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Java Jive: Genealogy of a Juridical Icon*

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Law . . . has a symbolic life; it resides in the minds of Americans The influence of legal symbols is indirect but powerful. . . In its symbolic form, the law shapes the context in which American politics is conducted. . . It casts a shadow of popular belief that may be ultimately more significant, albeit more difficult to comprehend, than the authorities, rules, and penalties that we ordinarily associate with law.¹

Stuart A. Scheingold

The accounts or narratives that people tell do more than relate events. They also make moral claims and to be intelligible must be related within conventional idioms and vocabularies of motive. . . [M]any stories are themselves hegemonic, helping to sustain the legitimacy of the taken-for-granted world²

Patricia Ewick & Susan Silbey

“Woman Burned By Hot McDonald’s Coffee Gets \$2.9 Million.”³

Associated Press

“When Stella Liebeck fumbled her coffee cup . . . she might as well have bought a winning lottery ticket . . . This absurd judgment is a stunning illustration of what is wrong with America’s civil justice system.”⁴

San Diego Tribune

Cosmo Kramer remarks about his suit for hot coffee burns: “Oh, I

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1. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, & POLITICAL CHANGE* xi (1974).

2. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 241 (1998) [hereinafter EWICK & SILBEY, *THE COMMON PLACE OF LAW*].

3. Associated Press, *Woman Burned By Hot McDonald’s Coffee Gets \$ 2.9 Million*, Aug. 18, 1994 [hereinafter AP, *Woman Burned*].

4. Editorial, *Java Hijack*, SAN DIEGO TRIBUNE, Aug. 20, 1994, at B6.

can be quite litigious.”⁵

Seinfeld

In the “Top Ten List — Blizzard Safety Tips” it is suggested: “. 8. Clear snow off driveway with just one scalding hot cup of McDonald’s coffee.”⁶

Mark B. Greenlee

“See, now this just makes me sick. A woman spills coffee on herself and gets three million dollars. I do that every day and what do I get? Coffee stains.”⁷

Goodbye Lover

The last seven epigraphs from varying venues of modern mass media all refer, in one way or another, to the legal case of *Liebeck v. McDonald’s Restaurants*⁸ (hereinafter the *McDonald’s Coffee Case*). Given its extensive and enduring presence in our popular media, the *McDonald’s Coffee Case* probably supplies more common knowledge about the United States civil justice system than any other single lawsuit.⁹ This article dissects that lawsuit as a heuristic case study to illustrate how a dispute over hot coffee evolved into a cultural icon and staple of shared knowledge about the inefficiency, inequity, and irrationality of the American legal system. We document the complex ways in which this story entered into the public mainstream, analyze the social context and actors that made this seemingly trivial event into a powerful cultural icon, and suggest some important ways in which this phenomenon matters for legal practice and politics in the contemporary United States.

THE ANALYTICAL FRAMEWORK FOR THE STUDY

The analysis offered here derives from a larger project on the politics of tort reform and the social construction of legal knowledge. Our

5. *Seinfeld, The Maestro* (NBC television broadcast, Oct. 5, 1995).

6. Mark B. Greenlee, *Kramer v. Java World: Images, Issues, And Idols In The Debate Over Tort Reform*, 26 CAP. U. L. REV. 701, 702 n.8 (1997) (referring to a top ten list on *The Late Show with David Letterman* (CBS television broadcast, Jan. 8, 1996)) [hereinafter Greenlee, *Kramer v. Java World*].

7. *GOODBYE LOVER* (Warner Bros. 1999).

8. *Liebeck v. McDonald’s Rest., P.T.S. Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994).

9. We obviously are making a big, unsubstantiated claim here. But we did try a small and limited test of the claim. We presented students on the first day of an undergraduate class in January 2001 with the Associated Press account of the *McDonald’s Coffee Case* and confidentially surveyed them to discover how many had previously heard of the case. 110 of the 119 students, or 92.4%, answered affirmatively. They listed on average more than two types of popular cultural media (TV, newspapers, radio, movies, etc.) as the sources of their information.

general argument in the study identifies three dimensions of power at work in the production of knowledge about the civil legal system in contemporary American society. The *first* dimension concerns *instrumental tactics* that advocates employ to support their claims in legislatures, courts, and popular media. The key actors in tort-reform contests include:

- Tort reformers — corporate-sponsored policy elites, intellectuals, public relations specialists, lobbyists, and their elected allies who disseminate simplistic, often fictional anecdotes or “tort tales” to warn the masses and elites about a litigation explosion by greedy, rights-obsessed plaintiffs and lawyers ripping off innocent business corporations and undermining communal norms of civility;¹⁰
- Personal injury lawyers — who regularly represent injured victims in court and contribute huge amounts of money to fight tort reform in legislatures and before judges, but who offer at best feeble efforts to challenge damning anecdotes circulated by the reformers in popular culture.
- Academic social scientists — who employ sociolegal studies of civil litigation disputing patterns to challenge tort reformers’ simplistic claims in intellectual forums but remain mostly unknown to the mass public and even its political representatives.¹¹

Of greatest relevance to this particular paper are the ways in which tort reformers’ strategically savvy and largely uncontested efforts to saturate American popular culture with images of greedy plaintiffs and a legal system gone awry have contributed to the general social context in which the *McDonald’s Coffee Case* acquired great symbolic significance. We will address this aspect of the story toward the end of our analysis.

The *second* dimension of our study, which is more centrally emphasized in this paper, addresses the *institutional practices* of the mass media, especially newspaper reporting of civil litigation activity. Our approach draws heavily on respected social science analyses regarding how journalists select and represent events for public consumption.

10. For a portrait of tort reformers, see JEAN STEFANIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA (1996). On their strategy to saturate the public space with tort tales and shape public opinion, see Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) [hereinafter Galanter, *Oil Strike*]; MARK A. SMITH, BUSINESS & DEMOCRACY IN AMERICA: PUBLIC OPINION, ELECTIONS, & POLITICAL POWER (2000).

11. The literature from socio-legal scholars is abundant. For one impressive law review article, see generally Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996).

In particular, analysts emphasize how the media dramatize, personalize, fragmentize, and normalize narratives of events and relationships, thus reconstructing complex social relations and policy issues in simplistic, systematically skewed ways. Our own aggregate content analysis (not reported herein) shows how news coverage of tort litigation by reporters relying on these routine institutional conventions produces a consistent portrait of legal action that parallels in form and substance the selective, simplistic anecdotal portrayals of civil legal practice disseminated by tort reformers.¹² When one adds to such patterns in coverage evidence that tort reformers actively work to spin events for reporters and are over-represented as sources in news reports, it is not surprising that media coverage generally has echoed tort reform advocates' accounts of the legal system and made them a staple of conventional wisdom in American legal culture.

The *third* dimension of our study looks at the *ideological propensities* in American society that constitute the terrains of shared meaning in which the above-noted instrumental contests and institutional practices have developed.¹³ Specifically, we are interested in how powerful, if indeterminate, norms of individual responsibility and suspicion toward formal state intervention in socio-economic life figure into the dominant social constructions of tort law practice.¹⁴ In particular, we refer to the "ethic of individualism" that "emphasizes self-reliance, toughness, and autonomy — qualities that are posed as being central to progress and 'getting along' in a market economy."¹⁵ Indeed, we shall show in coming pages how both popular news accounts and conservative pundits together have reinforced inherited inclinations to focus on individual irresponsibility, negligence, and greed of plaintiffs rather than on corporate accountability, state obligations to secure citizen welfare, or the lim-

12. Judith Aks, Anne Bloom, William Haltom, and Michael W. McCann, *Hegemonic Tales and Subversive Statistics: A Twenty-Year Study of News Reporting about Civil Litigation* (unpublished paper presented at the 2000 meeting of Law and Society Association, Miami, Florida) (on file with authors) [hereinafter Aks, Bloom, Haltom, & McCann, *Hegemonic Tales and Subversive Statistics*].

13. By "ideology," we do not mean a grand, coherent, cohesive body of abstract ideas that determines action. Rather, we have in mind something similar to what Ewick and Silbey outline: a complex process that shapes social life by inviting as well as delimiting the thinking and imagination of subjects. "Ideology derives from and reflects back upon shared experiences, particularly those of power; it is inextricably tied to practical consciousness." EWICK & SILBEY, *THE COMMON PLACE OF LAW*, *supra* note 2, at 225.

14. On how different versions of individualism either support or stigmatize rights claiming in personal injury disputes, see generally David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Town*, in CAROL J. GREENHOUSE, BARBARA YNGVESSON, & DAVID M. ENGEL, *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994). See also David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Town*, 18 *LAW & SOC'Y REV.* 551 (1984).

15. GREENHOUSE ET AL., *supra* note 14, at 173.

its of our regulatory/social insurance systems as the key issues at stake in civil legal contests. As such, the emphasis on individual choices and volitional contracts that are sewn into American law are confirmed and reinforced by the stories that we, as Americans, tell ourselves *about* the law and the law's promises. This will be illustrated not only by the individualized, decontextualized, morally simplistic representations of the McDonald's scalding coffee dispute in popular culture, but even further by the triumph of accounts that essentially reversed the official legal findings of responsibility and blamed the victim for her severe injuries, not to mention her excessive greed.¹⁶

Our analysis of the *McDonald's Coffee Case* incorporates all three analytical dimensions. We emphasize systematic selectivity in news coverage narratives regarding a specific liability case — that is, institutional practices. We show some of the evidence of effective spin on the coffee scalding incident by proponents of tort reform as well as ineffectively articulated responses among opponents of tort reform — that is, instrumental tactics. Apparent throughout this case study will be the pervasive cultural power of tales portraying irresponsibly greedy litigants and a legal system that fails to apportion individual responsibility justly. In short, our analysis attempts to provide insights into the complex, multi-dimensional process by which narrative constructions in the courtroom, the press, and popular culture transformed the complaint of a badly burned grandmother into an icon for runaway litigiousness.

While we begin our analysis with our own detailed account regarding the coffee spill incident and the evolution of the legal dispute, we want to make clear that our primary aim is not to contrast later popularized stories with what “actually happened.” Nor does our account presume that either the specific verdict or the settlement in the *McDonald's Coffee Case* was correct or just. Rather, our greatest interest is in exploring how some story lines (such as those focusing on blame) about law came to dominate our culture rather than other story lines and specifically why so little of the interpretive account that won at trial survived in the media while contrary accounts flourished. As such, our enterprise is an explicitly social constructionist analysis that emphasizes both the substantive content of cultural stories or narratives about law and the complex processes by which they rise to prominence over time.¹⁷

16. There is no small irony in the fact that the same legal logic that individualizes and commodifies the mechanisms of relief for injury can be turned toward characterizing rights claimants as rapacious and irresponsible individuals. See Richard L. Abel, *Torts, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 445 (David Kairys ed., 3d ed. 1998) [hereinafter Abel, *Torts*].

17. This is to say we are not offering a “gap” study regarding the distance between the law on the books and legal practice. Rather, we are attempting to expand exploration regarding how

Moreover, we recognize that our study has potentially important implications for critically evaluating recent political contests over tort reform proposals. Specifically, our account suggests that the cartoonish construction of the legal dispute over spilled coffee that raced throughout American culture during the late 1990s rendered virtually impossible any intelligent deliberation about the case's inherent reasonableness or justice, much less its larger policy significance for legal reform. Our argument, however, neither depends on nor seeks to demonstrate the proposition that the alleged "litigation explosion" or "legal lottery" system and triumph of irresponsible rights-claiming that the *McDonald's Coffee Case* came to symbolize lacks empirical confirmation, although we generally are convinced by social science scholarship that it does.¹⁸ Rather, our inquiry looks beyond specific policy matters to much broader concerns about the dynamics of legal culture. Beyond elite policy contests, we suspect that the stories circulated by tort reform advocates and reproduced to some degree by popular media more importantly shape the very perceptions and practices, or legal consciousness,¹⁹ of citizens in their various roles as legal actors — e.g., as real and potential litigants, jurors, lawyers, judges, risk managers, and the like. In short, the stories that routinely circulate about the law shape the very practices of law in important ways. We will offer a few thoughts and suggestive evidence regarding this broadly conservative cultural impact at the conclusion of our analysis.

stories in and about law develop cultural power and the implications of these processes for legal understanding and practice.

18. See Marc Galanter, *The Tort Panic and After: A Commentary*, 16 JUST. SYS. J. 1, 3 (1993) [hereinafter Galanter, *Tort Panic*]; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993) [hereinafter Galanter, *News from Nowhere*]; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter Galanter, *Reading The Landscape*]; Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 12, 15 (1992); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1307-08 (1993); Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System — And Why Not?*, 140 U. PA. L. REV. 1147, 1245 (1992) [hereinafter Saks, *Do We Really Know Anything*]; Michael J. Saks, *Malpractice Misconceptions and Other Lessons about the Litigation System*, 16 JUST. SYS. J. 7 (1993). Our larger project will summarize in detail the many studies relevant to claims about the hyperlitigious society.

19. The term "legal consciousness" "refers to the ongoing, dynamic process of constructing one's understanding of, and relationship to, the social world through use of legal conventions and discourses." MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 7 (1994). See also EWICK & SILBEY, *THE COMMON PLACE OF LAW*, *supra* note 2.

THE DEVELOPMENT OF A LEGAL DISPUTE

We begin with a detailed review of the legal dispute over hot coffee itself. Our case study will be organized generally in terms of the disputing approach familiar to "law and society" scholars. As such, we begin with the initial incident and then trace the evolution of the dispute through the stages of grievance, claiming, lawyer involvement, filed claims, trial, and post-trial settlement. Along the way, we will emphasize the key facts and interpretive accounts by which the dispute was waged among the growing list of actors.²⁰

A GRIEVANT BECOMES A CLAIMANT: MS. LIEBECK
SEEKS RECOMPENSE²¹

On February 27, 1992, Stella Liebeck purchased a cup of coffee from a drive-through window at an Albuquerque McDonald's. At the time, the seventy-nine year-old Ms. Liebeck had recently retired as a department store salesclerk in Tucson and moved to Santa Fe to live with her daughter, Nancy Tiano. Ms. Liebeck was sitting in the passenger seat of a Ford Probe driven by her grandson, Chris Tiano, a college graduate and assistant golf pro. They had traveled to Albuquerque to drop off Ms. Liebeck's son, Jim (uncle of Chris Tiano), at the airport for an early flight. Mr. Tiano pulled into McDonald's for breakfast shortly after 8:00 am, where Ms. Liebeck ordered an Egg McMuffin value meal and the coffee. After her grandson pulled the car away from the window and fully stopped by a curb in the parking lot, Ms. Liebeck tried to remove the cup's lid to add sugar and cream. Lacking a flat surface inside the small car, she placed the coffee between her legs to free up both her hands for prying off the lid. As the lid came off, the Styrofoam cup tipped, spilling all the coffee into her lap, where it was rapidly soaked up by her sweatpants.²² Ms. Liebeck screamed in pain, but Mr. Tiano did not understand, later relating that it at first seemed to be "no big deal." "When it happened, I thought, well, you know, we spilled a cup of coffee; it's basically our fault. You know it was our clumsiness that spilled the coffee." After all, spilling coffee or some other hot liq-

20. See generally Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980).

21. The details of the *Liebeck v. McDonald's Restaurant* case come from the trial transcript. Record, *Liebeck v. McDonald's Rest., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994) (on file with authors) [hereinafter *Liebeck Record*]. The record is an electronic file and page-cites are unavailable, however, the transcript is on file with the authors.

22. Ms. Liebeck's initial letter to McDonald's estimated that the spill took place less than four minutes after the coffee was served to her. (on file with author) [hereinafter, *Liebeck letter*].

uid on oneself is a common occurrence; "It was just a scald," he said repeatedly in his deposition.

The grandson then proceeded to drive out of the parking lot, until a minute later when his grandmother became quite nauseous, and he suspected she was in shock. Now realizing that the incident was serious, he pulled over to the side of the road, helped her out of the car, aided her in removing the sweatpants, and covered her with a sheet from the car's trunk. Mr. Tiano then headed for the nearest hospital, which was full, and then made his way to a second hospital, where Ms. Liebeck was admitted. Doctors determined that the hot coffee had caused third degree burns on her thighs, buttocks, genitals, and groin area — about 6% of her body — and lesser burns over 16% of her body.²³ Third degree burns are extreme injuries in that they penetrate through the full thickness of the skin to the subcutaneous fat, muscle, and bone. Ms. Liebeck stayed in the hospital for over a week, where she underwent treatment by a vascular surgeon and eventually was subjected to a regimen of very painful skin grafts. The surgeon, Dr. Arredondo, reported that her injuries added up to one of the worst burn cases from hot liquids he had ever treated. Due to considerable medical costs, Ms. Liebeck left the hospital earlier than recommended and had to be driven back to the doctor for medical treatment many days by her daughter, who was forced to take time off from work. Ms. Liebeck suffered great discomfort, lost over twenty pounds, was permanently disfigured, and was partially disabled for up to two years following the accident.

A member of a long-time Republican family, Ms. Liebeck had never filed a lawsuit in her life and did not immediately seek relief with the aid of a lawyer, judge, or jury.²⁴ But she also was aware that a simple coffee spill should not have caused such extensive injuries. Ms. Liebeck explained her *grievance* in a letter sent to McDonald's Restaurants on March 13, 1992, two weeks after the incident:

It seems to me that no person would find it reasonable to have been given coffee so hot that it would do the severe damage it did to my skin. Obviously, it was undrinkable in that it would have burnt my mouth. It seems that the reasonable expectation for a spilling accident would be a mess and a reddening of the skin at worst. Although I did the spilling, I had no warning that the coffee was that hot. It should never have been given to a customer at that temperature.²⁵

In short, while acknowledging that she was responsible for the acci-

23. RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS & THE PERVERSION OF JUSTICE IN AMERICA* 268 (1996) [hereinafter *NADER & SMITH, NO CONTEST*].

24. *Liebeck* letter, *supra* note 22.

25. *Id.*

dent, Ms. Liebeck's initial grievance was translated into a *claim* about a dangerously defective product that caused severe injuries for which the McDonald's corporation was liable. If routine coffee spills cause such damage and disability as experienced in this episode, after all, most people would also be partially disabled, subjected to considerable pain, and permanently disfigured during their lifetime. Still, Liebeck's initial letter made it clear that she had "no intention of suing or asking for unreasonable recompense."²⁶ She asked for three responses from the corporation: (1) to check the coffee machine and coffee-making process to see if it was faulty; (2) to reevaluate the temperature standards for coffee served to customers, for others must have been severely injured as well; and (3) to cover medical, recuperation, and incidental costs related to her injuries, which initially were left unspecified because the medical treatment was far from over at that time.²⁷ Later estimates for incurred costs have varied in different accounts, but they hovered around \$10,000-15,000 for medical bills, plus other directly related expenditures, for a total of around \$20,000. After six months of her grievance without the counsel of a lawyer, however, McDonald's refused her requests for a change of policy and offered only \$800 for personal compensation.

A CLAIMANT BECOMES A LITIGANT: LAWYERS ATTEMPT TO SETTLE THE DISPUTE

Frustrated by her inability to secure compensation for the physical and financial harm wrought by the scalding accident, Liebeck retained Kenneth R. Wagner and Associates, an Albuquerque law firm, in the fall of 1992. Through a legal assistant at the firm, Wagner learned of S. Reed Morgan, a Houston attorney who had settled a similar case against McDonald's involving scalding coffee (for \$27,500) in the late 1980s. Morgan was contacted and agreed to take on Liebeck's cause, in large part because he had been angered by what he saw as callous indifference displayed by the mega-corporation in the previous dispute. Morgan quickly issued a formal request for \$90,000 to cover Liebeck's medical expenses as well as pain and suffering. His amended claim fared no better than Ms. Liebeck's original claim, however, and was dismissed by McDonald's.

