to the figures of exposure versus lawsuit incidence in the medical malpractice area. The rate of malpractice filings must be viewed in light of hospital studies indicating that each year patients suffer approximately 400,000 injuries due to medical negligence and that an estimated 5 percent of the nation's doctors, serving 10,000,000 patients each year, are incompetent.[17]

What is the historical significance of the current level of litigiousness?

The current litigation figures also need to be put into historical perspective. Consider the following statement:

> Lawyers are plants that will grow in any soil that is cultivated by the hands of others, and when once they have taken root they will extinguish every vegetable that grows around them. . . . The most ignorant, the most bungling member of that profession will, if placed in the most obscure part of the country, promote litigiousness and amass more wealth than the most opulent farmer with all his toil.[18]

Although it may sound like a statement out of the mouth of the Chief Justice or out of the pages of *Time* magazine, it was written by H. St. John Crevecoeur in the same year that the United States Constitution was drafted.

14. *Id.* at 34.

15. Across all types of cases, there may be a misperception that the awards are higher than they actually are. Initially, media reports of a case focus on the amount the plaintiffs ask for, which often is far more than any amount they can expect to win. Moreover, even the amount that juries award may bear no resemblance to the final amount that the plaintiffs receive. Marks refers to a number of cases where judges have lowered the jury verdicts significantly or plaintiffs have agreed to settle for less than the jury verdict rather than risk a reversal on appeal. See, e.g., Marks, *supra* note 4, at 120 ($1.2 million jury verdict in asbestosis case reduced to $250,000 by trial judge).

16. Lieberman, *supra* note 5, at 49.

17. *Id.* at 68.

18. H. St. John Crevecoeur *in* Letters of an American Farmer, *quoted in* Charles Warren, A History of the American Bar 217 (Boston: Little, Brown, 1912), *cited in* Lieberman, *supra* note 5, at 15.

Both Marks and Lieberman note that our society has a tradition of litigiousness. Marks points out: "Our founding fathers were a litigious bunch; they would sue each other if one's stray horse ate another's clover."[19] And Lieberman notes that in postrevolutionary Worcester, Massachusetts (population 5,000), there were more than 2,000 lawsuits on the docket.[20] Elsewhere during that period, because of people's concern with the increase in litigation, courthouses were burned or nailed shut.

These examples of past litigiousness give rise to the question of why so much attention has been focused on the phenomenon of late.[21] Lieberman hypothesizes that those who feel that liability has expanded are making a comparison to the mid-1800s. With the dawning of the industrial age, says Lieberman, "[j]udges mindful of economic progress would look for ways to contract . . . a defendant's duty of care."[22] The judges' tactics included the extensive use of contributory negligence and assumption of risk, prohibition against wrongful death suits, and the invention of doctrines like the fellow servant rule, which said that an injured worker could not recover damages if his injury was caused by the negligence of a fellow worker. (This meant that work-related injuries almost always went uncompensated because recovery against the company was possible only if the owner or manager was personally at fault.)

According to Lieberman, it is the industrial revolution's contraction of liability, not the present litigiousness, that should be viewed with distrust. "Many critics of our present litigiousness look back favorably to this heyday of virtual immunity from liability for damages, even in the most serious cases, as the norm," says Lieberman. "In this they are mistaken, for it was a . . . falling away from an older, sounder norm."[23]

Whether the old rule actually was a sounder norm deserves a more extensive study than Lieberman is able to give it in his book. In particular, the procedural and substantive changes in law that have been made since the industrial revolution need thorough analysis.

Are courts overreaching?

