LAW &
LIBERTY

A Paean to the Great American… Lawsuit?

Mark Pulliam

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Americans have always been litigious. Tocqueville noted in *Democracy in America* (1835) that "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate." The aristocratic visitor from France, trained in the law, did not intend this as a criticism; to the contrary, Tocqueville viewed lawyers (and judges) in America as a stabilizing elite, and praised the extent that "the whole community" (including the "lowest classes") was influenced by the emerging country's "legal habits." Was Tocqueville's infatuation with the legal profession, which he believed tempered "the excesses of democracy," well-founded? Nearly two centuries after Tocqueville's tour of a nascent America in 1831-32, some in the academy evidently think so. In *Litigation Nation*, legal historian Peter Charles Hoffer argues that litigation "defined the new American nation"—in a good way. His case—sketchily made in a breezy account intended "for the general reader"—is less than compelling.

An Abbreviated History

Let us begin with what *Litigation Nation* is not. Despite being subtitled *A Cultural History of Lawsuits in America*, the book is not a comprehensive survey of the subject of litigation. Hoffer has nothing meaningful to say about attorney advertising, arbitration, medical malpractice, contingent fee arrangements, litigants' recovery of attorneys' fees (the so-called "American rule" versus loser-pays), junk science, punitive damages, forum shopping, the growth of the legal profession, judicial activism, litigation funding, legal education, and a host of other issues centrally important to the historical role of lawsuits in the U.S.

Instead, for the most part, *Litigation Nation* selectively focuses on the history of defamation, title disputes, divorce, lawsuits involving slaves and slavery, workplace disputes, and other prosaic

topics, fast-forwarding from the colonial period to the present with little discussion of the intervening developments—where most of the relevant "cultural history" actually occurred. For example, Hoffer's chapter on "Stock Swindles and Swindlers" consists of a workmanlike overview of railroad fraud in the Gilded Age. Then, in a *single page*, he purports to connect the dots to the Enron scandal in the modern era. Remarkably, this is the extent of his treatment of shareholder and securities litigation! Hoffer ignores the evolution of federal securities law (and its reform) and the corrupt abuses of the plaintiffs' bar generally. He devotes not a word to disgraced shareholder litigation mogul Bill Lerach, a major political player (and confidant of President Bill Clinton) who pleaded guilty to a felony charge of obstruction of justice and was disbarred after it was discovered that his firm recruited clients by paying them kickbacks.

Similarly, Hoffer's abbreviated discussion of class actions—one of the most momentous aspects of American litigation—treats them as an inevitable (and necessary) element of consumer protection. Using the decades-long Dalkon Shield class-action litigation—hardly a typical example—as a case study, Hoffer tediously reviews the complicated procedural history of the "mass tort" lawsuit that drove the manufacturer of the ill-fated IUD, A.H. Robins Co., into bankruptcy. (Hoffer misidentifies the company as "A.R. Robins.") After devoting 10 pages (out of a total of 200 pages of text) to this atypical case, which arguably represented the high-water mark of mass tort litigation, Hoffer laments that subsequently "the pendulum swung against permissive certification in the next decade." Moreover, Hoffer ruefully reports, Congress enacted class-action reforms, thereby leaving helpless individuals at the mercy of rapacious corporations. **In Hoffer's myopic world, all litigants are "aggrieved persons" who decide to sue in order to "tell their story."**

Litigation Nation often reads like a paean to trial lawyers, who are portrayed as the heroes, combating malevolent forces in American society. In Hoffer's telling, litigation is an inherently constructive activity, like exercise or eating plenty of fiber. The alternative to litigation is violence, he claims (even though England has less of both). This clichéd perspective lacks both balance and nuance.

Hoffer claims that the anecdotal cases he discusses "are typical of the sorts of cases that ordinary Americans find themselves litigating," ignoring the economic incentives and policy agenda that motivate a large portion of litigation. Hoffer's thesis—that lawsuits in the U.S. are based on Americans' "cultural beliefs" and that litigation "reflects the lives and values of ordinary people"—is a risible canard transparently calculated to justify the outsized role of lawyers and judges in our society. Hoffer never explains why the volume of litigation per capita is so much higher in the U.S. than any other country in the world. In Hoffer's myopic world, all litigants are "aggrieved persons" who decide to sue "when they want to tell their story," all lawyers are altruistic, and judges usually act in good faith. "The root of litigation," he gushes, "has been wounded honor or personal dignity"—*never* spite or avarice.