Mr. Morgan filed a formal complaint on behalf of Ms. Liebeck in the Second Judicial District Court, County of Bernalillo, New Mexico.²⁸

26. *Id.*

27. *Id.*

28. Complaint, *Liebeck v. McDonald's Rest., P.T.S., Inc.*, 1995 WL 360309 (N.M. Dist. Ct. 1994) (No. CV-93-02419).

The complaint alleged that the coffee that Liebeck purchased from McDonald's in 1992 was defective in two regards: First, it was excessively, dangerously hot; Second, inadequate warnings were provided regarding the risks posed by the hot coffee. The key legal claim was that the coffee breached warranties of fitness for its intended purpose of consumption under the Uniform Commercial Code.²⁹ Along with the claim for compensatory damages, punitive damages were requested on the reasoning that McDonald's sold the coffee with reckless indifference to the safety and welfare of its customers. Once the trial date was set, Mr. Morgan offered to settle the case for \$300,000, with no success. He later acknowledged that he would have settled for rather less, perhaps as little as half as much.

Just a few days before the trial, Judge Robert H. Scott ordered the disputing parties to participate in a mediation session. Based on earlier cases and a projection of what a jury would likely award, the mediator recommended a settlement of \$225,000. Once again, however, McDonald's refused the opportunity to negotiate a settlement. The trial commenced in the second week of August 1994.

A LITIGANT BECOMES A PLAINTIFF: ADVERSARIES FRAME THE ACCIDENT IN LEGAL TERMS

The trial produced relatively few important disagreements regarding the facts of the case. For example, McDonald's did not contest that the coffee was very hot or that hot coffee can severely scald customers. Conversely, Ms. Liebeck did not contest that she spilled the coffee on herself or that she was responsible for the accident. While the adversaries disagreed about some details, those issues by themselves could not determine a just outcome.

Rather, the case turned on contending interpretive arguments, or narratives, devised by each side to select, support, and make sense of the evidence in a coherent, compelling way. Just as in larger policy contests, lawyers in legal proceedings use narrative techniques to construct events in ways that are most favorable to their clients. Indeed, civil disputes typically can be understood in term of contending "causal stories" that attempt to identify different levels of responsibility or fault among different parties.³⁰ We identify below two very general interpretive accounts projected by lawyers for the two parties in the *McDonald's Coffee Case*.

29. Implied Warranty: Merchantability & Usage of Trade, U.C.C. § 2-314 (1977).

30. See generally DEBORAH A. STONE, *POLICY PARADOX & POLITICAL REASON* 147-65 (1988); JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RESPONSIBILITY: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990).

THE DEFECTIVE PRODUCTS LIABILITY NARRATIVE

Attorneys for Ms. Liebeck systematically labored to present the jury with a coherent and compelling interpretation of the scalding accident that focused on the inordinately hot coffee produced and sold by McDonald's. This *Defective Products Liability Narrative* combined basics of products liability law with supporting themes that suited the circumstances of the accident to legal categories. The relevant products liability law came straight from the Uniform Commercial Code's implied warranties of merchantability and fitness. Attorney Morgan confirmed that the plaintiff had relied on very basic business law: "The heart of the case [was that] the product was defectively designed. . . It wasn't a negligence case. We didn't even plead negligence. Just products liability. . . The individual responsibility is not the issue. The product is unreasonably dangerous."³¹ Media coverage would consistently state that Ms. Liebeck believed that the spill was McDonald's fault. Technically speaking, she claimed instead that McDonald's had failed to abide by standards that many or most businesses must meet.³²

To complement the implied warranties, Plaintiff Liebeck marshaled supporting themes. The first theme acknowledged that coffee spills were routine events but insisted that Liebeck's injuries were extremely atypical due to McDonald's dangerously hot coffee. This factual contention would place McDonald's in conflict with the implied warranties discussed above. Liebeck's attorney established this conflict via a number of points. He presented as evidence a McDonald's manual specifying that coffee should be made at temperatures between 195 and 205 degrees and served at temperatures between 180 and 190 degrees. Morgan then introduced testimony by two experts — Dr. Kenneth Diller, Chairman of Mechanical Engineering and Bio-Mechanical Engineering at the University of Texas and Dr. Charles Baxter of Southwestern Medical School and the Baxter Wound Center — regarding the severe burns that such hot coffee produces. Specifically, they confirmed that liquids between 180 and 190 degrees cause full thickness, third degree, highly painful and disfiguring burns within 2-7 seconds, which in many cases is before spilled coffee can be wiped off or clothing can be removed. The time that it takes for liquids to burn skin with equal severity increases greatly as the temperature descends toward 130 degrees. To illustrate

31. Interview with S. Reed Morgan, in San Antonio, Tex. (Mar. 23, 2000).

32. We do not mean to be unfair to mass media. Generalist reporters should not be expected to understand tort law, perhaps. We suggest two propositions however: (1) that excusing the dissemination of misinformation holds reporters to such a low standard as to be self-defeating; and (2) if reporters may not be expected to know, learn, or report settled law, inadequacies of reporting and the ready availability of misinformation are inevitable.

the point, Ms. Liebeck testified about the extent of her painful injuries, and graphic pictures of her severely burned and scarred skin were introduced along with doctor's statements to show the damage that the extremely hot coffee caused in only a few seconds. Beyond the plaintiff and her experts, a McDonald's quality assurance supervisor himself admitted that McDonald's served coffee that would scald:

REED MORGAN: [Y]ou know, as a matter of fact, that coffee is a hazard, selling it at 180 to 190 degrees, don't you?

CHRISTOPHER APPELTON: I have testified before, the fact that this coffee can cause burns.

MORGAN: It is hazardous at this temperature?

APPLETON: At that high temperature the coffee is a hazard.

MORGAN: If customers attempt to swallow that coffee, isn't it a fact that it will scald their throat or esophagus?

APPLETON: Yes, under those conditions, if they could get the coffee in their throat, that could happen, yes. . . .³³

A *second* theme in the products liability frame was that most customers are not aware of this danger posed by coffee served at these temperatures. This theme was important to underscore that McDonald's was vending an unfit product to customers who could not be presumed to know about or make provision for the coffee's extreme temperature. Morgan used two studies — one by a Restaurant Advisory Services consultant showing that home coffee makers produce coffee at 158-168 degrees and hold it at 150-157 degrees after three minutes; the other from his earlier case showing that McDonald's served their coffee at temperatures well higher than most other fast food restaurants — to demonstrate that McDonald's coffee was significantly hotter than most coffee that consumers make for themselves or purchase elsewhere. This was critical, for while Ms. Liebeck spilled the coffee on herself, she had no reasonable expectation that it would be so unusually hot and dangerous. Another expert for the plaintiff, Lila Laux, testified in support of this contention.³⁴

The *third* critical theme was that McDonald's knew what their customers did not know about these dangers from its hot coffee. Critical facts offered in evidence for this position included that McDonald's had received over 700 complaints about hot coffee in the previous decade

33. NADER & SMITH, NO CONTEST, *supra* note 23.

34. Greenlee, *Kramer v. Java World*, *supra* note 6, at 720. The deposition by Mr. Tiano, Ms. Liebeck's grandson, is evidence that most consumers do not know of the dangers at stake. He indicated he could not imagine the severity of injury suffered by his grandmother even while witnessing her screams of pain. Reed Morgan restated the point concisely: "Why would you blame a person using a dangerous product for their behavior if they are not abusing the product? That's a foreseeable risk of harm, dumping a cup of coffee in your lap." Interview with S. Reed Morgan, in San Antonio, Tex. (Mar. 23, 2000).

and had paid out nearly three quarters of a million dollars to settle such claims, including some payments of up to \$66,000. The case settled by Reed Morgan in the late 1980s, in which Morgan presented graphic evidence of third degree burns, was just one of such complaints. Against this contention, Dr. Robert Knaff, a safety consultant for McDonald's, offered that 700 complaints of burns were statistically irrelevant, "basically trivially different from zero," relative to the large number of customers served.³⁵

Finally, Liebeck's attorneys alleged that McDonald's displayed reckless indifference to customers' safety by doing nothing either to reduce the heat of coffee known to be dangerous or to provide adequate warning to customers. Morgan noted that a message "CAUTION: CONTENTS HOT" appeared on the cup, but it was difficult to read because it was the same color and size as the ornamental trim on the cup.³⁶ McDonald's admitted that the message was intended more as a "reminder" than as a warning. What is more, the plaintiffs urged, the motive that trumped the corporation's concerns for safety was well documented: the desire to lure more customers, to sell more coffee, and to earn greater profits. By emphasizing this pecuniary motive, the plaintiffs attempted to strip the mega-corporation of its family-friendly marketing mask and to expose the fearsome Goliath that the David-like plaintiff was challenging.

More than plaintiff's arguments alone supported this final theme. The aforementioned Christopher Appleton, having testified that McDonald's coffee was not "fit for consumption" when served, further admitted that he had been shown the injurious effects of hot coffee in the earlier case presented by Reed Morgan, but the company still did nothing.

REED MORGAN: Isn't it a fact that back in 1988, when I showed you the pictures of the young lady that was burned in that situation, that you were appalled and surprised that coffee could cause that kind of burn?

CHRISTOPHER APPLETON: Yes, I had never seen photographs like that before.

MORGAN: All right. In those six years, you still have not attempted, yourself, or know of anyone within the corporation that has attempted to find out the rate of speed, the lack of margin of safety in serving coffee at this temperature right

35. Andrea Gerlin, *How Jury Gave \$2.9 Million for Coffee Spill, McDonald's Callousness was Real Issue, Jurors Say in Case of Burned Woman*, PITTSBURGH POST GAZETTE, Sept. 4, 1994, at B2 [hereinafter Gerlin, *How Jury*].

36. Grandson Mr. Tiano said in his deposition that there was not a warning on the cup, underlining that the words were difficult to identify and read. *Liebeck* Record, *supra* note 21.

APPLETON: No, we have not.³⁷

All four of these themes were framed as key elements in the legal claim that, under the Uniform Commercial Code, McDonald's coffee represented an unreasonably dangerous product sold in breach of the implied warranty of fitness, and that the corporation thus was liable for injuries suffered by Ms. Liebeck. As we have seen, McDonald's quality assurance supervisor conceded that McDonald's coffee was not fit for human consumption when poured. He further acknowledged that the McDonald's corporation did not have a systematic mechanism for informing itself about the severity of injuries caused by its products or for determining how many injuries would justify adjusting the heat of the coffee served. Most such information was only known by the company's insurance agency.³⁸ Mr. Appleton unabashedly acknowledged that "there are more serious dangers in restaurants" than hot coffee and "there is no current plan to change the procedure [for coffee making] that we're using in that regard now."

Reed Morgan presented all such testimony to support his call for punitive damages to punish the callous indifference of the family restaurant chain toward its customers. The closing argument by the plaintiff's lawyers noted that McDonald's sells over a billion cups of coffee a year, generating revenues of \$1.35 million each day from such coffee, and that payment of two days' revenue from coffee might constitute a reasonable basis for punitive damages. As attorney Ken Wagner later summarized, "We said in order to send a message, you have to penalize them financially before the message will get to corporate headquarters in respect to serving coffee at this temperature."

THE INDIVIDUAL RESPONSIBILITY NARRATIVE

Defendant McDonald's had conceded many facts at the core of the plaintiff's products liability frame, but countered by emphasizing different facts framed in an alternative interpretive story about the incident. The defendants advanced what we label the *Individual Responsibility Narrative* to state their case. The basic logic of this story line is that people spill coffee on themselves all the time but do not expect others to take responsibility for the outcomes, however terrible. In short, a commonplace event like a coffee spill merited a commonsense response, the

37. NADER & SMITH, NO CONTEST, *supra* note 23, at 271.

38. Morgan told us in an interview that he learned this from his earlier action against McDonald's. "Unless there's some reason for somebody that works for the corporation to get intimately involved, they're probably misinformed. They really don't understand what they're doing to people." Interview with S. Reed Morgan, San Antonio, Tex. (Mar. 23, 2000). Records of attorneys' efforts to obtain information from within the corporate bureaucracy support the inadequate information system in the company.

same one Mr. Tiano immediately had: The spill was Grandmother's fault, not McDonald's.

The defense advanced specific themes that organized evidence to support this approach. *First*, the defense appealed to the ethic of individual responsibility deeply rooted in American culture. Ms. Liebeck, not McDonald's, spilled the coffee that resulted in injuries; she must accept the blame. Ms. Liebeck's own letter of March 13, admitting that she had spilled the coffee on herself, was particularly relevant. Noting that the placement of coffee between her knees while sitting in the car and failing to remove her clothes immediately were "unwise," defense attorneys insisted that Ms. Liebeck should accept responsibility for the lamentable accident.

A *second* theme was directly aimed at challenging the plaintiff's key scientific point regarding proximate cause of the injury. McDonald's presented an affidavit from Turner M. Osler, a burn specialist, contending that Ms. Liebeck might have received the same burns if the coffee had been less hot, as low as 130°F.³⁹ Major reasons for the bad burns in this case, the expert testified, included Ms. Liebeck's advanced age and her failure to remove her clothing soaked with the coffee in a timely fashion.

A *third* theme turned on the question of "Why pick on us?" The attorneys for McDonald's argued that systematic marketing studies, presented as evidence, showed that customers prefer their coffee very hot. In fact, this was one of the most appealing traits of McCoffee. One leading reason is that most customers do not drink the coffee immediately after purchase at drive-through windows, but typically wait until they arrive at the office or home. At the same time, it was shown that some other restaurants, and especially those leading in coffee sales, tend to serve their coffee at nearly the same high temperature as McDonald's. Indeed, McDonald's provided evidence that their specifications followed industry standards. Experts for the defense also testified about the highly quality of insulation in their cups and the special plastic tab on the tops of coffee cups that reduce the chance of burning. Far from being insensitive to customers, the defense contended, McDonald's hot coffee served in state-of-the-art containers was just what the public wanted.

Finally, the defense attorneys played on a theme at the heart of the tort reform campaign, implying that Ms. Liebeck's claim was an example of litigious plaintiff seeking damages for harms that she, however unfortunate, caused to herself. Attorney Tracy McGee summarized this

39. The plaintiffs challenged that Mr. Osler left out of his account the significantly varying amounts of exposure time required for extreme burns by liquids at different temperatures.

aspect of her case to *Newsweek* reporters. "The real question. . . is how far you want our society to go to restrict what most of us enjoy and accept."⁴⁰ Ms. McGee fended off the plaintiff's attempt to introduce evidence from previous scalding litigation by deriding the claims: "First person accounts of sundry women whose nether regions have been scorched by McDonald's coffee might well be worthy of Oprah . . . But they have no place in a court of law."⁴¹ As such, the themes of the defense supported individual responsibility with notions of fairness and common sense, as opposed to the strict letter of business law.

A PLAINTIFF BECOMES A VICTOR: JURORS ADOPT MOST OF MS. LIEBECK'S ACCOUNT

After a tedious trial over seven days, the jurors took but four hours to reach their verdict: McDonald's Restaurants owed Ms. Liebeck \$160,000 in compensatory damages and about \$2,700,000 in punitive damages. In calculating compensatory damages, the jury synthesized the contrasting claims and frames into a slightly mixed verdict. The jury agreed with the defense that Ms. Liebeck was responsible for her own accident to a degree. However, the jury fixed the degree of the plaintiff's contribution to the accident at 20%. Assessing the expenses, pain and suffering, disfigurement, and disability consequent to the accident, jurors awarded compensatory damages of \$200,000 for the accident. Since they held Ms. Liebeck to be one-fifth responsible for her accident, the jury then discounted the compensatory award by \$40,000 (one-fifth of \$200,000), which left the plaintiff \$160,000 in compensatory damages. Jurors had come to see McDonald's coffee as a product made hazardous by extreme heat, a dangerous brew for which the corporation had to bear primary liability even if Ms. Liebeck was partly responsible for her own injuries.

Beyond specific damages, jurors had come to see the Liebeck episode as an example of a stream of dangerously hot coffee flowing from drive-thrus and across counters. Jurors accepted the plaintiff's characterization of McDonald's and other outlets that serve steaming coffee as recklessly indifferent to consumers' safety. To dissuade McDonald's and others from continuing their willful indifference, the jury granted the punitive award — damages designed to deter a wrong-doer from continued bad conduct — recommended by Ms. Liebeck's lawyers: \$2.7 million, the number based on an estimate of two days' revenues from coffee at McDonald's restaurants nationwide. Remarkably, the award

40. Aric Press, Ginny Carroll & Steven Waldman, *Are Lawyers Burning America?*, *NEWSWEEK*, Mar. 20, 1995, at 35 [hereinafter, Press, *Are Lawyers*].

41. Gerlin, *How Jury*, *supra* note 35.

that would create such alarm among editorialists and other professional chatterers had been scaled back from several jurors' arguments for awarding a full week's coffee grosses at McDonald's, around \$9.6 million!

As always, public indications of the logic behind the jurors' judgment were sparse. Still, remarks on the record, along with the award, confirm that jurors were convinced by the key themes of the plaintiff's narrative about corporate liability for a defective product. Jurors who spoke to interviewers frankly admitted that they initially thought the case was a waste of their time. For example, jury foreman Jerry Goens told a reporter that he "wasn't convinced as to why I need to be there to settle a coffee spill," implying his predisposition toward the "individual responsibility" narrative of the defense before the trial.⁴² Another juror felt insulted: "The whole thing sounded ridiculous to me."⁴³

In contrast, the plaintiff's attorneys' construction of the case changed their minds. Several jurors commented on the strength of the scientific evidence regarding how quickly coffee burns skin at 180 degrees as well as the graphic photos of Liebeck's injuries. When juror Jack Elliott learned of Liebeck's seven days in the hospital and of her skin grafts, he said, "It made me come home and tell my wife and daughters don't drink coffee in the car, at least not hot."⁴⁴ Mr. Elliot concluded from testimony by a McDonald's quality assurance executive that McDonald's was profoundly indifferent to burns and suffering.⁴⁵ Juror Betty Farnham was so unimpressed by the claim that 700 complaints were trivial relative to the millions of cups that McDonald's served that she began to doubt that the corporation could see the human suffering underlying the statistics.⁴⁶ She concluded that "The facts were so overwhelmingly against the company . . . They were not taking care of their customers."⁴⁷ Another juror justified the punitive damages as a way to get McDonald's attention. "Their callous disregard was very upsetting."⁴⁸

Indeed, the plaintiff won over the jury to such an extent that the judgment extended beyond the immediate defendant. Juror Richard Anglada stated that the punitive damages were aimed at all restaurants

42. *Id.*

43. Attorney Reed Morgan confirmed this in an interview. "The first thing they [the jury] had to get over was they thought it was a silly case." Interview with S. Reed Morgan, San Antonio, Tex. (Mar. 23, 2000).

44. Gerlin, *How Jury*, *supra* note 35.

45. *Id.*

46. *Id.*

47. *Id.*

48. NADER & SMITH, *NO CONTEST*, *supra* note 23, at 270.

that poured excessively-hot coffee: "The coffee's too hot out there. This happened to be McDonald's."⁴⁹ Juror Roxanne Bell echoed the point, recalling "It was our way of saying, 'Hey, open your eyes. People are getting burned.'"⁵⁰

Not surprisingly, attorneys for McDonald's promised to appeal the case. However, there is some evidence that some corporate insiders took the verdict to heart, at least initially. An Albuquerque news investigator reported that the temperature of coffee at a local McDonald's shortly after the trial fell to 158 degrees.⁵¹ Moreover, the lids of coffee cups began to carry the clear warning "HOT! HOT! HOT" and admonitions that "Coffee, tea, and hot chocolate are VERY HOT!" soon were routinely posted at most McDonald's drive-thrus.⁵²

A VICTORY BECOMES LESS SPECTACULAR: JUDGE SCOTT REMITS THE PUNITIVE DAMAGES

Trial judge Robert H. Scott on September 14, 1994 reduced the punitive damages from nearly \$2.7 million to \$480,000, somewhat ironically using the tort reformers' own preferred formula of "three times the awarded compensatory damages" as the upper limit. He did not set aside the verdict or adjust compensatory damages, however. Instead, he agreed with the jurors on key findings. He concurred with them that testimony and evidence showed that McDonald's knew or should have known that its coffee was too hot and unfit for consumption, that McDonald's and its employees were indifferent to consumer safety, and that McDonald's undertook inadequate efforts to warn its customers. He stated that the punitive damage award was appropriate to deter, punish, and warn McDonald's.⁵³ After Morgan's appeal challenging the reduced damages was denied, Judge Scott ordered another conference (as he had done before the trial) that produced a final confidential settlement for an undisclosed amount.