Much of the current criticism of litigiousness focuses not on the "lawyers, as hungry as locusts," but on the courts. Judges are viewed as mak-

19. Marks, *supra* note 4, at 110–11.
20. Lieberman, *supra* note 5, at 14.
21. See, e.g., Auerbach, *supra* note 2; Laurence H. Tribe, Too Much Law, Too Little Justice, Atlantic, July 1979, at 25; Too Much Law? Newsweek, Jan. 10, 1977, at 42; Those **** Lawyers, Time, Apr. 10, 1978, at 56; The Rights Explosion: Splintering America? U.S. News & World Rep., Oct. 31, 1977, at 29.
22. Lieberman, *supra* note 5, at 37.
23. *Id.* at 39.

ing law rather than interpreting it and, in the words of Nathan Glazer, as going "beyond the wrong presented to them to sweepingly reorganize a complex service of government so that wrong can be dealt with—in the Court's mind at least—at its root."[24] Critics of the expansion of the court's function point to a 1973 case in Boston in which a federal district court ordered the state to sell lands and construct a new prison with the money.[25]

Lieberman introduces evidence that except for a few rare cases like the Boston one, courts have not altered their function as much as the critics imply. He analyzes the case of *Wyatt v. Stickney,*[26] in which Judge Frank M. Johnson, a federal judge in Alabama, ordered more than 50 changes in state-run mental hospitals. The order specified such things as the doctor-patient ratio, the number of toilets per patient, and the permissible range for the hospital temperature. But Lieberman points out that virtually all the provisions came from a memorandum of agreement of the parties,[27] rather than from the fertile imagination of the judge. This point suggests an area of litigation for study: the use executive agency officials (even as defendants) make of the courts in order to win changes that they could not win through the political and legislative processes.

While the blame is usually put on the courts that hear cases, much of the present litigiousness is due to congressional acts passed in the mid-1960s that covered private activities. These acts began to be used and challenged in the courts in the mid-1970s and, in Lieberman's view, account for much of the current litigation.[28]

What new substantive rights have people attained?

Reports of suits for parental malpractice or sexual harassment give the impression that many of the actions that people brought in the 1970s and are bringing in the 1980s involve novel legal theories. Whether new causes of action are the predominant reason for the increase in litigation is disputable. Lieberman points out, for example, that the perceived glut of medical malpractice cases was based on standard negligence principles rather than on new legal theories.[29] If cases were classified by substantive

24. Nathan Glazer, Towards an Imperial Judiciary? Pub. Interest, Fall 1975, at 118, *quoted in id.* at 113.

25. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974).

26. Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

27. Lieberman, *supra* note 5, at 122.

28. Lieberman points out that the "rate of civil filings . . . remained nearly constant from 1960 to at least the mid-1970s." *Id.* at 6.

29. Lieberman points out that although the standard of care in, e.g., specialty cases changed from being that of doctors in the local community to a national standard, "it did not change the basic rule

area, as suggested earlier, it would be possible to determine where the increase in litigation has actually occurred and determine the effect of expansions in who can sue, who can be sued, and what they can sue about.

Much of the popular press coverage of litigiousness focuses on who can sue. Some cases are *sui generis.* For example, in only one case has an infant born with birth defects been allowed to sue on a theory of "wrongful birth."[30] More generally, however, cases and statutes have expanded the scope of possible plaintiffs in recent years by allowing for private rights of action in cases where traditionally the government was the only party with an enforceable interest.

Also in the public eye have been cases expanding who can be sued. Last year, extensive coverage was given to the case of a Massachusetts woman who sued her husband for failing to shovel the snow in front of their house, which she said caused her to slip and injure herself.[31] One defect in Lieberman's otherwise excellent book is that he does not discuss the erosion of interspousal and intrafamilial tort immunity, giving the injured person the right to sue someone close to her for negligence. He does make the more important point, however, that there has been an expansion in the scope of liability of seeming strangers to injured persons. Thus, landlords have been liable for money damages when a rape occurs in their security-poor building, and a psychiatrist has been found liable when he failed to warn a third party that his patient intended to kill her. Sir Henry Maine in 1875 spoke of the movement of society from "status to contract,"[32] a movement away from people being born into a particular role to a situation where individuals were free to negotiate their agreements. Lieberman, a century later, characterizes the current movement of the law as being from "contract to fiduciary,"[33] in which the law attempts to charge a variety of relationships with a fiduciary character.