Political Motivation and Sloppy Research

In a manner similar to a public relations brief for the trial bar, *Litigation Nation* air-brushes out all the defects of the civil justice system, depicting only what he wants the reader to regard as benefits: progress, fairness, and safety. The book is silent about massive inefficiency, product

liability abuse, asbestos litigation fraud, recruiting phony plaintiffs in securities class actions, patent trolls, and the impact of frivolous malpractice litigation on the medical profession. Are Americans better off than their counterparts in, say, the United Kingdom, by virtue of their greater degree of litigiousness? Establishing such a conclusion would be necessary to prove Hoffer's case, but he never even tries. Hoffer presents the results of cases as an unalloyed good. He simply assumes that society is better off with judicially contrived claims for sexual harassment, strict liability for product defects, judicial recognition of same-sex marriage, and similar inventions.

Not only does Hoffer applaud these developments (revealing a progressive orientation in the process), he inexplicably characterizes them as "democratic." The second half of *Litigation Nation* is titled "Litigation Defends Democracy." At one point, Hoffer asserts that "the courts are often the most democratic of our governmental institutions." This is a highly dubious premise. The elected branches of government are by definition more democratic than unelected judges. When judges, legal scholars, or legal groups (such as the American Law Institute) overturn democratically-enacted laws or policies, the result cannot in fairness be praised as a triumph of democracy. On the contrary, it is the thwarting of democracy. Change *may* represent progress, but not all change is desirable. And, importantly, the hallmark of democratic change is that it occurs through the processes of representative self-government, not by judicial or administrative edict.

The book ends with an off-topic (and now dated) discussion of the LGBT litigation against the Boy Scouts of America, culminating with the 2000 Supreme Court decision in *BSA v. Dale*, ruling in favor of the associational rights of the Boy Scouts. Hoffer clearly sides with Dale, quoting sympathetically from Justice John Paul Stevens's dissent. If his theme is that sage-like courts always reach the right result, serving as a barometer of the underlying *zeitgeist*, his disagreement with the majority in *Dale* highlights his one-sided partisan perspective. Hoffer's thesis seems to be that courts are wise (reaching decisions reflecting society's values), except when they rule against the cause favored by the Left.

If this judgment seems harsh, consider the prominent back-cover blurb by Marxist law professor Mark Tushnet, Hoffer's reliance on left-of-center scholars such as Thomas Piketty, and his utter failure to even acknowledge the body of scholarly literature critical of America's civil justice system. Among the prominent reformers Hoffer fails to mention: Peter Huber, Lester Brickman, Philip Howard, Marcia Angell, George Priest, Victor Schwartz, Jeffrey O'Connell, and Mary Ann Glendon. Walter Olson, who has written extensively on this topic for nearly three decades, is mentioned only once—dismissively—in the author's "bibliographic essay." A gentle review in the *Wall Street Journal* concluded that "Mr. Hoffer seems to accept a generally liberal perspective on the goodness of social change effected in the courtroom."

Aside from an unconvincing thesis, cursory presentation, and slanted sources, *Litigation Nation* suffers from inexcusable sloppiness. Granted that Hoffer is trained as a historian rather than a lawyer, and that his book is written for a lay audience—errors are errors. Moreover, he credits his wife, a law professor, for reviewing the manuscript. Hoffer refers to the 1935 Wagner Act as the "Labor Relations Act" when the statute's official title is the National Labor Relations Act; he suggests that unions got no relief from labor injunctions until the NLRA was passed,

whereas the 1932 Norris-LaGuardia Act accomplished that goal three years earlier; and his account of *Sweatt v. Painter* (1950), a pre-*Brown* desegregation case involving my alma mater, the University of Texas, gets important details wrong. A minor mistake is calling the state trial court in Travis County, where Heman Sweatt's litigation began, the "circuit court." The Travis County trial court, housed in a building now bearing Sweatt's name, is (and was) a "district court."

More critically, Hoffer describes the Supreme Court's decision in *Sweatt* as holding that "There could be no equality in segregation, hence equal protection of the law could never be satisfied, so long as a state mandated separate schools." This is embarrassingly incorrect. *Brown v. Board of Education* reached that result four years later; *Sweatt* was decided under the "separate but equal" standard of *Plessy v. Ferguson* (1896). The Court in *Sweatt* determined that the segregated facilities created by Texas to accommodate Sweatt were qualitatively inferior to the facilities for white students at the University of Texas School of Law. This is an egregious error that calls the author's overall research, analysis, and conclusions (and the book's editorial review) into question.

Unfortunately, a balanced "cultural history of lawsuits in America"—a worthwhile project—remains to be written.