In sum, the legal narrative of Ms. Liebeck's grievance and claim regarding a defective, dangerous coffee product won hands down in a court of law even though the award she received was only about one-fifth of that initially authorized by the jury.

49. Cheryl Laird & Steven Long, *Hot Coffee Becomes a Burning Issue*, HOUSTON CHRONICLE, Aug. 19, 1994, at 1.

50. Press, *Are Lawyers*, *supra* note 40, at 35.

51. Gerlin, *How Jury*, *supra* note 35, at B2.

52. Greenlee, *Kramer v. Java World*, *supra* note 6, at 723-24.

53. NADER & SMITH, *NO CONTEST*, *supra* note 23, at 272.

THE PRINT MEDIA CONSTRUCT A LEGAL LEGEND

We suspected when we started this study that popular accounts significantly simplified and selectively skewed various aspects of Liebeck's legal challenge to McDonald's. Our expectations were based on a substantial body of research analyzing media reporting practices. In particular, we have been influenced by political scientist Lance Bennett's argument that routine media practices tend to favor certain sorts of stories as especially "newsworthy."⁵⁴ Bennett identifies four specific features of newsworthiness: Personalization, Dramatization, Fragmentation, and Normalization.⁵⁵

Personalized coverage tends to focus on individual actors, acts, and moral character to the exclusion or detriment of case-specific institutional, historical, or social contexts or dimensions.⁵⁶ Personalized coverage is related to *fragmented* coverage. Fragmented reporting treats happenings as immediate and self-contained.⁵⁷ Broader contexts, systemic relations, and chronic practices tend to be slighted to emphasize discrete vignettes.⁵⁸ As a result, particulars tend to be divorced from general patterns and relationships.

Dramatized coverage is what we expect of news media in the age of infotainment. To insure circulation or ratings, news is hyped. The most sensational, surprising, or titillating aspects of events—violence ("If it bleeds, it leads"), scandal, large amounts of money ("Dollars holler"), tragedy, fraud, etc. — are much more likely to be covered than merely accurate, expected, or mundane aspects. News is, thus, often about the unusual.⁵⁹

Finally, *normalizing* is the process of fitting "news" to "olds." Audiences need familiar referents and accessible scenarios if they are to understand news easily and efficiently.⁶⁰ News media presume that their clients will be attracted to coverage that matches common norms and expectations.⁶¹ Normalization complements the other framing devices by rendering hair-raising and attention-grabbing reports understandable and by offering some reassurance along with threats.⁶² As the routine is dramatized, the dramatic thus is rendered in highly conventionalized

54. See generally W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* 21-64 (2d ed. 1988).

55. See *id.* at 23-24.

56. *Id.* at 23.

57. *Id.* at 24.

58. See *id.* at 24.

59. *Id.* at 23-24.

60. See *id.* at 24-25.

61. See *id.* at 25.

62. *Id.* at 25.

terms as routine, typical, “normal.”⁶³ Together, these elements influence news selection and reporting practice.

We have previously used this framework to analyze a large data set of over 4,000 newspaper articles about tort litigation in five major national newspapers over nineteen years. Our study, reported in a paper and our developing book, found that news coverage of tort law indeed emphasized the dramatic, personalized, fragmented, and normalizing tendencies that were expected.⁶⁴ In particular, news coverage radically over-represented: (1) products liability cases, relative to other types of tort action; (2) legal filings of claims well before trial and judgments following trials, as opposed to the complex substantive exchanges of evidence and arguments at trial; (3) cases in which plaintiffs win claims against corporate defendants; (4) cases with huge, multi-million dollar judgments for the plaintiffs; and (5) experts who rail against specific claims and judgments for plaintiffs or the overall legal system. Moreover, we found that case coverage tended to be substantively thin and simplistic, offering very little insight into the civil litigation process, the reasoning of participants, the terms of law at stake in disputes, or alternative institutional means attempted or available for addressing civic disputes over injuries. In short, news coverage of civil tort disputes routinely paralleled in *form and substance* the simplistic tort tales circulated by tort reformers to assail the explosion of frivolous lawsuits and irresponsible actions by all parties involved in them.

Hence, we expected newspapers to reconstruct the *McDonald's Coffee Case* to match standard understandings of “news-worthiness” : Easy-to-understand specifics, personalized conflict, and sensationalized results would garner far more coverage than challenging contentions about the complexities of events, of disputing case history, of multi-causal relations, or of the legal process. As a result, important facts and interpretations critical to the jury — for example, the legal rules in the Uniform Commercial Code and the location and timing of the accident — would be slighted or left out altogether. Second, we expected that less familiar story lines would receive little attention while well-known narratives would serve as defaults for journalists and readers alike. Specifically, we anticipated that the subtle elements of the plaintiff's legally successful, but technically complex, products liability narrative would take a back seat to the culturally pervasive *Individual Responsibility Narrative* that jurors largely rejected as less revealing. Third, we surmised that fragmentary accounts and misleading factoids — state-

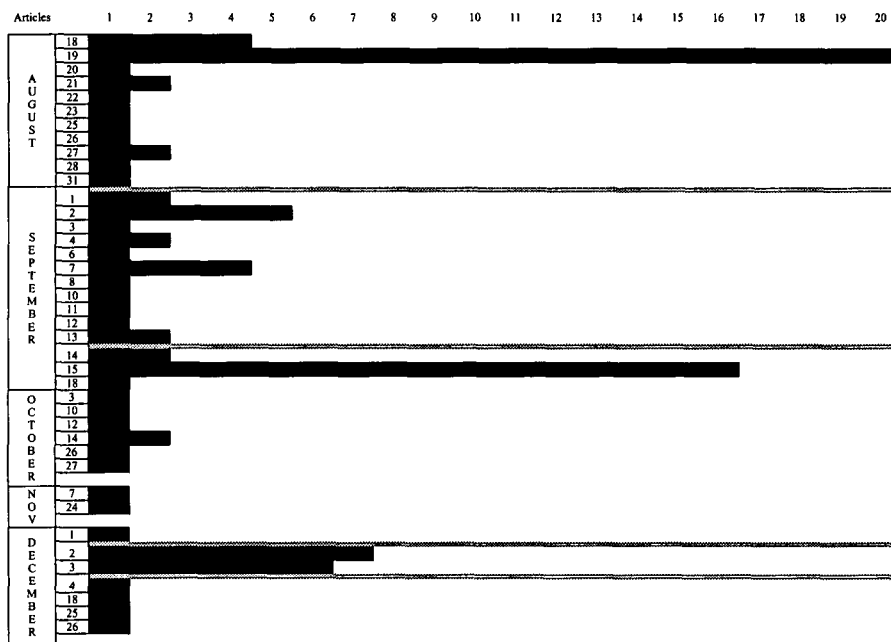
63. *Id.*

64. See Aks, Bloom, Haltom, & McCann, *Hegemonic Tales and Subversive Statistics*, *supra* note 12.

ments that are taken for facts by virtue of publication and dissemination but, upon inspection, turn out to be at best problematic⁶⁵ — would facilitate intercessions by reform-oriented and reform-influenced commentators to spin the case as another instance of frivolous litigation in which the victim was blameworthy.⁶⁶ As such, the *Liebeck* legend would only add to the ideologically loaded, misleading, and often inaccurate knowledge about the civil legal system routinely disseminated to ordinary Americans. With only a few exceptions, our skeptical expectations proved extremely well founded.

GRAPH ONE

“GRAPH OF 1994 NEWSPAPER ARTICLES RELATED TO
Liebeck v. McDonald's Restaurants”
(Wire Reports Excluded)



65. In using “factoid,” we follow NORMAN MAILER, *MARILYN: A BIOGRAPHY* 21 (1975) and Saks, *Do We Really Know Anything*, *supra* note 18, at 1162. We diverge from Professor Saks in eschewing “factlets,” his terms for highly specific details that seem to convey more information than they actually do.

66. Readers should note the perhaps latent advantage of labeling cases “frivolous litigation.” While “frivolous” may be used to denote the trivial or the unworthy, it may also connote idle or playful activities. To call a case frivolous litigation, then, may be to equivocate covertly: one may say one meant that the case was flimsy or without merit; one’s audience may take the phrase to mean that litigants are indulging themselves in games or pastimes.

ARTICLES

The first point to note about the hot coffee case is that it was widely covered in the print media; the jury award was immediately reported in at least twenty-six leading newspapers, and many scores of articles followed in subsequent years. As we shall show below, the case was widely covered because of its easy fit into prevailing newsworthiness conventions. Moreover, the *McDonald's Coffee Case* affords the close observer valuable insights because it generated multiple waves of coverage.⁶⁷ Graph One shows how and why we separate *Liebeck* news coverage, gathered through a systematic search of "Academic Universe,"⁶⁸ into five discrete phases. The *initial* and largest spate of spot coverage followed the announcement of the jury verdict on August 18, 1994. After the first two days, the *Liebeck* case was in both the public and the pundit domain, as we shall show. Two subsequent events might have elicited corrective coverage of the case around September 1, 1994, so we treated these events and their spotty coverage together as a *second* phase. When Judge Scott cut the jury's punitive award by over eighty percent to three times the compensatory award, he inaugurated a *third* phase of coverage. This phase stretched from September 14, 1994, until December 1, 1994, when final case settlement piqued a brief *fourth* phase of coverage. These developments in the dispute occasioned spot coverage and commentaries throughout the final months of 1994. Together with a modestly-covered but substantial article correcting initial reports, spot articles, and opinion pieces in Stages 1-4 reveal the process by which legally successful narratives and constructions of fact yielded to factoids and default "common sense" frames, transforming Litigant Liebeck into Symbolic Stella. After spot reports of the settlement ended around December 2-3, 1994, an on-going *fifth* phase reinforced dissemination of the iconic case to the detriment of the case that plaintiffs argued and jurors decided.

Phase Zero – Omission of Coverage Prior to the Verdict

While much of our account turns on omissions *from* coverage during five phases, we first note a virtual complete omission *of* coverage *before* the first phase. The dearth of coverage prior to the jury award made the results seem even more surprising than might otherwise have

67. WILLIAM HALTOM, REPORTING ON THE COURTS 224 (1998).

68. In June of 2000, we searched Lexis-Nexis "Academic Universe" from August 1, 1994 until December 31, 1994. Under "News," we searched both in "General News" and in "U.S. News," the latter to pickup regional newspapers not accessible in the former. Our primary keywords included: "court," "courts," "burn," "burns," "jury," "jurors," "coffee," "million," and "award." We then narrowed this far-flung search with the demand that all articles contain some spellings of both "McDonald's" and "Liebeck."

been the case. Had trial testimony and evidence been widely available — as was the case in many instances of tobacco litigation, for example — Ms. Liebeck's victory might have seemed less inexplicable and her claims more understandable. In noting omitted coverage, we attach no blame to news media as we do not presume that the *Liebeck* case merited coverage before its denouement. We merely remind readers that, as previously suggested, the scarcity of pre-verdict coverage left much of the evidence and testimony under-developed and unlikely to become developed, given demands on the press for alacrity and concision. The failure of reporters to attend the trial or scrutinize the trial record greatly increased the chances that a substantial judgment would generate sensational but incomplete, misleading, and even erroneous coverage shaped by media conventions and prevailing cultural norms. Therefore, this first omission may have been as important as other omissions we shall note below.

NEWSPAPERS RELAY THE VERDICT: ELISION AND IMPRECISION IN PHASE ONE

Despite under-development of the story prior to the verdict and concomitant omissions from coverage, Phase One print reports covered the verdict in a predictable, professional manner, repeating the standard emphases of mainstream media. Basics of the specific accident and particular judgment — the answers to “Who?”, “What?”, “Where?”, and other customary questions — were featured prominently in reportage. At the same time, consistent with our general findings,⁶⁹ the most dramatic and personalized elements were emphasized in simplistic, familiar renderings, while subtle and complex dimensions of the trial record that did not fit prevailing formulas were left out. This reconstruction and fragmentation to suit newspapers' standards became accentuated when editorialists and commentators filled the gaps in reporting to yield spin and factoids.

WIRE REPORTS: ROUTINE CONCISION LEADS TO TELLING ELISION

We begin with the Associated Press morning wire-service report for three related reasons: it represented the longest and most detailed national account; it became a basis for coverage by most newspapers in our sample; and the Associated Press reported major developments in later phases as well. The initial news account on August 18, 1994 is reprinted below in its entirety as replicated on “Academic Universe.”

69. See Aks, Bloom, Haltom, & McCann, *Hegemonic Tales and Subversive Statistics*, *supra* note 12.

WOMAN BURNED BY HOT McDONALD'S COFFEE GETS \$2.9 MILLION

A woman who was scalded when her McDonald's coffee spilled was awarded nearly \$2.9 million - or about two days' coffee sales for the fast-food chain - by a jury. Lawyers for Stella Liebeck, who suffered third-degree burns in the 1992 incident, contended that McDonald's coffee was too hot. A state district court jury imposed \$2.7 million in punitive damages and \$160,000 in compensatory damages Wednesday. Ken Wagner, Liebeck's attorney, said that he had asked the jury for punitive damages equal to two days' worth of McDonald's coffee sales, which he estimated at \$1.34 million a day. Testimony indicated McDonald's coffee is served at 180-190 degrees, based on advice from a coffee consultant who has said it tastes best that hot, Wagner said Thursday. The lawsuit contended Liebeck's (sic) coffee was 165-170 degrees when it spilled. In contrast, he said, coffee brewed at home is generally 135-140 degrees. He said McDonald's expressed no willingness during the trial to turn down the heat or print a warning. Defense attorney Tracy McGee already has said the company will appeal. McGee also said the jury was "concerned about an industrywide practice" of selling hot coffee. Juror Richard Anglada confirmed the jury was trying to deliver a message to the industry. "The coffee's too hot out there (in the industry). This happened to be McDonald's," Anglada said Wednesday. Liebeck's lead counsel, Reed Morgan of Houston, said there have been several lawsuits nationally over the temperature of McDonald's coffee but that he believes the Liebeck case was the first to reach the verdict stage. A California case was settled out of court for \$235,000, he said.

Morgan said Wednesday the woman's medical bills totaled nearly \$10,000.

According to testimony, Liebeck was a passenger in a car driven by her grandson outside a McDonald's in southeast Albuquerque when she was burned by a cup of coffee purchased at a drive-through window. The jury found, among other things, that the coffee was defective and that McDonald's engaged in conduct justifying the punitive damages.⁷⁰

The astute reader should notice two characteristics of the account immediately. For one thing, it is very short, simple, and thin — already well fitted to become an anecdote. Moreover, the characteristically fragmented, disjointed presentation of information is familiar. Virtually no signs of carefully constructed legal arguments presented by the disputing parties, of debate over fundamental legal issues at stake or of contrasting evidentiary claims in the trial survive the Associated Press's reconstruction. Readers hoping to find clearly demarcated themes or well-crafted

70. AP, *Woman Burned*, *supra* note 3.

legal narratives are sure to be frustrated. As such, the wire account offers few explicit cues to make sense of what principles were at stake, or even reason to believe that legal norms of right or justice mattered at all.⁷¹

Beneath its surface randomness, the selection and prioritization of information in the Associated Press story exhibits a logic that we have encountered before and will see repeated endlessly in news coverage of the hot coffee case. While little direct attention to substantive themes and arguments is apparent, the information presented in the wire report clearly displays the logic of both the newsworthiness routines discussed above and the defendant's specific individualistic interpretation of the accident. Let us now examine in greater detail how the wire report reconstructed the *McDonald's Coffee Case* selectively and tendentiously.

The first and most extensively noted information in the article — i.e., identifying the burn injury and the award — *dramatizes* the case. By far, most prominent in the wire report are the monetary figures. The bold headline and the first, third, and fourth sentences each highlight either the \$2.7 million punitive damages award or the cumulative \$2.9 million award. The fourth mention (fourth sentence) disaggregates the total into two figures, followed by the calculus of two times \$1.34 million in coffee sales to determine the punitive damages. This is important, for journalistic norms privilege placing the most important information first, after which repetition highlights the message. Near the end of the report, other lesser but still large sums — an earlier settlement of \$234,000 and medical bills of \$10,000 — are mentioned. In short, as any reader of wire-service stories might have predicted, “dollars holler” from the headline through to the end of the brief report.

Conversely, the wire account somewhat surprisingly underplays the gory details of the scalding injury that were prominent at trial. The headline as well as the opening and closing paragraphs both note the scalding or burns that were caused by the coffee and gave rise to the legal claim for compensation. After this report showed readers the money, it showed them an injury, albeit understating Ms. Liebeck's injuries and rehabilitation while playing up the mega-verdict.

The news account also is highly *personalized*. Indeed, it is filled with mentions of individual actors: Stella Liebeck; her attorneys Reed Morgan and Kenneth Wagner; McDonald's; one defense attorney, Tracy McGee; and one juror, Richard Anglada. Such synecdoche seems expedient and even efficient, but *personalization* deprived client

71. These characteristics also suggest that the story was relayed by journalists with little substantive “spin” from elite interpreters with particular policy interests.

newspapers and readers of contextual elements. For one thing, recognition that the dispute was between a seventy-nine year old retired working-class woman with inadequate Medicare benefits and a huge multinational corporation and that the legal duel was between a personal-injury attorney and a battalion of corporate lawyers⁷² is almost entirely obscured by the individualized account, which casts each agent in his or her formal role. While "McDonald's" appears repeatedly, the Associated Press failed to remind readers of the vast size and wealth of the McDonald's corporation; it is at most a "fast-food chain," one player in a larger "industry." Indeed, some readers might be uncertain that the corporation, rather than the Albuquerque franchise, was the defendant. Moreover, the attention to the spill accident — although generally incomplete and misleading (and later often flatly erroneous) — further tended to reconstruct the case to suit interpretations based on individual responsibility far more than the plaintiff's case or the jury's rationale. Specifically, no mention is made that: (a) the car was parked motionless to the side rather than at the window or moving; (b) there was little recklessness about the action leading to the accident; or (c) the injuries involved extreme pain, skin grafts, and sustained disability. That the accident was indeed ordinary but the injury extraordinary — Stella Liebeck's fundamental claim — is difficult, at best, to discern from the news account. In sum, *personalization* in this wire story favored McDonald's and disadvantaged Ms. Liebeck.

Important items implicating the corporation in the accident were included in the report, but selective *dramatization* and *personalization* pared details essential to the plaintiff's arguments and the jury's verdict. As Professor Bennett has demonstrated, mass media do not merely *dramatize* and *personalize*; through their selectivity, news media *fragmentize* news.⁷³ The Associated Press, we can see, *fragmentized* the coffee case by its inclusions and exclusions. The story notes that Liebeck, her lawyer, and a juror "contended" that the "coffee was too hot." But the links to the defective product claim are indirect and implicit rather than explicit. The news account also specifies that the coffee temperature of 165-170 degrees was about thirty degrees hotter than most home-brewed coffee and that complaints and lawsuits had been filed previously against McDonald's. However, the latter points, which were pivotal to the jury, come only at the end of the news report. Conspicuously absent are the most important elements of the plaintiff's defective products narrative that influenced the jury and judge: (1) the

72. While Morgan had a couple of hot liquid cases, including one hot coffee case against McDonald's, he was hardly a "repeat player."

73. BENNETT, *supra* note 54, at 24.

scientific evidence from two noted experts about the celerity at which skin burns at 170-180 degrees, without which mere mention of coffee temperatures means little; (2) the details about the plaintiff's immense pain and disability; (3) the fact that a documented 700 complaints had been filed against McDonald's in recent years; (4) the fact that McDonald's administrators admitted the company knew about and ignored the palpable dangers of extremely hot coffee; and (5) the facts about the early stages of the dispute, including Liebeck's initial request for meager compensation, the plaintiff's multiple efforts over two years to settle spurned by McDonald's, the mediator's recommended award, and the like.

