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Writing About the Law

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JETHRO K. LIEBERMAN

Writing About the Law

ABOUT THE AUTHOR: Jethro K. Lieberman is a professor of law and vice president, academic publishing at New York Law School and founding publisher and editorial director of Tribeca Square Press, the publishing arm of New York Law School. From 1973–1982 he was legal affairs editor of *Business Week*. Among his many books are *The Litigious Society* (Basic Books, 1981) and *The Enduring Constitution* (West and Harper & Row, 1987), both winners of the American Bar Association’s top literary prize, the Silver Gavel. This essay is adapted from a speech given on February 16, 2007, in response to Tom Goldstein’s brief remarks honoring the twenty fifth anniversary of the publication of *The Litigious Society*, at the Symposium on Writing About the Law, co-sponsored by the Program in Law & Journalism at New York Law School and the *New York Law School Law Review*.

Thank you all for being here. This is really an honor. This has never happened to me before. The most staggering thing about it, which I discovered walking in, is that there is a copy of *The Litigious Society* on every table. There are more copies of the book here than were actually sold in 1981.

Although I made a lot of notes in advance for this occasion, I'd rather just tell a couple of stories. In the mid-1960s, when I was in my second year of law school, I wanted to find a job as a journalist. I went to the Harvard Law School placement office, but they couldn't help me. They had never heard of such a thing as a law student wanting to be a journalist, and they told me to go away. So I wrote a lot of letters. I wrote to every news organization I could find, about thirty-five or forty in all. I was incredibly excited to get three responses, one from *Business Week*, one from the *New York Herald Tribune* and one from ABC TV.

My future was assured, I thought, and I came to New York to interview at these places. When I got to ABC, I was convinced that I was going to get the job—until the interviewer became aware of what kind of work I wanted to do. He asked, “Are you saying that you want to report news about the Supreme Court?!” I responded that yes, that was what I was thinking of doing. The interviewer laughed and said, “Let me tell you something. We can't get more than sixty seconds *a year* about the Supreme Court on ABC News.”

That was forty years ago. Today, people everywhere talk incessantly about the Supreme Court, the law, and lawyers. You can't turn on the evening news without finding some discussion of the law or the courts, and such discussions are usually found on many shows each night. There has been an amazing movement toward reporting about law and the courts. Yet the reporting is not necessarily good, and I'm looking forward to the symposium to help enlighten us on why it is not.

Let me provide another vignette. In the mid-1970s, reporters told Americans that the United States was experiencing a product liability “crisis.” It was the first time that this issue became national news, and thus roughly fifteen years had elapsed before significant jury awards in strict liability cases had begun registering on the public consciousness.

All the journalists of the day, including me (for by then I was at *Business Week*, which had originally hired me that summer after my second year in law school and then taken me on full-time after graduation), started writing stories about this supposed crisis. Insurance companies were asserting very grave financial implications, complaining that they were being forced to pay out enormous sums of money to wanton plaintiffs who were looking to rob and pillage them with bogus claims.

The problem, however, was that none of the insurance companies separated product liability payouts from general liability payouts. And because they did not know how much they actually paid for product liability claims, the stories alleging a litigation “crisis” had very little basis. Indeed, the federal government even established an “Inter-Agency Task Force” to probe the issue, and soon discovered

that most of the stories circulating about product liability claims were false. By the early-1980s, these stories just faded away. Apparently, we had survived the crisis.

Then, in the mid-1980s, stories of a litigation crisis suddenly started running again. And guess what these stories pointed to as the cause of the rise in lawsuits against insurance companies? Tort law run amuck. Now, if you think about it, that's rather strange because throughout this whole period the assumption was that product liability lawsuits were increasing. So how is it possible that we faced the same crisis in the mid-1970s and the mid-1980s but not in the period between in the early-1980s? What would have caused concern over a lawsuit crisis to disappear? Certainly tort law did not suddenly turn away plaintiffs in the early-1980s and then just as suddenly invite them back five years later.