In focusing on the expansion in who can be sued, however, Lieberman gives short shrift to the legal changes in what people can sue about. While the elimination of the need for privity of contract increases the number of entities in the chain of distribution that an injured person can sue (and thus fits into Lieberman's analysis of a move from contract to fiduciary),

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that it was the medical profession which defined the acceptable standard of practice." *Id.* at 71. And although development of the informed consent doctrine might be viewed as a change in substantive law affecting doctors, Lieberman points out that informed consent figured in only about 3 percent of the cases, in which only 2 percent of the total payments were involved. *Id.* at 88, *citing* National Association of Insurance Commissioners, Malpractice Claims 92–93 (Milwaukee: National Association of Insurance Commissioners, 1976).

30. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

31. Fred Barbash, Courts Increasingly Asked to Rule on Affairs of Heart, Wash. Post, Aug. 18, 1980.

32. Sir Henry Maine, Ancient Law 100 (New York: Dutton, Everyman's Library, 1917), *cited in* Lieberman, *supra* note 5, at 20.

33. Lieberman, *supra* note 5, at 20.

in other areas whole new causes of action for injuries to civil rights or the environment have been made justiciable. Those laws and cases that appear to make previously legal acts unlawful may be subject to attack in years to come. It is not hard to imagine legislators being reluctant to pass laws creating new rights when their constituents believe that society is already suffering from too much law. It is also plausible that critics of litigiousness will demand from courts and legislators a litigation impact statement (similar to industry's required environmental impact statement) when the lawmakers wish to grant new substantive rights.

Before these scenarios become reality, various studies about the amount of litigation that a grant of new rights provokes are warranted. An analysis is needed to determine, for example, whether particular cases announcing novel legal theories actually set precedents or are merely judicial aberrations. Doctors were worried about the potential effect of the case of *Helling v. Carey,*[34] in which the Washington Supreme Court did not look to the standards of the medical profession in determining negligence, but held a doctor liable for not testing a young woman for glaucoma even though it was standard practice not to administer such tests to people under 40. Although this case has been characterized by University of Chicago law professor Richard Epstein as "one of the most important [malpractice] decisions to come down in recent times,"[35] the effect of the 1974 case has been minimal. Lieberman points out that not a single court has adopted the *Helling* rule, and, in Washington state a year after the case was decided, the legislature adopted a law to prevent the application of the rule in future Washington cases.[36]

A similar panic ensued when the courts started getting involved in sexual harassment cases. A judge in such a case predicted that an invitation to dinner would become an invitation to a federal lawsuit,[37] but the cases themselves do not appear to bear that out.

A close look at who's suing whom about what can pinpoint the areas in which there has been an expansion in litigation. This can be helpful in determining such things as how insurance premiums can be priced[38] and

34. 83 Wash. 2d 514, 519 P.2d 981 (1974).

35. Richard A. Epstein, Medical Malpractice: The Case for Contract, 1976 A.B.F. Res. J. 87, 113.

36. Lieberman, *supra* note 5, at 78.

37. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd and remanded,* 568 F. 2d 1044 (3d. Cir. 1977).

38. Lieberman unearths evidence that both product liability insurers and medical malpractice insurers blamed their mid-1970s raise in premiums on increased litigation and large judgments even though they had no sound basis to make that claim. The federal Interagency Task Force on Product Liability found in 1977 that it was "not possible to correlate premium increases with trends in the number and severity of claims." Lieberman, *supra* note 5, at 49–50. For one thing, product liability insurance was not offered as a distinct line of coverage until 1978. *Id.* at 49.

In the medical malpractice area, Lieberman makes the claim that "the malpractice crisis was a function of insurer malpractice." *Id.* at 85. He points out that insurance companies make money in two

which court resources need to be expanded. But determining how much litigation is too much and pinpointing the areas in which the system seems to have gone awry requires more subtle analysis. Although there is a strong popular sentiment that Americans litigate too much, litigiousness is in the eye of the beholder. Doctors want to stop patients from suing them but at the same time "would not for a instant wish to be deprived of their right to sue their investment advisers for fraud or perhaps incompetence (financial malpractice)."[39] Corporations disparage environmentalists for using those dilatory litigation tactics that the business community itself pioneered.[40]

Lieberman makes the point that "unlike crime or foul weather, litigiousness is something that cannot even be sensibly deplored in the abstract."[41] His statement underscores the notion that we cannot even begin to criticize the level of litigiousness until we understand the types of cases being brought as well as their purposes, results, and effects.