What we have previously generalized about news coverage,⁷⁴ we here particularize to wire reportage of *Liebeck v. McDonald's Restaurants*: large awards make news while crucial details are discarded to make stories concise and accessible. Whether the discarded facts were unknown or regarded as irrelevant or too esoteric by journalists, we can only guess.⁷⁵ But the inclusion of some key facts and exclusion of others emphasized the large award to the plaintiff for a seemingly inconsequential mishap — a key contention in the narratives of individual greed disseminated by tort reformers — while obscuring essential elements of the *legal argument* (the *Defective Products Liability Narrative*) that led jurors to find the corporation responsible for the painful injury in question. Failure to mention the legal grounding for that judgment in the Uniform Commercial Code as well as the plaintiff's multiple, amply-evidenced arguments leaves readers to question whether the jury acted on either law or reason, much less both. The enigmatic final statement of the report underlined this question. Albeit "the jury found . . . that the coffee was defective" and "punitive damages" were justified, readers cannot be certain why jurors decided as they did.⁷⁶

On balance, the concise spot-news offered by the Associated Press thus conveyed much relevant information about the case, but it de-contextualized the accident in ways that analysts of the news have led us to expect. The omissions and under-emphases of the wire report repeated in many newspapers tended to discount the plaintiff's defective product narrative far more than the commonsensical individual responsibility

74. Aks, Bloom, Haltom, & McCann, *Hegemonic Tales and Subversive Statistics*, *supra* note 12.

75. We asked many journalists about this. Some confirmed that scientific evidence is often considered too esoteric or technical to print in spot news. We expect that there is a routine filtering bias at stake in this regard, which is part of the newsworthiness inclination. The most obvious reason, however, is that no journalists were present at the trial to hear such evidence or to obtain a clear version of it.

76. AP, *Woman Burned*, *supra* note 3.

frame of McDonald's, which readers and journalists arguably had long been primed to presume in making sense of public events. While nothing in the initial wire report explicitly linked Ms. Liebeck's suit to the alleged epidemic of silly suits afflicting the nation, the Associated Press story reconstructed the case in a manner that left open, and even invited, that linkage. The "man bites dog" angle of receiving \$3,000,000 for spilled coffee made this item far more newsworthy and culturally resonant but also far less accurate.

INITIAL PRINT REPORTS: MORE CONCISION; LESS PRECISION

Reports in the twenty-four newspapers in our Lexis-Nexis "Academic Universe" sample emulated the Associated Press report.⁷⁷ As expected, the Associated Press stories were more copiously detailed than almost all stories run by clients who edited the wire copy.⁷⁸ Thus, inclusions and exclusions by the wires prevailed in newspapers. As Table One demonstrates, newspapers varied in the wire-service inclusions they printed, but they rarely added elements omitted by the wires.⁷⁹

Three patterns in Table One characterize what made it into the *McDonald's Coffee Case* and what was filtered out. *The first pattern consists in elements uniformly included.* In Table One, we can see that four elements of the *Liebeck* victory were included in reports in every newspaper in our sample: the severity of the injuries, the stupendous award, the claim that McDonald's coffee was too hot, and description of the coffee spill.

A second pattern consists in elements regularly excluded alto-

77. The other wire services reprinted in "Academic Universe" tracked the Associated Press story, sometimes verbatim, sometimes more briefly. Because the papers in our sample cited the Associated Press and because the Associated Press story is expansive relative to the other wires, we used the Associated Press AM report.

78. Only the *Houston Chronicle* and *Albuquerque Journal* (the latter unavailable in "Academic Universe" and hence not in our sample)—ostensibly due to Reed Morgan's residence and local relevance respectively—ran articles that were longer and more detailed.

79. Table One affords an overview of relative emphases in both the Associated Press reports and subsequent newspaper accounts. It breaks reports of the *Liebeck* verdict down according to the information mentioned in each sentence of each report. Rows feature every print report we were able to locate by "Academic Universe." The AM and PM reports of the Associated Press are highlighted for easy contrast with two dozen reports in newspapers. We array fifteen categories of information in an order determined by coverage. Having coded located articles published on August 18 or 19 in 1994 for the fifteen categories of information, we rearranged vertical columns [defined by categories of facts] and horizontal rows [defined by the news organs that published the articles] to maximize reproducibility. The advantage of a reproducible table is that newspaper articles range from the ones that covered the greatest number of categories of information [at the top of the table] to the ones that covered the fewest ["lower" rows of Table One], while the categories of information are ordered from the categories mentioned in at least one sentence in every report [the leftmost columns] to categories mentioned in not even one sentence of one article [the three rightmost columns].

TABLE ONE — PATTERNS OF INFORMATION IN SPOT COVERAGE OF *LIEBECK V. McDONALD'S*,
18-19 AUGUST 1994

All dates below are 8-19-94 unless otherwise noted.	Liebeck's Injuries	Jury Award for Damages	Allegations that Coffee Was Too Hot	Liebeck's Spill of Coffee	Reactions of Parties to Spill or Judgment	McDonald's Conduct and Past Complaints	Location of Spill	Jury's Reasoning or Message	Adequate Warnings on Coffee Cups?	Place in Broader Civil Justice System	Sympathy for Plaintiff	Initial Claim, Desire to Settle	Litigiousness of Plaintiff or Others	Uniform Commercial Code	Total Sentences	Total Words
<i>Associated Press AM 8-18</i>	0-2, 16-17	0-1, 3-4, 18	2, 5-7, 10-13, 18	6	9	8, 14-15	17	10-11	8						18	341
Phoenix Gazette	0-2, 15-16, 19	0-1, 3-4, 9, 17-19	2, 5-7, 10-12, 17	1, 19		8, 13-14	16	10-12	8						19	330
Charleston WV Daily Mail	0-2, 12	0-1, 3-4	2, 5-7, 10	0-1	9	8, 11		10	8						12	273
Houston Chronicle	0-1, 16	3, 26-28, 33	2, 5-12, 17-24, 26, 29-30, 32-33	1, 14-15	4, 29, 33-34	13	14	30-32, 36, 38		37, 39					39	621
Chicago Sun Times	0-2, 5-10, 14	0-1, 3-4	2, 11-13, 17-18, 20-22	1, 5	19	14-15	1	17-18							22	340
Bergen Record	1, 11, 20-21	0-2, 6	4-5, 9, 12-18	1, 3, 20	8		3	6-7	10						21	324
<i>Associated Press PM 8-18</i>	0-1, 6-7	0-1, 12-13	2-3, 9-10, 13	1, 5-6	11	3-4	5	8							13	205
Charleston WV Gazette	0-1, 6-7	0-1, 12-13	2-3, 9-10, 13	1, 5-6	11	3-4, 13	5	8							13	205
Greensboro NC News & Rec.	0-1, 6-7	0-1, 12-13	2-3, 9-11, 13	1, 5-6	11	3-4	5	8, 10							13	204
Memphis Com. Ap.	0-1, 6	0-1	2-3	1, 5-6	7	3-4	5								7	132
Atlanta J. C. 8-18	1, 6-7	1, 3-4	2-3	1, 5	5	3-4	5-6								7	127
Louisville Cour. Jo.	1-2, 2, 6-12	1, 3-4, 20	0, 2, 6-7, 13-15, 17	2, 6	4, 16	18	1								20	256
USA Today	0-2, 5	0-1, 3	2, 6, 8	1	4										8	116
Wall Street Journal	1-2, 0-2, 5	0-1, 3-4	2, 6	1	5										6	67
Des Moines Register	0-2	0-1, 3	2	1	4										4	78
New York Times	0-2	1	0, 3-4	1			2								6	117
Dayton Daily	1-2	1	2-3	1, 4-5			4								6	161
The Columbian 8-18	1, 5-6	0-1	2-3	0-1											7	161
St. Petersburg Times	0-1, 3	1-2	2, 4-6	0-1											4	85
Atlanta Jo. & Const.	0-2	0-1, 3-4	2, 5-7	1		3-4									2	59
Chicago Sun T. 8-18	1	1	2-3	1											3	71
Arkansas Dem. Gaz.	1	1	1-2	1											3	69
Denver Post	1-2	1, 3	2	1											2	49
Boston Herald	0-2	1, 3	2	1											2	49
Seattle Post Int.	1-2	1	2	1											2	48
Washington Post	1-2	1	2	1											2	48
Total Headlines	14	14	3	2	0	0	0	0	0	0	0	0	0	0	—	—
Mean First Mention	1.04	1.12	2.5	1.23	7.92	6.58	6.77	10.8	8	10	37	—	—	—	—	—
Total Sentences	77	64	117	43	18	24	14	20	3	1	2	0	0	0	268	—

gether. Scientific testimony about the swiftness with which very hot liquids inflict sever burns surfaced only in the tenth sentence of the *Bergen (NJ) Record* and neither in the Associated Press stories nor in stories in larger, "national" papers. Details about the extent and severity of the burns or the infirmity they caused were almost completely absent from the accounts. The *Houston Chronicle* commented on routine civil justice cases in its thirty-seventh and thirty-ninth sentences; no other source in Table One so contextualized the Albuquerque anomaly. Not even one source mentioned the Uniform Commercial Code or the initial inclination of the plaintiff to settle without filing suit or, later, to settle without trial. All sources avoided characterizing the plaintiff as litigious or either party as sympathetic.

A third pattern is a bit more complicated. Elements in Table One correlated with the length (in sentences) of articles. Only three articles (counting the Associated Press AM report) raised the presence or adequacy of warnings about the temperature of the coffee. About one third of the reports in Table One devoted one or more sentences to the jurors' reasoning, despite the quotation from Mr. Anglada in the Associated Press report. Slightly more papers and both Associated Press reports "placed" the car at the side of the lot or Liebeck in the passenger seat, and the same number of sources mentioned the intransigence of McDonald's concerning past complaints and lawsuits. More sources than not mentioned reactions to the verdict, if only in single sentences in all but two instances.

These three patterns and other information in Table One reveal much about Phase One reporting. The four elements invariably covered — the burns, the awards, the temperature of McDonald's coffee, and the spill — also led the other elements in the total number of sentences that made reference to the element, in the priority (that is, how low the number) of the first mention of the element in the article, and in being part of headlines. These four offered a succinct, simple sequence: a woman spills coffee in her lap, sues McDonald's for making coffee so hot that it severely burned her, and gets millions. This sequence preserved the perceived irrationality, if not absurdity, of an extravagant award generated by an everyday occurrence and novel claim.

If those four elements are all that the reader may learn from a story — and in about half of the newspapers sampled they are all or almost all of the crucial elements of the story that we found — then newspapers' reports were not merely fragmentary, as wire stories were, but reductionist. The patterns discussed above and the marginals below Table One testify to the elements missing from most or many articles and scanted in most or all: past complaints about and lawsuits against McDonald's;

the impassivity and indifference evident in the testimony of McDonald's officials; the lowball offer extended to Ms. Liebeck for her crippling injuries, extensive rehabilitation, and onerous expenses; the contrasting mindsets of plaintiff and jurors; the location of the car in the lot and of Ms. Liebeck in the car; and the presence and usefulness of warnings on cups. Each element that, by itself, would have made the story less bizarre — the science of burns; Ms. Liebeck's initial request for \$20,000 in expenses; and the Uniform Commercial Code — eluded almost all reports.

In sum, Table One shows how newspapers constructed the story of the *McDonald's Coffee Case* to suit newsworthiness at considerable cost to precision and comprehensiveness. That the initial reports suited the defense's *Individual Responsibility Narrative* far better than the plaintiff's *Defective Products Liability Narrative* or the jury's decision was an unintended boon for McDonald's and, we shall see, tort reform in the public relations battle that followed the case.

PHASE ONE FEATURES AND COMMENTARIES: ENTER THE FACTOIDS

To be sure, wags and pundits might have distorted the coffee case for partisan, ideological, policy, or satirical purposes no matter how well spot reports had conveyed the facts. Fragmentary or reductionist reportage, however, left editorialists and commentators free to fill in omissions with helpful, if incorrect, information. Even if the misinformation that suffused print media after August 18, 1994 was utterly independent of fragmentary coverage, the predominance of interpretations built on Ms. Liebeck's sole, personal blame for the accident and the utter blamelessness of McDonald's would have been inevitable. Gaps in public knowledge about the specifics of the case simply made easier the manufacture of factoids imputing greater moral blame to Ms. Liebeck, the injured.

Features on reactions to the *Liebeck* verdict, editorials, and letters to the editor tended to shortchange the most technical information on which the plaintiff's case depended, thereby divorcing commentators' views ever further from the case the jurors actually heard. Similarities between Table One and Table Two reveal how pundits' emphases tended to track those of initial reports. Table Two arrays patterns of emphasis in articles that appeared soon after the verdict but were not spot reports on the verdict. Since features on reactions, editorials, and letters to newspapers do not tend to follow the journalistic convention of putting the most important information first, the relative placement need not tell us anything, and so Table Two is not scaled.⁸⁰

80. Although Phase Two began roughly on September 1, 1994, we have included four articles that did not take into account the two events that define Phase Two. Those four appear in

TABLE TWO — PATTERNS OF SENTENCES IN COMMENTS AND EDITORIALS REGARDING *LIEBECK V. McDONALD'S*,
PHASE ONE (18-31 AUGUST 1994)

	Liebeck's Jury Award Burn Injuries	Allegations that Coffee Was Too Hot	Liebeck's Spill or Coffee	Reactions of Parties to Spill or Judgment	McDonald's Conduct and Past Complaints	Location of Spill	Jury's Reasoning or Message	Adequate Warnings on Coffee Cups?	Science of Burns	Place in Federal Civil Justice System	Sympathy for Plaintiff	Initial Claim, Desire to Settle	Litigiousness of Plaintiff or Others	Uniform Commercial Code	Total Sentences	Total Words
San Diego Union Tribune Editorial 8-20-94	2	3	1	5		1	4			4			1, 5-6		6	116
Rocky Mountain News Feature on Reactions 8-21-94	0, 4, 8-9	0, 11-12, 17, 19	4, 6-7	5, 14	16-18, 22	4		12-13		9-10, 15					22	417
Chicago Sun Times Editorial 8-21-94	0-1, 3	7	1, 3			3	0-2, 7-8								8	145
Phoenix Arizona Republic Editorial 8-22	3, 7-8	6, 13	7, 9				0, 4, 16			15	6		16		16	316
Cleveland Plain Dealer Editorial 8-23	3, 6-8	3-4, 6, 40	3, 5, 10- 13	51			4, 26, 33	3					1, 13-18, 26-27, 29-39		40	804
San Diego Union Tribune Editorial 8-25-94	1, 6-8	5, 10-15, 29-30, 36	1, 6, 8-9, 11, 41-42	40	31-35, 37, 41	5		16-19		40			0, 2-3, 20- 28, 38-39, 43-45		45	756
Denver Post Editorial 8-26-94	16	0, 4, 16, 36	1-2, 4, 9-11, 20-26, 32	12-13, 31		5	3, 11-15, 17-18, 39-41 20, 22	29		14, 30	16, 18		4, 8-9, 12, 38		41	670
Arkansas Democrat Gazette Editorial 8-27-94	8-11, 17	14-15	5-6, 19	15, 23							22		6		41	679
Denver Post Editorial 8-28-94	8, 11, 18	2, 18, 22	4, 12-14, 16-17	8, 15, 26		7	19-20, 25			2, 27			1, 6, 27-30		31	617
Columbus (OH) Dispatch Editorial 8-31-94	5, 16-17	6-7	1, 3-4, 10	18	22	1, 3	9-10	19-20		11-14			2, 9-10, 14- 15, 23-25		25	490
Austin American Statesman Letter to Editor 9-2-94	2	2	0-1, 3-5				2, 6-7			6-7			0, 5		7	97
Austin American Statesman Letter to Editor 9-2-94	2	2, 3, 9	3	11	6, 9	3	2				1, 8		10		12	264
Vancouver (WA) Columbian Editorial 9-2-94	1-2, 8	6-7		1, 15-16		5	0, 3-4, 12-13, 19-20				3, 10-11, 14		17-18		20	592
Bergen (NJ) Record Feature on Reactions 9-2-94	0, 2, 12	1, 13-16	11	3-9		10-11		3, 6							16	363
Headlines Sentences	3 33	2 57	1 42	0 22	0 14	0 12	3 38	0 12	0 0	0 16	0 10	0 0	2 60		330	

As with the spot reports, burns and monetary awards drew widespread comment, albeit averaging only about two and one-half sentences per category. The heat of McDonald's coffee, Ms. Liebeck's allegation that its temperature was "too hot," and the specifics of the spill elicited even more sentences than information about the injury and award. The position and immobility of the automobile were still merely a matter for passing comment. These differences are significant for they display the alacrity with which the known facts and fact patterns were arrayed against the plaintiff. *Most important, information pertaining to the litigiousness of the plaintiff drew the most sentences of any category, despite that category's having elicited not a single mention in spot coverage (see the column fourth from the right margin in Table One) and despite the defense's having presented no evidence that an octogenarian who had never before sued anyone was trifling with McDonald's or trying to pull a fast one.*

Spotty coverage left authors free to adopt differing perspectives on the case's justifiability and significance and to marshal information to suit their presuppositions. Two staff writers for the *Denver Rocky Mountain News* attempted to allay fears that purchased coffee would become tepid or that scalding suits would proliferate, two perils predicted far more often than realized.⁸¹ They noted the severity of the burns and other factors that made the case a poor predictor of things to come.⁸² In addition, these two lavished four sentences on past difficulties with hot liquids at McDonald's and two sentences on whether warnings were adequate. The *Chicago Sun-Times* ignored facts about warnings, burn science, or the scaldings that marred the record of the fast-food chain headquartered nearby, although they did not put Ms. Liebeck in the driver's seat or in a moving car.⁸³ The *Sun-Times* apparently needed no factoids to support its call for jurors to take greater account of individual responsibility and common sense.

Far more commentators fell back on stereotypes and shibboleths to accentuate apparent absurdities that had made the case newsworthy. A brief comment in the *San Diego Union-Tribune* sounded the tort reform refrain immediately via the headline "Java Hijack" and gave short shrift to Ms. Liebeck's injuries, to her repeatedly spurned efforts to settle for modest compensation, to the litany of complaints and lawsuits against McDonald's, or to inadequate warnings about the dangers of hot

the bottom four rows of Table Two, which assembles articles in chronologically defined rows. Columns in Table Two are arranged to match columns in Table One for ease of comparison.

81. Bill St. John & Marty Meitus, *Despite Lawsuit Brew-haha, Hot Coffee No Burning Issue*, ROCKY MOUNTAIN NEWS, Aug. 21, 1994, at 28A.

82. *Id.*

83. Editorial, *Coffee Case Burns Common Sense*, CHICAGO SUN-TIMES, Aug. 21, 1994, at 41.

liquids.⁸⁴ The editorial said in its entirety:

When Stella Liebeck fumbled her coffee cup as she rode in the car with her grandson, she might as well have bought a winning lottery ticket. The spilled coffee netted her \$2.9 million in the form of a jury award. Liebeck had sued McDonald's for serving take-out coffee that her lawyer claimed was too hot. This absurd judgment is a stunning illustration of what is wrong with America's civil justice system. Ironically, it also may become a powerful spur to the cause of tort reform. Our guess is that other greedy copycats in restaurants throughout America soon will be happily dumping coffee into their laps in a bid to make a similar killing in the courtroom.⁸⁵

Amid hyperbole and misstatements,⁸⁶ the *Union-Tribune* mischaracterized the events of the accident. It is untrue that Ms. Liebeck fumbled her cup "as she rode."⁸⁷ Jurors learned she was a passenger in a parked car. By an interesting coincidence, the *Rocky Mountain News* feature committed the same error!⁸⁸ Editorial writers for the *Arizona Republic* veered into a statement that contradicted their own coverage of the spot news: Ms. Liebeck "... tried to open the cup in a moving car"⁸⁹ Just days after the verdict, in sum, misinformation began to alter the story in a manner that inaccurately highlighted the plaintiff's recklessness. The fact that commentators filled in often inaccurate details about the "reckless" nature of the accident underscores the inclination to focus on matters of individual responsibility and the opening left by fragmentary initial reports that emphasized the incongruities between coffee spilled and millions awarded.