From a journalistic perspective, the problem was that there was a new generation of reporters (I was by then out of the business of reporting, having come to New York Law School). These journalists had not reported the story a few years earlier, and they did not visit the newspaper and magazine morgues to look at the clips of their predecessors to find out whether anybody had written about any of this before. Journalists (and the public) were being bamboozled all over again. The law, like all things, has a history. You cannot talk about significant developments in law without reflecting on that history. But journalists rarely do that. They report only about what happened yesterday, or maybe the day before that. If someone says we are suffering from litigiousness, that's what gets reported; whether or not we actually are suffering from litigiousness is not examined.

In the 1980s, a great cry went up (from important government officials and others) that lawsuits were ruining American business. Interestingly (and oddly), at the very same time government officials were also touting the wonderful, strong American economy. Well, here we are twenty-five years later, and you can still hear the same claims: "Lawsuits are destroying the American economy" and "the American economy is booming." What do you think the total number of lawsuits in the United States was about twenty years ago?

Female Voice 1: Twenty Thousand.

Mr. Lieberman: Twenty Thousand. Anyone else?

Male Voice 1: Fifty Thousand.

Female Voice 2: One million.

One million is a little low. The trouble is no one really knows much about the contours and impact of litigation. That's partly because nobody collects statistics about litigation in any particularly useful way. The National Center for State Courts does collect litigation numbers state by state. The last time I looked at the actual numbers in detail was in the mid-1980s, when the total number of U.S. lawsuits was said to be approximately one hundred million. Now, that's a

staggering number. To make it clear, let me ask you to look to your left and look to your right. One of the three of you has a lawsuit going. That is the implication of one hundred million lawsuits in a society with a population of three hundred million. Is one of the three of you in the middle of a lawsuit? Probably not. So we have to unpack that figure of one hundred million. It turns out that about seventy million of the supposed one hundred million lawsuits were, guess what? Traffic tickets. We speed a lot in this country. And in most states speeding tickets were denominated as lawsuits because tickets culminated in a judgment.

Another set of suits, consisting likely of many millions, were probate matters. They were in the courts, and there were named parties, so they counted as lawsuits. So as we parse out that staggering total of one hundred million, the actual number quickly dissolves. When these sorts of administrative matters are removed, the resulting number is approximately one million actual lawsuits. That's still a staggering number if it's really true, but I don't know that anybody knows that for sure. And I don't know if anybody to this day knows the economic implications of all these filings. Professor Marc Galanter, who has visited at New York Law School in the last few years, is one of very few people who have tried to look closely at these numbers, and he admits to the fuzziness of the data. It has been suggested that Congress has spurned efforts to fund the collection of data because it is afraid of what it might find out. It will either turn out we are too litigious or not litigious enough, I suppose.

Speaking intelligently about these matters requires a lot more work. It's our hope here at the law school that through the Program in Law & Journalism we can help serve the purpose of investigating whether the press not merely accurately, but adequately reports on the law. We are just beginning, and there's much to be done. But the question is whether there is room for such reporting in the face of shorter attention spans, smaller sound bytes, and an insatiable hunger for celebrity news. That's why I think our symposium is so exciting. It begins with a long overdue discussion of what we're doing collectively and individually when we write about the law. Nothing less important than the rule of law may ultimately depend on that discussion.

I do have one more thing to say about *The Litigious Society*, with the permission of my wife, Jo. It happened before I met her, when, in between marriages, I was briefly dating a woman whose son was at Amherst College. I gave her a copy of this book. Her son came home at Christmas time and saw this book sitting on a table. He asked her why she was reading it, as this was not her usual reading material. She told him that she was dating the author. He thought about that for a minute and then exclaimed, astonished, "Someone *wrote* that book?" It turns out that *The Litigious Society* was on his reading list for a political science course, and this was the first time that it dawned on him that books on his assigned reading list were actually written by human beings—who might even date his mother.

I'm delighted that you are here, and I look forward to the discussion by many distinguished participants in the symposium. I thank you all very much.