Many who would turn back the clock to simpler notions of lawfulness overlook the societal changes that make such a retrenchment impossible. When people grew their own food and worked their own land, there was not the same possibility for lawsuits about adulterated products and unsafe working conditions.[42] If litigation has increased, it has increased in part because there are a greater number of people whose activities have the potential for doing us a greater degree of harm.

As society has gotten more complex, there has also been a decrease in the strength of those mediating structures that historically could help us accept or resolve conflict without a lawsuit.[43] Churches, family, communi-

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ways—through premium income and through investment income. According to Lieberman, although malpractice claims had been rising since the late 1960s, "there was no outcry from the industry until 1973 when the stock market finally soured." *Id.* at 84. By 1974, stock market losses of insurance companies totaled $3.3 billion (nearly double that of underwriting losses). That's when the insurance industry "discovered" the malpractice crisis and started raising rates. And, since few state insurance commissioners before 1975 collected statistics about malpractice claims, the industry's assertions went undisputed. Lieberman notes that in contrast to those companies that raised rates after suffering great losses in the stock market, one malpractice insurance company that had a conservative investment philosophy (and thus had no stock market losses to recoup) had only a few rate increase requests, which were in keeping with perceived increases in liability. *Id.* at 83–85.

39. *Id.* at 91.

40. *Id.* at 109.

41. *Id.* at 7.

42. Lieberman notes that when nature, rather than social institutions, was the force most likely to do harm to a person, litigation was limited by the fact that one couldn't sue nature. *Id.* at 12. Not only have the social and technological advances provided people with more entities to sue, they have also made life more pleasant, with every difficulty seeming to be an enormous affront. "In a society that takes for granted what to any other age would be considered beyond utopia, each harm, every source of ill-being, cries out for redress." *Id.* at 187–88.

43. It is interesting to note that where other mediating structures such as community values are stronger than they are in the United States, lawyers and lawsuits are less necessary. In an Israeli kibbutz, for example, the sanctions of community opinion obviate the need for a lawsuit. Auerbach, *supra* note 2.

ty, and custom have diminished in importance in our mobile society, and suing may have consequently become a first rather than a last resort.

The panic about litigiousness has gotten so strong that, in *Bates v. State Bar of Arizona*, the State Bar of Arizona actually argued that lawyer advertising should be banned because, if people learned of their rights, use of the courts would be increased. But this lexiphobia is misplaced because an increase in lawsuits does not necessarily mean an increase in frivolous lawsuits. Justice Blackmun pointed out in *Bates*, "Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."[44]

If society does want to cut back on the use of the courts, where do we begin? Do we dismantle the civil rights law and relegate blacks to the back of the bus and women to the typing pool? Do we use the contract model[45] for every transaction between consumer and manufacturer, patient and doctor, lawyer and client, even though the complexities of society assure that one party will always be materially less well informed?

Thus far, the attempts to curb litigiousness appear to have been based on faulty reasoning and to have been unresponsive to the actual problems.[46] Any search for a cure to litigiousness is inappropriate until enough data are collected to determine whether litigiousness is actually a problem. To date, the analyses of litigiousness have notably lacked a scrutiny of the reasons individuals bring particular types of suits, the societal needs litigation serves, and the benefits and potential harms of litigation (besides the perceived harm of an increase in the use of the judicial machinery itself). The focus thus far has been on the level of litigiousness, rather than on how much litigation modern society actually needs. Until we can legitimately say what purposes litigation serves and how well it does so, we should be wary of the possibility of forcing people to "suffer a wrong silently" just to clear judicial dockets.

44. Bates v. State Bar, 433 U.S. 350, 376 (1977).
45. See, e.g., Epstein, *supra* note 35.
46. For examples of the shortcomings of legislation that has been passed to curb litigiousness, see Lieberman, *supra* note 5, at 51, 87.