Diana Griego Erwin's editorial for the *San Diego Union-Tribune* recounted the case accurately and without unfair spin, but still imputed litigiousness to Ms. Liebeck and unfairness to jurors:⁹⁰

. . . Liebeck also admitted that the plastic foam cup was wedged between her legs when she pulled off the lid, splashing steaming, hot

84. Editorial, *Java Hijack*, SAN DIEGO UNION TRIBUNE, Aug. 20, 1994, at B6.

85. *Id.*

86. Of course, plaintiffs hardly "net" jury awards and "winning lottery tickets" usually return a known amount while post-verdict developments may devour the plaintiff's "windfall."

87. On the same date, a feature in the *London Times* noted that Ms. Liebeck "... tried to drink the coffee while travelling in a car. She wedged the styrofoam cup between her legs in order to remove it's lid, whereupon the contents spilt over her lap." *Café au Loi*, LONDON TIMES, Aug. 20, 1994.

88. See St. John & Meitus, *supra* note 81. "Liebeck sustained third-degree burns when she opened the lid on a cup of McDonald's coffee while anchoring it between her legs as she rode in a car." *Id.*

89. Editorial, *McDonald's Coffee: Sending the Wrong Message*, ARIZONA REPUBLIC, Aug. 22, 1994, at B4.

90. See Diana Griego Erwin, *Big Bucks for Dumb Luck? Coffee Is Hot and Life Is Full of Risks—Deal with It*, SAN DIEGO UNION-TRIBUNE, Aug. 25, 1994, at B11.

java onto her legs, groin and buttocks. She was 79 years old at the time and received third-degree burns.

Still, hot coffee is generally not intended for direct application to the legs, groin and buttocks. So why is the fast-food giant at fault here rather than Liebeck?

I do agree that McDonald's coffee is too hot, but is this a matter for the court or the marketplace?⁹¹

Ms. Erwin appears to have missed the fact that the Uniform Commercial Code and other state and national legislation long ago made dangerous products a matter for courts.⁹² Perhaps if initial reports had covered the legal grounds for the plaintiff's case, Ms. Erwin might have entertained the notion that McDonald's should bear some share of the blame for the burns, rehabilitation, and expenses.

Other commentaries were festooned with misleading factoids. Talk-show host Mike Rosen excoriated jurors' decision making while minimizing the evidence on the basis of which the jurors had decided.⁹³ Amid a welter of presumptions about lawsuit epidemics and what the economics of litigation would teach, Mr. Rosen acknowledged that Ms. Liebeck was a passenger but did not say whether the car was in motion.⁹⁴ Skipping over the multitude of complaints about McDonald's coffee and the science of burns and mentioning the issue of warnings in but one sentence, Mr. Rosen then attacked jurors who had issued "(t)he latest winner in the Stupid Lawsuit Sweepstakes."⁹⁵

Our nation's suing epidemic may enrich some plaintiffs and their lawyers, but it all shows up as overhead on society. Perhaps prospective jurors should be required to attend a seminar on the economics of litigation. Maybe, then, they wouldn't be so generous. Or better yet: if a ridiculous award like this is reversed on appeal, how about letting the defendants sue the jury. [sic]⁹⁶

Jurors were not educated in the economics of litigation, but they did learn about pertinent law. Had news reports similarly instructed Mr. Rosen, he might not have dismissed the suit out of hand. The same could be said regarding systematic patterns of personal injury litigation over recent decades. Regular readers of the news would find precious little reason for complex, much less skeptical thinking, about the alleged epidemic of lawsuits and "litigation lottery."⁹⁷

91. *Id.*

92. *See* Implied Warranty: Merchantability & Usage of Trade, U.C.C. § 2-314 (1977).

93. Mike Rosen, *Coffee and \$2.9 Million to Go*, DENVER POST, Aug. 26, 1994, at B11.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Aks, Bloom, Haltom, & McCann, *Hegemonic Tales and Subversive Statistics*, *supra*

The champion at misstating the case and, to some extent, harbinger of conventional beliefs to come was Dave Rossie. As Table Two reveals, Mr. Rossie's August 28, 1994 column in the *Denver Post* passed over lawsuits and complaints about McDonald's coffee, the science of burns, and warnings, all of which were integral to the products-liability case advanced by the plaintiff.⁹⁸ He then compounded these sins of omission with sins of commission. He began his commentary with the hackneyed *non sequitur* that the *Liebeck* decision proved that the United States was the most litigious society on the planet,⁹⁹ and then accused the Associated Press of having excluded inconvenient details.¹⁰⁰ Mr. Rossie supplemented those details with convenient factoids. He noted that the Associated Press report set Ms. Liebeck's hospital bills at nearly \$10,000, "which suggests she may have been seen by more than one physician in the emergency room."¹⁰¹ Although the Associated Press story on which Mr. Rossie relied stated that Ms. Liebeck had endured third-degree burns, it did not state how much of her body was burned so severely.¹⁰² Nor did the Associated Press mention her skin grafts or week in the hospital, during each of which more than one physician undoubtedly saw her.¹⁰³ What the quoted language is supposed to insinuate is not clear to us, but Mr. Rossie may have understated the injuries and rehabilitation due to the Associated Press's abbreviated coverage.

Mr. Rossie then careened into outright error: "It was brought out in the trial that McDonald's heats its coffee to between 165 and 170 degrees."¹⁰⁴ Actually, both Associated Press stories noted that the McDonald's deliberately served its coffee at 180 degrees or more, a standard that, jurors had learned, was explicitly demanded in McDon-

note 12. See generally Galanter, *Tort Panic*, *supra* note 18; Galanter, *News From Nowhere*, *supra* note 18; Galanter, *Reading the Landscape*, *supra* note 18.

98. See Dave Rossie, *How About a Hot Cup of Coffee?*, DENVER POST, Aug. 28, 1994, at G5.

99. *Id.* "Anyone who doubts that we are the most litigious society on Earth should consider the case of Stella Liebeck of Albuquerque, N. M." *Id.* Every scholar who has looked at the matter realizes how problematic claims of American litigiousness are. See generally Richard A. Posner, *Explaining the Variance in the Number of Tort Suits Across U.S. States and Between the United States and England*, 26 J. LEGAL STUDIES 477 (1997). Even if the litigiousness of Americans were established, we cannot imagine how that proposition would bear any necessary relation to the *Liebeck* case.

100. Rossie, *supra* note 98, at 65. To be fairer to Mr. Rossie than he was to the Associated Press, he was correct to note the omission. Somewhat curiously, the shorter evening Associated Press report did convey the information that the longer morning wire story did not.

101. *Id.*

102. The longer Associated Press report from the AM cycle did not state that Ms. Liebeck had held the coffee in her lap, but the shorter PM cycle report did. Thus, we assume that Mr. Rossie was drawing exclusively from the earlier, longer report. See AP, *Woman Burned*, *supra* note 3.

103. See *id.*

104. Rossie, *supra* note 98, at G5. Mr. Rossie did include facts comparing such a range to the much lower temperatures of home-brewing machines.

ald's manuals. The lower range was the plaintiff's estimate of the temperature when Ms. Liebeck opened the lid about four minutes after buying the coffee. Had Mr. Rossie understood that Chris Tiano had stopped the car after leaving the window and only then had Ms. Liebeck uncapped the cup, he might have noted that the car was not moving. Instead, he like so many others merely noted that Ms. Liebeck was a passenger in a car driven by her grandson but did not situate the car at the time of the spill.¹⁰⁵ But then, the Associated Press had not supplied those details.

Mr. Rossie then explained the award as follows:

Ms. Liebeck's lawyers figured out that McDonald's sells \$1.34 million worth of coffee a day, and decided that their client was entitled to two days' worth of coffee sales revenues to compensate for her pain and suffering and hospital [sic] bills, not to mention their fees.¹⁰⁶

The reference to lawyers' fees was as clever as snide, but by this point the pundit could no longer blame Associated Press for the misinformation or disinformation that supported his tirade. The Associated Press had informed Mr. Rossie that the \$2.68 million award was to punish McDonald's for its callousness and to dissuade it from continuing its reckless ways, not to compensate Ms. Liebeck for pain, suffering, and bills. If Mr. Rossie could blame his freewheeling in the absence of facts on the omissions of the Associated Press, he here was contradicting his own source to manufacture factoids convenient for his presuppositions and attitudes.

Having misstated matters to slander the lawyers, Mr. Rossie then slandered civil jurors in general ". . . more often than not, when confronted by a giant, [sic] corporation of uncounted wealth on the one hand and the lone individual, especially a little old lady, on the other, the jury is going to come down on the side of the individual."¹⁰⁷ Leaving to the side the absence of authority for Mr. Rossie's "calculation" — pundits' license, let us agree — and presuming that Mr. Rossie was unaware that scholarly investigations of jurors' sentiments and reasoning refuted his generalization,¹⁰⁸ he adduced exactly no evidence to show that the Albuquerque jurors had merely punished the deep-pocketed fast-food corporation. Mr. Rossie concluded that the Liebeck case ". . . should never have gone to trial. The judge should have tossed it before the first

105. *Id.*

106. *Id.*

107. *Id.*

108. The consistent evidence against Mr. Rossie's generalization is reviewed in VALERIE HANS, *BUSINESS ON TRIAL: THE CIVIL JURY & CORPORATE RESPONSIBILITY* (2000).

May it please the court. [sic]"¹⁰⁹ Had the Associated Press provided a more complete account or had Mr. Rossie researched the case, he might have discovered the latent truth of his first sentiment: the case should never have gone to trial because McDonald's had multiple opportunities to settle. His second sentence is based on profound ignorance of the facts and law that constituted the case but encouraged by selective news coverage.

To summarize: spot coverage of Phase One featured few outright errors, but commentators compensated for omitted information by faulty inference and invention. In such a manner concise, fragmentary coverage fostered a flood of factoids and derisive spin about the accident, which quickly morphed into a fashionable fable about a civil legal system gone awry and the triumph of a predatory plaintiff and litigious lawyer.

PHASE TWO COVERAGE IN NEWSPAPERS: SECOND CHANCES FOR LITIGANTS AND JOURNALISTS

On September 1, 1994, two developments might have changed the evolving story of Stella Liebeck. First, trial judge Robert Scott directed the parties towards a mediator.¹¹⁰ Second, a front-page article in the *Wall Street Journal* revealed much about *Liebeck v. McDonald's Restaurants* that had been obscured in or omitted from early coverage.¹¹¹ These two events define a second stage in the *Liebeck* litigation.

MEDIATION — A NON-STORY

The directed mediation made little difference to knowledge about the *Liebeck* case because, that we have found, only the Associated Press and the *Chicago Sun-Times* carried the story. As Table Three (see under "Phase Two") displays, this pair of stories provides only the sketchiest indication of how coverage of the Liebeck story might have evolved between August 18, 1994 and September 1, 1994. The attention-grabbing jury award, the severe burns, and the ill-advised actions of Ms. Liebeck were as prominent in this duo of spot reports as in the first wave of coverage. Both the *Chicago Sun-Times* and the Associated Press reported reactions and the circumstances of the accident, just as they had in August.¹¹² Each allotted a sentence to the civil justice system, con-

109. Rossie, *supra* note 98, at G5.

110. *Liebeck* Record, *supra* note 21.

111. Andrea Gerlin, *A Matter of Degree*, WALL ST. J., Sept. 1, 1994, at A1.

112. Associated Press, *Mediator Gets Hot Coffee Case*, CHICAGO SUN-TIMES, Sept. 2, 1994, at 26.

TABLE THREE — PATTERNS OF REFERENCES TO ELEMENTS IN SPOT COVERAGE IN THE FIRST FOUR PHASES

	Liebeck's Burn Injuries	Jury Award for Damages	Allegations that Coffee Was Too Hot	Liebeck's Spill of Coffee	Reactions of Parties to Spill or Judgment	McDonald's Conduct and Past Complaints	Site of Car and/or Spill	Jury's Logic or Message	Warnings Adequate?	Science of Heat and Burns	Broader Civil Justice System	Sympathy for Plaintiff	Plaintiff's First Claim, Desire to Settle	Litigiousness of Plaintiff or Others	Uniform Commercial Code
Phase One — Jury's Judgment Announced — August 18-19, 1994 (n = 26 spot reports)															
Total Headlines	14	14	3	2	0	0	0	0	0	0	0	0	0	0	0
Mean First Mention	1.04	1.12	2.5	1.23	7.92	6.58	6.77	10.8	8	10	37	—	—	—	—
Total Sentences	77	64	117	43	18	24	14	20	3	1	2	0	0	0	0
Phase Two — Trial Judge Advises Mediation — September 1-2, 1994 (n = 2 spot reports)															
Total Headlines	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0
Mean First Mention	2	1	8	1	3	—	3	—	—	—	4.5	—	—	—	—
Total Sentences	3	4	3	4	5	0	2	0	0	0	2	0	0	0	0
Phase Three — Trial Judge Reduces Punitive Damages — September 14-15, 1994 (n = 17 spot reports)															
Total Headlines	6	14	0	0	0	0	0	0	0	0	0	0	0	0	0
Mean First Mention	1.29	1.0	9.11	3.87	5.75	3.8	4.73	7.5	17.5	—	—	17.5	—	13.5	—
Total Sentences	36	81	26	29	24	16	11	4	2	0	0	2	0	2	0
Phase Four — Case Settles — December 2-3, 1994 (n = 16 spot reports)															
Total Headlines	5	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Mean First Mention	1.0	2.0	7.4	2.62	10	11	2.6	8.5	—	—	—	6.08	6.8	—	—
Total Sentences	24	26	8	18	3	1	10	2	0	0	0	5	5	0	0

trary to their initial reports.¹¹³

If this pair of spot reports tells us little about reportage of post-trial developments, it nonetheless makes the point that omissions undermined dissemination of the case that the jurors witnessed. Ms. Liebeck's contention that the McDonald's coffee was too hot was mentioned by the Associated Press, albeit in fewer sentences and far later in its report than in its Phase One story.¹¹⁴ The *Chicago Sun-Times* omitted these items, which were crucial to Ms. Liebeck's case.¹¹⁵ Past complaints and actions by McDonald's, which drew two to three sentences from the wires and *Sun-Times* in August, elicited no coverage in the later spots. Skimpier reports made for an even more fragmented story.

Perhaps the omission of greater moment was the lack of any coverage whatsoever in any of the other twenty-five papers that covered the verdict.¹¹⁶ This omission is not merely a matter of concern for scholars who expect more of the news.¹¹⁷ Non-coverage of post-trial events facilitated misconceptions. It not only failed to educate but misled. When editorialists argued as if the *McDonald's Coffee Case* ended in the Albuquerque courtroom on August 18 and letter writers seemed unaware that punitive damages are commonly reduced by trial judges or appellate judges or both, both may have been relying on spot reports that treated civil judgments as *faits accomplis*.

Omissions were exacerbated by a familiar error in the Associated Press account.¹¹⁸ The third sentence of the Associated Press story read in full: "Stella Liebeck, then 79, received third-degree burns on her legs, groin and buttocks in 1992 when she placed a cup of coffee between her legs at the drive-up window to steady it while prying the lid off."¹¹⁹ This sentence once more misstates facts presented to the jury. That Ms. Liebeck and her grandson took the precaution of moving the car away from the window and stopping the car before Ms. Liebeck

113. *Id.*

114. *Jurors Sting McDonald's for Scalding Coffee*, ASSOCIATED PRESS, Aug. 19, 1994.

115. *\$2.9 Million Award Scalds McDonald's*, CHICAGO SUN-TIMES, Aug. 19, 1994, at 2.

116. See, e.g., *Woman Wins Lawsuit*, FT. LAUD. SUN SENT., Aug. 19, 1994, at 3A; *A Woman Who Was Scalded When Her McDonald's Coffee Spilled Won a Jury Award of Nearly \$2.9 Million — or About Two Days' Coffee Sales for the Fast Food Chain*, ST. PETE. TIMES, Aug. 19, 1994, at 6A; *Scalding Coffee Nets \$2.9 Million*, PITTSBURGH POST-GAZETTE, Aug. 19, 1994, at A7; *News & Abstracts*, WASHINGTON POST, Aug. 19, 1994, at C1; *Coffee Spill Burns Woman, Jury Awards \$2.9 Million*, WALL ST. J., Aug. 19, 1994, at B3; *McBurn Earns Woman Millions Drive Burned by Coffee That Was Too Hot, Judge Rules*, TORONTO STAR, Aug. 19, 1994, at A1; *Coffee Too Hot, Jury Finds*, TORONTO SUN, Aug. 19, 1994, at 67; *Woman Burned by Coffee Wins \$2.9 Million Award*, ORLANDO SENT., Aug. 19, 1994, at A16; *Big Jury Award for Coffee Burn*, N.Y. TIMES, Aug. 19, 1994, at D5; *McDonald's Scalding*, BOSTON HERALD, Aug. 19, 1994, at 30.

117. See HALTOM, *supra* note 67, at 201.

118. See Associated Press, *Judge Orders Conference in Spilled Coffee Award*, Sept. 1, 1994.

119. *Id.* (emphasis added).

fidged with the lid may have suggested to jurors that Ms. Liebeck and Mr. Tiano were not as negligent as the Associated Press report might imply. As if that were not enough misstatement, the account obliterates Ms. Liebeck's estimate that she attempted to add cream and sugar within about four minutes of the coffee's being poured.¹²⁰ Such interjected facts about the accident again suggest an inclination to direct focus towards the (alleged) recklessness of the spill, while distracting attention from the danger of the product that unexpectedly caused the severe injuries.

REMEDICATION — THE REST OF THE STORY REACHES FEW READERS

Another stimulus, Andrea Gerlin's investigation of the *Liebeck* case as jurors saw it,¹²¹ had enormous potential for broadening and deepening understanding of the *Liebeck* case and verdict. Ms. Gerlin explained in the *Wall Street Journal* how jurors could have reached judgments that pundits and wags had ridiculed and editorialists had pronounced absurd or stupid.¹²² She found it easier to understand, if not agree with, the jury once she learned about major facts and legal arguments that had shaped their reasoning.¹²³ Gerlin recounted McDonald's longstanding and extensive record of scalding its customers.¹²⁴ She reviewed testimony from McDonald's officials and experts that made the corporation appear nonchalant and even callous.¹²⁵ She reported on the severity of the burns, on the impact that photographs of Ms. Liebeck's injuries had had on jurors, and on some scientific evidence regarding the celerity of burns.¹²⁶ Ms. Gerlin discovered reasons for sympathizing with Ms. Liebeck, reasons that had hitherto received but the shortest shrift.

To be sure, Ms. Gerlin's piece shortchanged some aspects of the case. Nowhere did she inform readers that the grandson was driving or that the car was parked away from the window. She also skimmed on how the science of burns suggested the urgency of reducing the temperature of hot liquids, on the legal basis for the judgment, and on the long history of the dispute prior to trial. But, overall, the account was complex, rich, and well researched.

Despite the excellence of Ms. Gerlin's report, any potential for at least some increased understanding about the case was not impressively realized. Only seven additional news sources (of the original twenty-

120. *See id.*

121. Andrea Gerlin, *A Matter of Degree*, WALL ST. J., Sept. 1, 1994, at A1.

122. *Id.*

123. *See id.*

124. *Id.* at A4.

125. *Id.*

126. *Id.* at A1, A4.

six) produced articles that wholly or largely reprinted Gerlin's *Wall Street Journal* report. Ms. Gerlin's follow-up and articles based on it complemented Phase One coverage. As in the earlier phase, facts about burns, monetary awards, the heat and defects of McDonald's coffee, and the nature of the spill were amply highlighted. In addition to these staples of spot-coverage, though, the follow-ups to Gerlin did devote attention to the record of McDonald's: past scaldings, complaints, and litigation; resistance and recalcitrance; and flaunting and flouting of standards for coffee in the fast-food industry. These facts cast the defendant in a less flattering light and made the awarding of punitive damages more understandable than it had been when first covered. Relatively sympathetic attention to the case as understood by jurors and plaintiff made this second phase of coverage quite different from the first.

Of course, even papers that relayed Ms. Gerlin's addenda need not have updated their views to take the newly available information into account. The *Cincinnati Enquirer* included much of the same enlightening information as the other articles, but the editorial interjected three sentences alleging Ms. Liebeck's undue litigiousness, which was decidedly not a theme explored by Ms. Gerlin.¹²⁷ Having observed that many jackpot jury awards were reversed or reduced on appeal, the editorial continued: "Unfortunately, cases like these have destroyed the credibility of the justice system, giving Americans a picture of bone-headed jurors giving away millions for cuts and scrapes at the demand of greedy gold-diggers and their ambulance-chasing lawyers."¹²⁸ In other words, after admitting the myriad ways in which the *Liebeck* dispute refuted popular prejudices about civil justice cases, the *Enquirer* then reconstituted this exception as evidence for the "rule" that civil justice is not credible, that jurors are gulls, that plaintiffs are chiselers, and that plaintiff's counsel are shysters. Not content to have reiterated a passel of stereotypes in an editorial that itself demonstrated that those clichés did not fairly apply to the *Liebeck* litigation, the *Enquirer* then drew the dramatic moral lesson: "Personal responsibility has been scrapped for the notion that someone can be made to pay for any mistake — including opening a cup of hot coffee between your legs while driving."¹²⁹ Tort reformers could not have articulated the theme of individual responsibility at the heart of their legal argument any better!¹³⁰ Not only

127. *Spilled Coffee: The Rest of the Story About McDonald's \$3 Million Claim*, CINCINNATI ENQUIRER, Sept. 6, 1994, at A6.

128. *Id.*

129. *Id.*

130. By the end of the editorial, the *Enquirer* blames defense counsel for the loss of the case. *Id.* In an editorial pertaining to personal responsibility, the McDonald's Corporation emerges as the only courtroom participant not blameworthy in the *Enquirer's* view.

did the *Enquirer* relay Ms. Gerlin's corrections only to supplant them with common charges inapposite to the immediate dispute, but the editorial exploited Ms. Gerlin's (and her predecessors') omissions by providing inaccurate information about the automobile's location, stationary status, and actual driver.¹³¹ The perils of omissions and the persistence of factoids could not be clearer.

Why does Gerlin's correction appear to have made so little difference? Cynics might generalize Pundit Rossie's contention that the Associated Press dislikes to be reminded of its omissions; dailies choose not to emphasize shortcomings and superficiality in their coverage.¹³² Having missed crucial details in the first place, most papers seem to have been averse to revisit a matter no longer timely. Absent the factual update, commentators were left to fill in missing details as suited their moralistic spin. When journalistic omissions and commissions meet in a mutually reinforcing peak, erroneous factoids result and familiar story lines (here echoing tort reformers) find implicit support.

PHASE THREE COVERAGE IN NEWSPAPERS: MORE OMISSIONS AND MORE FACTOIDS

Whatever the explanation of press reticence about Ms. Gerlin's investigations in Phase Two, in Phase Three the press compounded its indifference to key points that proved pivotal to the plaintiff's successful story before the jury. When Judge Scott inaugurated Phase Three by reducing the punitive damages by over eighty percent to three times the compensatory damages, the press had an opportunity to correct details and educate the public about how the civil legal system routinely works. As Table Three (please look under "Phase Three") summarizes, we have been able to document few reports that took advantage of that opportunity. Crucial omissions persisted and errors of commission proliferated.

SPOT OMISSIONS CONTINUE AND A SPOT FACTOID ERUPTS

We were not surprised that 37.5% fewer newspapers covered the reduction of punitive damages than covered the original award. We found two wire-service stories but only fifteen spot reports in newspapers, two of them in the *Chicago Sun-Times*.¹³³ The verdict having

131. *Id.*

132. Our interviews with journalists confirmed this point quite emphatically, especially regarding trying to "make up" for earlier omissions.

133. See, e.g., *Judge Reduces Award in Coffee Scalding Case*, CHICAGO TRIBUNE, Sept. 14, 1994, at 2; *Hot Issue*, CHICAGO SUN-TIMES, Sept. 14, 1994, at 3; *Judge Reduces Award Against McDonald's*, ASSOCIATED PRESS, Sept. 15, 1994, at 1; *McDonald's Coffee Award Reduced 75% by Judge*, WALL ST. J., Sept. 15, 1994, at A4; *Judge Chills Jury Award to Woman in Coffee Spill*, TORONTO STAR, Sept. 15, 1994, at A3; *Judge Lowers Settlement*, FT. LAUD. SUN. SENT., Sept. 15,

become nearly month-old news, this waning of interest was predictable. Nonetheless, reduction of coverage exacerbated the original holler of the dollar. If even diligent readers ran across no story of the reduction in punitive damages, they became more likely to remember the outlandish award. Therefore, it is little wonder that even well-informed commentators apparently missed the reduction. This understandable omission conformed the story to *news* framing but deformed the *legal* frame that the jury had accepted.

While the scaled information items for Phase Three did not precisely reiterate the order in earlier phases rank-order correlations between the four phases were high.¹³⁴ Information on the monetary award and burn injury predictably switched places between Phase One and Phase Three, with the reduced punitive damages now dominating, but both elements were ubiquitous as they had been in the first set of spot reports, while facts pertaining to the spill were omitted from only two newspapers.¹³⁵ It seems unsurprising that the disputants' reactions were covered by a greater proportion of papers in Phase Three than in earlier phases — reactions were easier to come by a month after the original verdict. Facts about McDonald's past conduct and the location of the automobile were about as prominent in the September reports as in the August reports. Although information pertaining to the heat of the coffee or allegations about its dangers were postponed in a slight majority of the papers and omitted entirely from six papers, when addressed, these themes consumed more sentences than many other categories. Three newspapers conveyed information about the jury or jurors, a drop from initial coverage.¹³⁶

The variety of information types discussed declined even further between Phase One and Phase Three. Six categories of information drew no mentions whatsoever in any paper. The Associated Press's sin of commission continued in the newspapers as well. Following the AM and PM Associated Press reports that Ms. Liebeck tried to open her cof-

1994, at 3D; John Taylor, *Coffee to Return to Popeye's Menu*, OMAHA WORLD HERALD, Sept. 15, 1994, at 15; *Judge Cuts Award in Scalding-Coffee Suit to \$640,000*, L.A. TIMES, Sept. 15, 1994, at D2; *Court Cuts Scalding Award*, FINANCIAL TIMES, Sept. 15, 1994, at 1; *Judge Lowers Coffee Award to \$480,000 McDonald's Should Only Pay Reasonably Related Damages*, DALLAS MORNING NEWS, Sept. 15, 1994, at 1D; Sue Major Holmes, *Judge Cuts McDonald Coffee Damages*, CHICAGO SUN-TIMES, Sept. 15, 1994, at 6; *N.M. McDonald's Penalty Reduced*, BALTIMORE SUN, Sept. 15, 1994, at 18C.

134. Between Phase One and Phase Three, for example, Spearman's $\rho = 0.906$.

135. See *Judge Lowers Coffee Award to \$480,000 McDonald's Should Only Pay Reasonably Related Damages*, DALLAS MORNING NEWS, Sept. 15, 1994, at 1D; John Taylor, *Coffee to Return to Popeye's Menu*, OMAHA WORLD HERALD, Sept. 15, 1994, at 15.

136. John Taylor, *Coffee to Return to Popeye's Menu*, OMAHA WORLD HERALD, Sept. 15, 1994, at 15.

fee “at a McDonald’s driveup window . . . ,”¹³⁷ seven of the nine newspaper spot reports provided misleading information about the location or mobility of the automobile, again underlining the assumption that Liebeck’s spill was reckless. This is relevant, for the earliest reports in Phase One had often left unexamined the position of the car and its immobility. For all the corrections afforded by Ms. Gerlin’s report, the whereabouts of the car when the spill occurred was not accurately identified.¹³⁸ With the Associated Press stories of September 1 and September 14, omissions and ambiguities began to give way to interjected errors, and those errors began to fly-speck spot reports that tracked the Associated Press.¹³⁹ Even more important, critical omissions about facts and frames presented at trial remained and enticed readers to fill in omitted details with convenient factoids again inaccurately implying Ms. Liebeck’s recklessness as cause for her injuries.

FEATURES: OMISSIONS AND FACTOIDS APLENTY

Commentaries and editorials during Phase Three increased the distance of the news story from the account heard by the jury. For example, errors about the location and mobility of the Ford Probe dotted editorials and features during Phase Three. The nine articles that we located for the period from September 15, 1994 through December 1, 1994 tended to track spot coverage, which we have seen to be in error. The nature of the awards and the burns as well as select items regarding the accident still fueled articles. We found greater attention to the record of McDonald’s corporation than we might have expected, but we note that some of the attention followed from repetition of an editorial written by a partially informed high school student¹⁴⁰ and two-thirds of the sentences that referred to the McDonald’s record came from an editorial relaying Ms. Gerlin’s follow-up. For the most part, these few articles reveal a fading of intensity as Ms. Liebeck became less topical and more familiar.

Six of the nine editorials and letters once again made some reference to the drive-up window. Of those six, two editorials (from the *Ari-*

137. Sue Major Holmes, *Judge Reduces Award in Coffee Scalding Case*, ASSOCIATED PRESS, Sept. 14, 1994, AM cycle and PM cycle.

138. The report of the reduction in the *Wall Street Journal* does not speak to location or mobility of the automobile. See *McDonald’s Coffee Award Reduced 75% by Judge*, WALL ST. J., Sept. 15, 1994, at A4.

139. See, e.g., *Judge Cuts McDonald’s Coffee Damages*, CHICAGO SUN-TIMES, Sept. 15, 1994, at 6 (claims Liebeck “tried to pry lid off at McDonald’s drive-through”); *Judge Lowers Settlement*, FT. LAUD. SUN. SENT., Sept. 15, 1994, at 3D (Liebeck allegedly “tried to pry off its lid at McDonald’s drive-up window”).

140. Mili Vakil, *Merchants Shouldn’t Take Heat for Dumb Act*, CLEVELAND PLAIN DEALER, Oct. 10, 1994, at 2E [hereinafter Vakil, *Dumb Act*].

zona Republic, an editorial incorporating parts of the Gerlin article, and *Washington Times*) did not suggest that Ms. Liebeck had fumbled her coffee at the drive-through window.¹⁴¹ Other comments were wildly inaccurate. The *Greensboro News and Record* accurately placed the plaintiff in the passenger's seat but distorted the locale of the accident: "Liebeck, who had put the cup of coffee between her legs while riding through the drive-thru, spilled it on her lap when she tried to pry off the lid."¹⁴² A *Cleveland Plain Dealer* editorial (written by the aforementioned high school student) made a similar error.¹⁴³ In addition, five of the nine articles linked the case to excessive litigiousness, with the *Providence Journal-Bulletin* devoting numerous sentences to the charge.¹⁴⁴ Meanwhile, none of the commentaries expressed sympathy or support for Ms. Liebeck.

PHASE FOUR: THE CASE SETTLES AND THE LEGEND IS SET

On November 30, 1994, McDonald's settled with Ms. Liebeck for an undisclosed sum. Spot coverage about the end of the formal dispute marked a fourth phase and completed the story for most reporters. We located sixteen spot reports in fourteen newspapers most on December 2, 1994. After news of the settlement, Ms. Liebeck's matter surfaced in few articles for the remainder of 1994. Phase Four, then, represents a denouement of reportage, after which the case largely yielded to widespread factoids.

In Phase Four, omissions increased again as spot coverage crystallized for a last time. Only the characteristics of Ms. Liebeck's injuries "made" every report in Phase Four. Every other element was omitted from at least two reports. The dollar continued to holler even as Ms. Liebeck's "jackpot" shrank, perhaps because agreement on money resolved the dispute. Even coverage regarding the award was somewhat mixed: the only relevant headlines we found referred to injuries rather than money. Having hollered dollar awards to accentuate the absurdity of millions for an everyday mishap (and to increase the news-value of the report), print media now alluded to how little Ms. Liebeck and her attorneys may have gotten, mainly because the agreement was sealed at the request of McDonald's. Papers lost the hype of the hollered dollar but could not provide an alternative to the gaudy figure of initial reports.

141. See Editorial, *Put a Limit on Medical Liability Awards?*, WASHINGTON TIMES, Oct. 2, 1994.

142. Leigh Pressley, *Great Gobblers!*, 1994 *Turkeys of the Year*, GREENSBORO NEWS AND RECORD, Nov. 24, 1994, at D1.

143. Vakil, *Dumb Act*, *supra* note 140.

144. John Martin, *ABC Takes Aim at the "Blame Game"*, PROVIDENCE JOURNAL-BULLETIN, Oct. 26, 1994, at 5E.

As a result, editorialists and commentators continue to use wildly inflated figures for Ms. Liebeck's award.

Selected information pertaining to the accident itself persisted as a common reference, as did descriptions about the placement and mobility of the automobile, sustaining focus on the accident rather than the product. Beyond those four sorts of information, reporting was skimpy. The plaintiff's claim that McDonald's coffee was so torrid that it was a defective product appeared in less than a third of the articles.¹⁴⁵ Again, the four evidentiary claims central to the plaintiff's winning legal construction at trial did not surface at all. The history and current posture of McDonald's corporation graced only the article in the *Wall Street Journal*, which alone recalled an aspect of the dispute trumpeted by the Gerlin investigation.¹⁴⁶ The claim that Ms. Liebeck spilled her coffee at the drive-through window persisted three months after the Associated Press introduced the error. That error surfaced in eight of nine news organs that referred to location.¹⁴⁷ Only the earlier report in the *Chicago Sun Times* omitted a reference that conveyed incorrect information.¹⁴⁸

PHASE FIVE BEGINS: McDONALD'S LOST THE BATTLE BUT LIEBECK LOST THE WAR

The end of 1994 defines a cusp between the first four phases of the *Liebeck* story and the extended fifth stage that began with the settlement and continues today. We located but four references in 1994 to the *Liebeck* case after spot reports of the settlement, all four the same commentary.¹⁴⁹ Scott Montgomery's discourse on blame-avoidance was carried by four newspapers in our "Academic Universe" sample. Approximately 114 of Mr. Montgomery's sixteen hundred words pertained to the *McDonald's Coffee Case*.¹⁵⁰ Recalling earlier editorials, Mr. Montgomery emphasized Ms. Liebeck's responsibility for the spill

145. For one example, see *McDonald's Reaches Settlement in Coffee Burn Suit*, L.A. TIMES, Dec. 3, 1994, at D2.

146. *McDonald's Settles Lawsuit Over Burn From Coffee*, WALL ST. J., Dec. 2, 1994, at B6.

147. Examples include: *McDonald's Hot Coffee Settlement*, KANSAS CITY STAR, Dec. 3, 1994, at B2; *McDonald's Reaches Settlement in Coffee Burn Suit*, L.A. TIMES, Dec. 3, 1994, at D2; *McDonald's Corp. has Reached Out-of-Court Settlement*, TORONTO SUN, Dec. 2, 1994, at A23; *Hot Coffee*, CHICAGO SUN-TIMES, Dec. 2, 1994, at 56; *Hot Coffee Settlement*, NEWSDAY, Dec. 2, 1994, at A26; *Coffee Suit*, USA TODAY, Dec. 2, 1994, at 3A.

148. *Hot Coffee*, CHICAGO SUN-TIMES, Dec. 2, 1994, at 56.

149. There were references to the case that even our expansive search in "Academic Universe" did not turn up. See, e.g., Jeff Peline, *Excuses, Excuses—Sun Gets in the Eyes of Corporate America*, SAN FRANCISCO CHRONICLE, Dec. 29, 1994, at D1. In pursuit of replicability, we did not add such articles to the data set.

150. Scott Montgomery, *Lay Blame: It Is the Name of the Game*, SOUTH BEND TRIBUNE, Dec. 18, 1994, at F1.

and the lamentable litigiousness that her case represented.¹⁵¹

As was the case in commentaries during the third phase, the *Liebeck* matter had been distilled in editorials, features, and comments to a very shallow account. This account related briefly elements indispensable for identifying the case: hollering dollars, painful burned skin, spilt coffee, and reaction from McDonald's corporation or counsel. The overwhelming focus of the treatment, however, was on Ms. Liebeck's failure to take personal responsibility for her clumsiness and her litigious inclinations towards blaming her misfortune on a well-heeled corporation. In short, by the start of Phase Five, the *Individual Responsibility Narrative* favored by defendant McDonald's had obliterated the *Defective Products Liability Narrative* that had motivated the plaintiff and persuaded the jury. To be certain, given its ideological pull in our society, the invocation of "individual responsibility" against the plaintiff's greed, adversarialism, and rights obsession might have triumphed anyway. Emphasis on elements and interpretations that redounded to the benefit of the defendant, and, far more important, omission of information and arguments crucial to the plaintiff's case certainly assisted that triumph, however. Omissions from otherwise solid spot coverage in effect disguised and distorted the actual claims produced by Ms. Liebeck and assessed favorably by the jury and trial judge. We should not wonder, then, that "the McDonald's Coffee Lady" became a symbol for undeserved victory in the litigation lottery.¹⁵²

Indeed, throughout subsequent years, newspaper references to the incident were common if widely variable in type (editorial, letter to editor, advice column, humor column, etc.) and location. Not only was the *Liebeck* case often recalled, but disputes over hot liquids in other settings increasingly received attention in the news.¹⁵³ Moreover, invocations of Stella's saga proliferated in commentaries, with inaccuracies increasing in proportion to self-righteous moralizing. Closing out the year, Jeff Pelling wrote in the *San Francisco Chronicle* that "America has a victim complex," as witnessed by "such surreal cases as the woman who recently won a \$2.7 million verdict after spilling coffee on her leg in a McDonald's restaurant."¹⁵⁴ A few months later, a *New York*

151. *See id.*

152. Please notice that we do not claim that fidelity to narratives was either necessary or sufficient for the "iconization" of Stella Liebeck. Rather, we argue that: (1) print media disseminated factoids and fantasies into the public forum while interpreters in an array of media were defining the case for themselves and for their audiences; and (2) the absence of countervailing facts freed interpreters to insinuate further factoids and moral fantasies into convenient places.

153. *See* examples cited in Greenlee, *Kramer v. Java World*, *supra* note 6, at 723-24 n.57.

154. Pelling, *supra* note 149.

Times editorial similarly invoked Stella Liebeck as a symbol for a society run off of its tracks. “[L]ife. . . used to be blissfully simple: the coffee hot, the drinker sitting and sipping. But now everyone’s hither and yon, perching take-out coffee in mid-dash. And spilling it. And suing someone.”¹⁵⁵ Around the same time, an editorial in the *Oakland Tribune* began by making our own point quite concisely, for a different purpose: “There is probably one in the paper today, if you take the time to look. There usually is: A numbing tale of a citizen hauling someone into court over something absurd. . . .”¹⁵⁶ This rant continued:

The poster woman for this sort of ludicrous lawsuit is an 81 year old New Mexico woman who sued McDonald’s after she spilled her hot McDonald’s coffee in her lap . . . Is there any doubt in anyone’s mind that our legal system is being badly abused? Greedy lawyers, victims out to make a buck, and a culture that encourages people to sue instead of accepting their own responsibility or working things out, have clogged with cases that don’t belong there.¹⁵⁷

Humorist Dave Barry included inaccurate references to the hot coffee judgment on his list of major reasons for wonder about American society at the start of 1995; the former labeled his retrospective essay “A Great Year for Victims.”¹⁵⁸ Columnist Joseph Perkins of the *San Diego Union-Tribune* even named an annual award “The Stellas.”¹⁵⁹ “The award is named for Stella Liebeck, the Albuquerque, N.M. woman who became an instant millionaire and American icon after spilling a cup of McDonald’s coffee in her lap and winning a judgment against the fast-food chain.”¹⁶⁰ Ann Landers added the dispute to her own columns regularly dispensing “common sense” about moral responsibility to the American public.¹⁶¹ An angry reader was quoted as saying about Ms. Liebeck that “. . . she was a malingering old biddy who pumped up her alleged injuries to get more money . . . (F)ar from being a victory for the consumer, this case merely encourages unethical, greedy lawyers and their greedy clients to continue to perpetuate such frauds on gullible juries. . . .”¹⁶²

155. *OUTLOOK 1995: THE ECONOMY—Highlights—A Simple Pleasure, Made Complicated*, N.Y. TIMES, Jan. 3, 1995, at C3.

156. Editorial, *A Nation of Lawyers*, OAKLAND TRIBUNE, May 5, 1995, at A14.

157. *Id.*

158. Dave Barry, *A Great Year for Victims*, DALLAS MORNING NEWS, Jan. 1, 1995, at 2F.

159. Joseph Perkins, *The Year’s Best Examples of Strange or Wild Lawsuits*, ROCKY MOUNTAIN NEWS, Dec. 23, 1997, at 45A [hereinafter Perkins, *Stella Awards 1997*]; Joseph Perkins, *The Year’s Most Outlandish Lawsuits*, ROCKY MOUNTAIN NEWS, Dec. 22, 1996, at 60A.

160. Perkins, *Stella Awards*, 1997, *supra* note 159.

161. See Ann Landers, *McLawsuit Plaintiffs Should Wake Up & Smell the Coffee*, FRESNO BEE, Oct. 6, 1995, at F2.

162. *Id.*

The legend of Stella has lived on in newspapers until the present. Spot news coverage of lawsuits for excessively hot liquids or pickles on hamburgers and a chicken head among the new fried chicken wings at McDonald's provide one form of enduring reference keeping memory of the original case and what it represented alive.¹⁶³ The case lives in many other forms as well. For example, on Sunday, January 2, 2000, the front page of the *New York Times* "Arts and Leisure" section featured a long article in which comic Steve Martin ruminated about his dilemma of just "exactly what to celebrate on December 31, 1999."¹⁶⁴ Martin's witty meditation, titled "The Third Millennium: So Far, So Good," began with a "A Short History of Thought" in which the author urged readers to ". . . think of poor Socrates, with his simple answer to the question 'What is justice?' There was no way for him to have foreseen a jury's \$3 million payout to a McDonald's customer who spilled a cup of too-hot coffee in her lap."¹⁶⁵ Martin's joke turned on the absurdity that the legal damages awarded to octogenarian Stella Liebeck in 1994 for injuries resulting from an everyday occurrence represented 2500 years of human progress in thinking about justice.¹⁶⁶ The wry juxtaposition worked, of course, only to the extent that Martin's reference to the jury verdict¹⁶⁷ over five years earlier still resonated clearly among readers of the *Times*.

One feature of Phase Five coverage is especially notable if, by this point, unsurprising. Whereas quoted reactions regarding the judgment in the first four phases were dominated by those sympathetic to the winning plaintiff (Liebeck's attorney, juror, etc.), by Phase Five, cited authorities and experts were critical of the judgment and/or Ms. Liebeck by more than a two-to-one margin.¹⁶⁸

BLAMING THE VICTIM: MS. LIEBECK IN POPULAR CULTURE

The transformation of the scalding coffee case into a classic tort tale and Stella Liebeck into the poster lady for the tort reform movement

163. See, e.g., *Chicken McNoggin, Hold the Fries*, WASH. POST, Dec. 1, 2000, at C1; see also Greenlee, *Kramer v. Java World*, *supra* note 6.

164. Steve Martin, *The Third Millennium: So Far, So Good*, N.Y. TIMES, Jan. 2, 2000, §2 at 1, 8.

165. *Id.* at 1.

166. See *id.*

167. Mr. Martin may have relied on the phrase "\$3 million payout" to prompt readers' recollections or he may have believed that a jury did or could compel McDonald's to send three million dollars to the customer. In either event, Mr. Martin is inaccurate for reasons detailed in this article.

168. McDonald's attorneys and spokespersons opted to offer little comment after the jury's judgment, while Liebeck's supporters were happy to claim victory. After the dispute was settled, the legend drew heavy fire. The data derived from a study of five top newspapers in 1995-1998.

burgeoned outside newspapers. Indeed, the diffusion of the inverted, factoid-riddled morality tale throughout the electronic media, popular culture, and political discourse was so rapid, dramatic, and sustained that every reader of this sentence must be familiar with some invocation of the icon that Stella Liebeck has become. We briefly catalogue just some of the venues in which the story was replicated, usually in derisively cartoonish terms. In doing so, we not only elaborate on the dissemination of the McDonald's coffee chronicle, but we demonstrate through the case study the ways that representations by print media and other media of popular culture are continuously interrelated in constructing the spectacle and lore of law.¹⁶⁹

TV NEWS COVERAGE

We found thirty-eight spot news broadcasts mentioning the verdict on TV (fourteen national, twenty-four local) in the two days after the jury award was announced. For the most part, this coverage was similar to the newspaper coverage in what it did and did not provide for public consumption, although it was even less substantial and accurate than the print versions. Accounts were riddled with the same errors and, more important, omissions of critical elements heard at the trial, thus again emphasizing the recklessness of the accident over the dangerous product. One important difference from spot coverage in newspapers was that local TV broadcasts often openly ridiculed the decision that they reported as news. One report joked with a pun about "burned buns" at McDonald's.¹⁷⁰ Another sardonically reported that Liebeck (after "she spilled scalding coffee on herself in a McDonald's restaurant") said, "hot coffee is terrible on the groin and buttocks."¹⁷¹ Yet another report quoted a customer and an attorney who both said they thought "the suit was stupid," offered no parallel defenses of the suit, and ended by pointing to Liebeck "explaining how to get rich after spilling a hot beverage on their crotch (sic)" ¹⁷²

NEWS MAGAZINES AND NEWSLETTERS

Newsmagazines also extended considerable recognition to the hot coffee incident, usually in similarly abridged, misleading, often inaccurate tort tale-like versions. Indeed, a quick search of "Academic Universe" identified numerous mentions for "McDonald's and coffee and

169. Our forthcoming book will provide much greater detail and examples for the forms of media coverage briefly outlined here.

170. *Eyewitness News* (KABC Los Angeles television broadcast, Aug. 18, 1994, 11PM).

171. *Eyewitness News* (KABC Los Angeles television broadcast, Aug. 18, 1994, 4PM).

172. *Eyewitness News* (KTTV Los Angeles television broadcast, Aug. 18, 1994, 10PM).

burn or scald” in *Newsweek*, *Time*, *Business Week*, *US News & World Report*, and *Forbes* between August, 1994 and January 1, 2000. Most such accounts echoed the critical editorials in the newspapers — full of misleading errors, focused on the accident rather than the product, and again openly disdainful of the irresponsible plaintiff and the capricious legal system.

TV NEWS FEATURES AND TALK SHOWS

Ms. Liebeck’s saga played widely on television feature news and interview shows. For example, the case was mentioned and Stella Liebeck’s daughter interviewed shortly after the incident on the *Larry King Live* show. Perhaps the most incendiary treatment was on an ABC special, *The Blame Game: Are We a Country of Victims?*, hosted by the controversial John Stossel.¹⁷³ Like his later attack on the civil legal system, *The Trouble with Lawyers*,¹⁷⁴ Stossel’s show mixed selected anecdotes, assorted facts, and a barrage of leading rhetorical questions into a mix of caustic commentary and amusing entertainment. The show began provocatively by citing the *McDonald’s Coffee Case* as one of several examples of business owner’s complaints about “what’s wrong with America.”¹⁷⁵ In short, claims one interviewee, “everybody’s a damn victim. . . . We have so much to give, and so many who take.”¹⁷⁶ The show later used a highly selective, simplified cartoon version of the story to illustrate what Stossel posed as a fundamental breakdown in Americans’ individual responsibility, civil law, and culture. Roger Conner, of the American Alliance for Rights and Responsibilities, was asked to cap the sermon:

The word of these lawsuits spills out into society, enters into the national conversation. And people start thinking that this is the appropriate way to live. . . . It makes people think, I’d be a chump if I did otherwise. If I take responsibility for what I do and for what happens to me, I’m a fool. Now, when that idea gets loose, America’s in trouble. . . . This whole victimization, it’s like a — it’s like a disease that’s weakening America’s moral fiber.¹⁷⁷

A host of other shows on virtually every major channel offered up similar rituals for responsibility that ripped the hot coffee case, the plaintiff, and the judgment.

173. *The Blame Game: Are We a Country of Victims?* (ABC television broadcast Aug. 17, 1995) available at <http://www.LEXIS.NewsTranscripts.com> [hereinafter Stossel, *Blame Game*].

174. *The Trouble with Lawyers* (ABC television broadcast, Aug. 17, 1997).

175. Stossel, *Blame Game*, *supra* note 173.

176. *Id.*

177. *Id.*

LATE NIGHT TV

Given the ridicule that permeated supposedly serious news coverage, it is not surprising that late night talk show hosts appropriated Ms. Liebeck's saga for their own comic routines. The best-known episode involved Jay Leno, who several times told jokes referring to the case. Attorney Morgan told us that he wrote Leno in protest, and Leno actually called him in response.¹⁷⁸ However, Leno continued to make jokes about scalding spills of McDonald's coffee at least through February 9, 2001.¹⁷⁹ David Letterman also made reference to the hot coffee liability issue a number of times over several years.¹⁸⁰

PRIME TIME TV COMEDY

Viewers who do not stay up to watch late night television could catch a longer comic play on the dispute over spilled coffee on the wildly popular *Seinfeld* show. The specific episode, titled "The Maestro," initially ran October 5, 1995, and has been rerun many times.¹⁸¹ The show focuses on the aftermath of an incident in which the zany and socially inept Kramer spills coffee on himself when stuffing a Styrofoam cup into his pants to sneak a latte into a movie theater. After filing a lawsuit, he confronts his friend Jerry who expresses surprise at Kramer's litigiousness. That prompts Kramer to reply "Oh, I can be quite litigious,"¹⁸² as we recorded in an epigraph for this essay.

CORPORATE ADVERTISEMENTS

It took a while, it seems, but eventually the advertising industry appropriated references and images of the case for humorous promotions as well. We found national magazine advertisements for a major hot chocolate product and television commercials for both a major phone company and several automobile manufacturers making explicit references to the hot coffee case.¹⁸³ In a like advertisement, a little girl says, "Here's a scalding hot cup of tea, Grandma" in the back seat of Mercedes-Benz careening over rough roads. The fact that corporations could so blithely appropriate the image to promote their products reflects both the dominant story line attached to the coffee case in mass mediated culture and the privileged position of corporate producers in that culture.

178. Interview with S. Reed Morgan, in San Antonio, Tex. (Mar. 23, 2000).

179. *Tonight Show with Jay Leno* (NBC television broadcast, Feb. 9, 2001).

180. See Greenlee, *Kramer v. Java World*, *supra* note 6, at 702 n.8.

181. *Seinfeld*, *The Maestro*, *supra* note 5.

182. For extensive analysis of this show and its implications, see Greenlee, *Kramer v. Java World*, *supra* note 6, at 704-09.

183. Advertisements photocopied in authors' files.

THE MOVIES

A bit to our surprise, the coffee incident has been alluded to in only one major movie that we have found — *Goodbye Lover*, starring Ellen DeGeneres.¹⁸⁴ Discarding a newspaper, Ms. DeGeneres's character offers the last epigraph with which we began this case study.

CONGRESSIONAL HEARINGS

As the *Liebeck* story was mocked in popular entertainment, it was mostly scorned by public officials as well, which of course found its way back into many newspaper and TV accounts. As such, serious news and popular entertainment, official politics and political comedy, fused together into a complex stream of anecdotal references to Liebeck's litigation as leading symbol of a legal system and civil society gone wrong. "Everybody in America is fed up with being sued by everybody for everything. I just have to refer to the case of the lady that sued and won for having been scalded by a cup of coffee she bought in McDonald's 5 minutes earlier," proclaimed Representative Kasich as Republicans geared up to take action to limit frivolous lawsuits in 1994.¹⁸⁵ Indeed, an electronic subject search of the congressional hearings in 1995 confirmed that the *McDonald's Coffee Case* was a staple of political discourse. Just as the mass media had reconstructed a successful claim of legal right into a cartoon, so did politicians use that cartoon to justify reconstructing and righting the law itself.

THE TORT TALE ENDURES

We have just sampled here the many forums in which the *McDonald's Coffee Case* has become a prominent part of the prevailing legal lore in America. In fact, as one of us sat writing a draft of this very study on July 13, 2000, he heard a story on National Public Radio about a man who had sued after being scalded by coffee in a restaurant. The man insisted that ceramic cups have warning labels on them. The judge denied the claim, saying "What next? Warnings on steak knives?"¹⁸⁶ Such a report obviously was intended as humorous fluff on a serious

184. *GOODBYE LOVER* (Warner Bros. 1999).

185. 140 CONG. REC. H9766m (daily ed. Sept. 27, 1994) (statement of Rep. Kasich).

186. We point to a final example. On October 8, 2000, the *Seattle Times* ran a story about a woman who filed a legal claim for \$110,000 against McDonald's because she was burned by a pickle that fell on her chin from a McDonald's hamburger. See *Reno, 18 Other Women Win Spot in New York Shrine*, SEATTLE TIMES, Oct. 8, 2000, at A12. We have no idea about, or interest in, the facts of the case, which may well be a spurious claim that will go nowhere. The relevant point is that the story was even told and framed as a typical cartoonish tort tale, from the title — "Lesson from woman's lawsuit — Next time, hold the pickles" — to the end. *Id.*

broadcast. But our point is that it would not be considered funny without the lingering legacy of *Liebeck* in the public space.

ANALYSIS: HOW A COURT CASE BECAME A TORT TALE

Having seen how an understandable if not unassailable judgment was transformed from a legal outcome to a politically charged cultural icon, we now assess implications of our case study for our contentions in our larger project.

THE MASS MEDIA

The *McDonald's Coffee Case* demonstrates in great detail how ordinary news reporting practices both select particular types of events and construct them for the reading public in highly subjective, limited, and problematic ways. But why did this atypical legal case become so typically newsworthy? While many factors were involved, the juxtaposition of a familiar accident with a seemingly astounding award provided a perfect mix of the personal, dramatic, and normal that the press loves, all bound together in a discrete incident. Aspects of the case almost perfectly fit the standard conventions of newsworthiness for "infotainment" coverage. For one thing, the disputing parties fit very familiar images: an elderly woman and the most familiar, ubiquitous family restaurant chain in the world. That nearly everyone has taken out food and drinks from a McDonald's drive-through no doubt mattered also. Moreover, the fact that nearly all persons have spilled hot coffee or hot chocolate or tea on themselves likewise highlights the routine character of the case. What "infotainment" could *not* handle well — those aspects of the *Defective Products Liability Narrative* that persuaded jurors, to cite the most telling example — could be omitted from coverage without readers' or viewers' notice.

As a result of both newsworthiness conventions and routine exposure to parallel tort tale narratives, widespread coverage of this case: (1) privileged certain facts that fit the predilections for personalized and dramatized stories while omitting other information, issues, and story lines in ways that left the account highly fragmented and routinized; (2) provided little attention to the key facts and narrative logic that proved successful in the official trial phase; (3) failed to provide perspective for this particular, atypical case relative to broader patterns in civil litigation; and, as such, (4) re-presented an event in ways that were open to, and even invited, interpretations consistent with the tort reform agenda by elite news spinners and the mass audience. Thin, selective initial coverage quickly gave way to a simplistic anecdotal version of the story

that has become a staple of American conventional wisdom about law, a notable chapter of what we have labeled "law's lore."

This case study also reveals parallels and interconnections between newspaper coverage and other media of cultural knowledge production — especially television daily news, news features, talk shows, and comedy shows, as well as radio, movies, and public forums of official politics — in our "infotainment"-oriented society. Evidence in this article suggests that this broader complex of technologically mediated information production today may be even more conducive to legend production than that of newspapers alone.¹⁸⁷ Moreover, attention to multiple media manifestations of the hot coffee story distinguishes its impact from familiar "big" stories in the news. The infamous story of Stella Liebeck did not hit the public over the head in one huge attack of front-page headlines. Rather, the steady parade of small, thin accounts and brief allusions in multiple media over a sustained period of time quietly supplanted a real victim (McDonald's or herself or both) with a caricature familiar across the American legal and political culture.¹⁸⁸

Our case study of Ms. Liebeck's saga thus demonstrates a more fundamental general theme of our larger project—that mass media have played a relatively independent institutional role in the specific social construction of *legality*. By legality, we refer to Ewick and Silbey's provocative, expansive concept regarding the "'ideas, problems, or situations of interest' to unofficial actors as they take account of, anticipate, or imagine 'legal acts and behaviors.'"¹⁸⁹ Legality thus operates "as both an interpretative framework and a set of resources with which and through which the social world (including that part known as law) is constituted."¹⁹⁰ This role of the media in constructing popular legal

187. We have tried to follow the prescription of Ben Page, who argues that:

[W]e should not study only what does or does not appear about politics in just one type of medium, like television news; as far as possible, we should look at what all the media have to say, including elite newspapers and journals of opinion, as well as more popular communications channels. We need to pay attention to the totality of political information that is made available . . . to the public.

BENJAMIN I. PAGE, WHO DELIBERATES? MASS MEDIA IN MODERN DEMOCRACY 7 (1996). The problem was that, contrary to Page's expectations, the further we looked, the more inadequate, misleading, and skewed the media coverage of the *McDonald's Coffee Case* became.

188. It has not been our purpose as authors to adopt a broadly critical perspective regarding—for whatever the many complex reasons—the increasing superficiality and fantasy-like character of mass mediated political discourse in our nation. But, unfortunately, such a posture is difficult to avoid in presenting our case study findings.

189. EWICK & SILBEY, THE COMMON PLACE OF LAW, *supra* note 2, at 23.

190. *Id.* at 23, 273 n.1. We should qualify our position here. Our argument is about the widespread production and dissemination of particular interpretations of the coffee case in mass mediated culture. We do not presume that most citizens passively accept these produced story lines and their implications. Legality is constructed and reconstructed anew in ongoing dynamic processes by differently situated citizens. Still, we believe that repeated exposure to a particular

meaning is most simply shown by the fact that the story of scalded Ms. Liebeck broke quickly after the jury verdict with little foreknowledge even among tort reform specialists about the lawsuit. It is worth noting in this regard that McDonald's attorneys and representatives said very little immediately after the judgment and experts or other sources cited in the initial articles were weighted to the side of the plaintiff.¹⁹¹ In other words, the mold for problematic public construction of the *McDonald's Coffee Case* was initially set by journalists relatively free of direct instrumental input from tort reformers and other media-attentive elites. Within two weeks after the event, copious information that would have provided a fuller, more complex account was available to newspapers at very small cost in money or time, but those sources were rarely accessed in the interest of informing readers. In short, newsworthy routines largely defeated legal constructions of the case that won in trial and constructed new legal images for the citizenry to consume, appropriate, and variously integrate into their reserve of "common sense."

At the same time, however, this claim of institutional independence must be qualified with regard to both instrumental actions of elites who routinely "feed" the press and the broader ideological and organizational forces in American society that shape the press as an institution. We take up the former matter in the next section. With regard to the latter, we again stress the propensity for individualistic interpretations that focus on personal responsibility, suspicion toward government intervention, respect for corporate forms of ownership, fascination with large sums of money, etc.—all expressing and reproducing dominant ideological currents in American society—demonstrated by coverage of the *McDonald's Coffee Case* and other disputes. These tendencies in turn are similarly reinforced by the pressures of corporate organization privileging rapid news generation for easy consumption to maximize sales to customers and advertisers, thus further shaping the context in which the routines of reporting legal events takes place.

TORT REFORMERS

The argument in the previous section is not intended to suggest that the legions of sophisticated tort reformers contributed little to the rapid rise of Stella Liebeck as a symbol for a legal system gone awry. Most important, the preceding fifteen or so years of concerted tort reform advocacy assaulting the legal system and personal injury lawyers con-

story line and normative logic significantly delimits and shapes the cultural repertoire from which citizens construct legal meaning. There is, we expect, considerable lure to law's lore.

191. Our pilot study of newspaper coverage revealed that sources cited by journalists heavily favored Stella's attorneys and others on "her side."

tributed greatly to the context of media reporting, elite discourse, and public understanding that quickly elevated the *McDonald's Coffee Case* to great symbolic significance. The tort reform movement and corporate campaign to impugn the legal system and celebrate norms of individual responsibility provided a public appetite and familiar menu that the *McDonald's Coffee Case* served very well.¹⁹² That the movement's standard charges against the legal system found or generated many allies among newspaper editors and columnists is clear from previous evidence.

Moreover, tort reformers contributed directly to accelerating and sustaining the continuing familiarity of the story in the ongoing phase of the story's public life (since 1995). While the appointed spokespersons and spinners for tort reform did not influence the initial phases of the public interpretation, they had a field day with the *McDonald's Coffee Case* once they mobilized in subsequent months. "Tort reformers . . . gleefully seized on the case as the epitome of frivolity," confirms one observer.¹⁹³ The incident became a staple on the list of *Horror Stories* maintained by the American Tort Reform Association (ATRA) and others, press releases, and other stories.¹⁹⁴ Reporters have told us in interviews that the *McDonald's Coffee Case* quickly became a routine component in the standard tort reform literature regularly fed to the press. For example, Robert Ash, a senior fellow at the Discovery Institute, made the case a lead item in a published and widely distributed address, "Is It Time to Reform the Adversarial Civil Justice System?" in late 1996.¹⁹⁵

Ash stated:

In sum: when a plaintiff can win a million dollar settlement from McDonald's because its coffee is too hot, when suing and being sued become normal ways of doing business or pursuing political and social agendas, when procedure triumphs over substance. . . It's time for fundamental reform to make the legal system accord with new realities.¹⁹⁶

192. See generally STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES & THE POLITICS OF REFORM* (1995); Galanter, *Oil Strike*, *supra* note 18; Saks, *Do We Really Know Anything?*, *supra* note 18.

193. Sandra Torrey, *Tort and Retort: The Battle Over Reform Heats Up*, WASH. POST, Mar. 6, 1995, at F7.

194. See American Tort Reform Association, *Litigation Horror Stories: Stories That Show a Legal System That's Out of Control*, at <http://www.atra.org/hstories.flml> (last visited Nov. 21, 2001).

195. ROBERT ASH, *DISCOVERY INQUIRY, IS IT TIME TO REFORM THE ADVERSARIAL CIVIL JUSTICE SYSTEM?* (1996).

196. *Id.* It is worth noting that Ash confounds business-on-business litigation, which truly may have exploded, with product liability and tort litigation, which has exploded far less, to say the

An ATRA press release decrying a lawsuit against toothbrush manufacturers as late as April, 1999, listed the *McDonald's Coffee Case* as the leading honoree in the "Crazy Lawsuit and Warning Label Hall of Fame."¹⁹⁷

Corporations were also quick to get into the act of exploiting the high profile case. Mobil Oil took out a substantial advertisement in the *New York Times* that cited the case, noting that "nearly \$3 million was awarded to a customer who spilled hot coffee on herself."¹⁹⁸ Echoing ATRA press releases and paid ads, the Chamber of Commerce sponsored its own ad on the radio: "Is it fair to get a couple of million dollars from a restaurant just because you spilled your hot coffee on yourself? Of course not. It's ridiculous. But it happened."¹⁹⁹

It is important to underline that the *McDonald's Coffee Case* was not just another anecdotal tort tale manipulated by the reform troops, however. By 1994, the national tort reform movement was flagging in its energy. A decade of failure to pass major national legislation in Congress had sapped energies and nurtured frustration. The "easy" victories at the state level had been exhausted, and even these were being undone or undercut through effective litigation campaigns by trial lawyers. Moreover, while social science studies refuting the tort reform message had not widely penetrated the public space, challenges to the accuracy of oft-told tort tales and the reformers' grand grievances were becoming more familiar to political elites and leading journalists. The empirically informed retorts on torts by crusading law professors such as Marc Galanter (University of Wisconsin) and Theodore Eisenberg (Cornell University) were regularly finding their way into top national news stories. In short, the tort reform movement was on its heels, locked into an increasingly defensive battle.

Then, along came the *McDonald's Coffee Case* — the perfect anecdotal antidote to the movement's maladies. No better case could have been fabricated by the movement to provide an effective "We told you so" to skeptics in the media, the political establishment, and the general public. Ms. Liebeck's saga, reduced to factoids by ordinary news reporting routines and repeatedly re-spun by reformers, quickly hot-wired the currents of concern about our failing civil legal system and flagging ethos of individual discipline. It seems hardly a coincidence that the next year the story circulated widely in hearings that led to the

least. Perhaps needless to add, it is unlikely that McDonald's settled for a million dollars a judgment that had already been reduced to \$640,000 almost three months before.

197. Press Release, American Tort Reform Association, Crazy Lawsuit & Warning Label Hall of Fame (Apr. 15, 1999), available at <http://www.atra.org/press.f1ml> (last checked Jan. 1, 2001).

198. N.Y. TIMES, Feb. 16, 1995 (on file with author).

199. Cited in Torrey, *supra* note 193.

first major national tort reform legislation passed by Congress.²⁰⁰ Although President Clinton vetoed that bill, it was clear that the movement had found new life in the aftermath of the scalding coffee story. Indeed, Clinton's successor in the White House made his name as a Texas governor successfully leading the tort reform charge; both of the leading party presidential and vice-presidential candidates were open supporters, in varying degrees, of national tort reform.

ATTORNEY REED MORGAN AND THE PLAINTIFFS' BAR

Our larger study of tort reform politics has found that the plaintiff's bar has not actively or aggressively challenged the reformers' charges against the tort system in the court of public opinion. Moreover, we were somewhat surprised to find that Ms. Liebeck's lead attorney, S. Reed Morgan, did not actively attempt to shape initial media constructions of this specific case. Unlike many politically experienced attorneys in public litigation and the stereotype of a publicity-seeking ambulance chaser, Mr. Morgan offered no immediate press release feeding reporters important information framing the logic of the winning case. While he frequently commented on the case, his published answers were mostly responses to specific reporters' questions rather than efforts to amplify why he thought Ms. Liebeck won or the case's connection to larger public issues. Indeed, Morgan clearly indicated in interviews with us that he had no way of anticipating the caricature of the case that would emerge from the press or its rapid transformation into a symbol for the tort reform crusade.²⁰¹

Once negative reaction developed, Morgan did write a letter clarifying ignored aspects of the case he presented and defending the verdict for the public. Exemplary was the letter published in the *National Law Journal* on October 24, 1994.²⁰² Morgan told us that he wanted to offset the harm of the negative publicity "because it was hurting the system badly . . . people that were trying to do something to protect people through the justice system." But it was too little too late to make a difference.

The wider community of trial lawyers also was relatively slow and mostly reactive in its efforts to frame the story in positive ways. An

200. See 141 CONG. REC. H2661 (daily ed. Mar. 6, 1995).

201. One reason for this is that Morgan himself was surprised by the size of the jury verdict which, he told us, he expected to be between one half and one million dollars. He also noted that lawyers generally "are not educated to handle PR questions. We don't have anyone representing us as PR spokespersons and we are very misunderstood." Interview with S. Reed Morgan, in San Antonio, Tex. (Mar. 23, 2000).

202. S. Reed Morgan, *Verdict Against McDonald's Is Fully Justified*, NAT'L L.J., Oct. 24, 1994, at A20.

excellent account by Gordon E. Tabor, former President of the Indiana Trial Lawyers Association, was written just weeks after the jury verdict. However, his *McFacts*, *McMedia*, and *McCoffee* had little visibility to the mainstream press and general public. As noted above, Ralph Nader attempted to present the overlooked facts and key issues to legislators in 1995, and he later wrote an excellent account of the case with Wesley Smith in their 1996 book *No Contest*.²⁰³ Likewise, the Association of Trial Lawyers of America website carried a defense of the case in the late 1990s, but that also came rather late and was aimed at specialized audiences.²⁰⁴ Again, this relatively tepid and delayed defense of the case illustrates some of the general political limitations of the plaintiff's bar as an advocacy group.²⁰⁵ Moreover, these facts confirm the point that the press was relatively free to frame the case of the scalding coffee according to their usual routines and familiar cues, inadvertently doing much of the tort reformers' work for them.

One of the most interesting and important manifestations of the legal lore surrounding the *McDonald's Coffee Case* was among jurors. It is worth noting that the legendary coffee case cultivated skepticism among jurors that was widely recognized by attorneys on both sides of tort cases. "It comes up all the time. . . The McDonald's case has entered into American folklore. It has become the poster child for tort reform," summarizes James Burgund, a jury consultant with Jury Selection Sciences in Dallas, Texas.²⁰⁶ Reed Morgan confirmed this point based on his own experience. Because of the negative stigma attached to the *McDonald's Coffee Case*, Morgan quickly witnessed the prejudice that subsequent jurors brought to his cases. In fact, Morgan has routinely filed motions requesting that no one link him or his law firm to the earlier case to obviate guilt by association with the legend. That precaution, however, meant that Mr. Morgan could not do what he knew other plaintiffs' lawyers had begun to do — to anticipate the widespread prejudice and talk about how misleading the case was during jury selection or early in a trial, or to use discussion of the *McDonald's Coffee Case* to educate the jury about how the process really works.

Morgan himself was deeply hurt emotionally, professionally, and financially by the legacy of the *Liebeck* case. While the immediate set-

203. RALPH NADER & WESLEY SMITH, *NO CONTEST*, *supra* note 23, at 262-314.

204. Press Release, Association of Trial Lawyers of America, *The McDonald's Scalding Coffee Case*, available at <http://www.atla.org/cjfacts/other/mcdonald.ht> (last checked Feb. 5, 2001).

205. On the tension between professional norms and political advocacy, see *CAUSE LAWYERING: POLITICAL COMMITMENTS & PROFESSIONAL RESPONSIBILITIES* (Austin Sarat and Stuart Scheingold eds., 1998).

206. Greenlee, *Kramer v. Java World*, *supra* note 6, at 703, n.12.

tlement of case generated a decent return, his small practice and its modest income declined after the case. He represented several more victims of hot liquids, but then resolved to take no more such cases. Most important was the sense that he and his humble campaign against dangerous products had been wrongly charged and convicted by the press.

The one emotional thing that came out of this for me was, I kind of had the sense that if you really worked something real, real hard and get to the truth and win, that's the right thing to do. And I was just — there was this tremendous irony, that here's this lawyer who is not really a high profile lawyer, who tries to do quality work and does exactly what he's supposed to do and then this whole tort reform slam comes out of the case. It's like, why don't you pick on a guy that's got a hundred million dollars on a benzene case or an asbestos case? And the obvious answer is because they can make this one look ridiculous, but the nature of the facts . . . I still feel to this day like it [the *Liebeck case*] is just escalated somewhere where it shouldn't be.²⁰⁷

In our interview, Morgan was unwavering about the justice of the verdict for Ms. Liebeck and the campaign against dangerous products like excessively hot liquids. Ironically, he echoed Steve Martin's wag-gish suggestion that the jury verdict modified millennia of thought about justice: "It's sort of like, 'God, you know after a thousand years of civilization, how did it happen that people didn't understand the risk of harm?'"²⁰⁸ In Morgan's perspective, the McDonald's coffee legend did offer a case study about greed, manipulation, and amoral institutional practices. The problem is that the legend itself focused on the wrong parties. This is what he told us about why the coffee case became a media phenomenon:

If you think it through what is going on, the mass media is controlled by big money. It's owned by big corporations. And they are much more interested in selling news and selling papers than selling the truth. So, and then they have the tort reformers feeding it. You have a certain bent of editors for a lot of national newspapers that are conservative. They see a lot of lawsuit news, high verdicts, because people call in high verdicts, they don't call in the 60 percent or so of jury verdicts that are zero verdicts. So they get a perception that here's another out-of-control lawsuit so they write it up. Because they know people want to read that and buy papers.²⁰⁹

207. Interview with S. Reed Morgan, in San Antonio, Tex. (Mar. 23, 2000).

208. *Id.*

209. *Id.*

STELLA LIEBECK: THE ULTIMATE VICTIM

While highly tempted, we chose not to try to meet with Ms. Liebeck to complete our research.²¹⁰ By all accounts, she also felt wrongly persecuted by the treatment of her personal tragedy by the American press, the corporate elite, the tort reform crusade, and public opinion.²¹¹ She was victimized twice, once by a terrible scalding accident and then even more devastatingly by the very routine workings of American media politics that blamed her for her painful fate. We saw no reason to impose on her further with our questions regarding how she now feels about becoming an enduring icon in our nation's legal lore.

CONCLUSION: THE IMPLICATIONS OF LAW'S LORE

This essay has aimed to show how an unlikely lawsuit over spilt coffee was constructed by the mass media and tort reformers into a powerful symbol of runaway litigiousness, a legal system gone awry, and the erosion of traditional norms regarding individual self-restraint. We conclude by briefly pondering the broader implications of this legend's legacy for American legal culture.

Most generally, prevailing popular constructions of the hot coffee case have at once reflected and reinforced cultural tendencies to view relationships and events in terms of individual responsibility and blame. As such, the moralistic, individualizing, disciplinary logics of law are underwritten by popular representations *about* law. The *McDonald's Coffee Case* also, however, illustrates the very social costs and constraining implications of these logics.

We consider first the consequences for political debate about the rationality of the existing tort law system. The construction of the McDonald's case as a lightning rod for concern about the alleged litigation crisis inhibited the emergence of alternative constructions that complicated issues of individual blame with attention to other integrally related public concerns.²¹² For example, the injuries suffered by Ms Liebeck and her frustrated resort to litigation could instead have highlighted the need for better consumer protection standards, better regulatory oversight, the need for expanded medical benefits for the elderly, the inadequate medical insurance options for most citizens in the United

210. We were eager at the outset of our research to get Ms. Liebeck's perspective. Our reluctance to victimize her anew grew as we learned more about the case.

211. See Torry, *supra* note 193.

212. On the inadequate conceptions of individual responsibility and fault, and their tension with other competing goals of safety, welfare, and compensation, at the heart of tort law, see Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990). See generally Abel, *Torts*, *supra* note 16. For parallel arguments, see Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1430 (1993).

States, or the lack of workplace leave compensation policies to deal with family emergencies. After all, the high costs of medical treatment and the loss of wages by her daughter who had to take care of Ms. Liebeck prompted the reluctant plaintiff to sue.²¹³ But virtually nowhere — in the media, among any of the major players on either side of the dispute, or among the politicians and policy advocates who appropriated the symbolic case for policy reasons — were any of these policy concerns raised in connection to the incident. This is particularly striking, because just a short time before the incident, President Clinton had unveiled proposals for radical transformation of health care and medical insurance in the United States.

Moreover, the core challenge to the enormous discretionary power, pecuniary motives, and unaccountable practices of corporate producers identified by Liebeck's lawyers barely saw the light of media attention. Indeed, what media coverage, popular legend, and political debate all obscured was just how anomalous was Stella Liebeck's victory in court against a multinational mega-corporation. The motives of corporate-sponsored tort reformers in assailing this and many other cases are clear enough, of course. Plaintiffs of small means and low status who win substantial awards for challenging corporate recklessness destabilize the prevailing legal logic of distributing economic costs widely and generally supporting the unequal structure of capitalist society. Nevertheless, political activists, lawyers, scholars — including those on the ostensible political Left — were drawn into defending the existing inadequate, inequalitarian, inaccessible tort law system and contesting the case's significance in the moralistic terms of "individual responsibility" and reckless rapacity defined by tort reformers. The social construction of the *McDonald's Coffee Case* thus illustrates the ways in which prevailing hegemonic norms, institutional arrangements, and power relations reproduce themselves in politics. We surely appreciate the importance of opportunities for consumers to mobilize law to challenge harmful corporate practices within the existing system.²¹⁴ However, the fact that virtually all parties have assessed the McDonald's case almost solely for what it did or did not reveal about an epidemic of predatory plaintiffs and their greedy attorneys dramatically evinces the narrowly moralistic and undemocratic public discourse characteristic of the contemporary

213. Of course, the anomalous fact that Ms. Liebeck won compensation for her claim diverted attention from the inherent inequality and inadequacy of tort mechanisms for promoting safety and compensating victims generally, especially for lower income and otherwise marginalized people. See Abel, *Torts*, *supra* note 16.

214. See generally MICHAEL W. McCANN, *RIGHTS AT WORK* (1994); MICHAEL W. McCANN, *TAKING REFORM SERIOUSLY* (1986).

neo-liberal era.²¹⁵

Finally, we note yet one other way in which the hot coffee legend is indirectly, subtly, and generally significant in contemporary American culture. We call attention again to how popular constructions of the hot coffee case have tended to reverse the very attributions of liability found in the official court of law. As is often the case in other legal domains such as criminal justice or welfare law,²¹⁶ prevailing narratives tended toward blaming the victim for the painful injuries she suffered and thus stigmatized her efforts to claim rights as a means of redress. Left with little recourse but appeal to a legal system that protects profit, individualizes claims of harm, and commodifies relief, the seriously burned plaintiff was pilloried as selfish, greedy, and irresponsible in the court of public opinion. This dynamic parallels closely the ways that allegations about excessive litigiousness and rights claiming perpetuate what Greenhouse, Yngvesson, and Engel call “narratives of [law] avoidance” in small American towns.²¹⁷ These narratives are ideological statements and norms that work to “create or impose order within the community, to define or deflect change, and to articulate a philosophy of individualism and equality that could also be reconciled with their tenacious defense of the status quo.”²¹⁸ In the same way, we suggest, the tort tales that we are told and retell among ourselves impose a disciplinary force of restraint on the perceptions and practices of citizens as legal actors throughout contemporary American society. We have already noted examples of how the *McDonald's Coffee Case* reinforced concerns about plaintiff greed among jurors in subsequent cases around the nation that personal injury lawyers must address. Other scholarship confirms the anti-plaintiff, anti-rights, and pro-corporate predispositions that jurors typically bring into the courtroom.²¹⁹ And yet other studies have similarly demonstrated how local legal officials — clerks, judges, police, etc. — routinely discourage and dismiss legal action on basic rights claims among citizens, and, especially among those “undeserving,” many who are least privileged by inherited relations.²²⁰ We thus suggest that the legacy of the *McDonald's Coffee Case* illustrates the

215. See generally NIKOLAS S. ROSE, *POWERS OF FREEDOM* (1999).

216. See generally STUART A. SCHEINGOLD, *THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION* (1991) (dominance of “volitional” models of crime); A. SARAT, *WHEN THE STATE KILLS* (2001) (similar treatment of capital punishment in American popular cultures); JOEL F. HANDLER & JEHESEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* (1997) (similar treatment on welfare discourse).

217. GREENHOUSE, YNGVESSON, & ENGEL, *supra* note 14, at 119.

218. *Id.*

219. See generally VALERIE HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (2000).

220. GREENHOUSE, YNGVESSON, & ENGEL, *supra* note 14, at 119; see generally SALLY MERRY,

subtle ways in which prevailing hegemonic norms, institutional arrangements, and power relations reproduce themselves in ordinary life.²²¹ The extensive, if unwitting, complicity of the American mass media in contributing to both the reproduction of such legal lore and its centrality in our shared national culture is no small part of this process by which the prevailing hierarchical, unaccountable order is sustained.

GETTING JUSTICE GETTING EVEN (1990); BARBARA YNGVESSON, VIRTUOUS CITIZENS DISRUPTIVE SUBJECTS (1993).

221. Of course, ideologies are dynamic, indeterminate, and contradictory in social practice, thus facilitating resistance and even challenge to hegemonic constructions and dominant relationships in society. We recognize that narratives often are explicitly counter-hegemonic, and that various versions of "anti-law" and "law reform" narratives often hold significant liberatory, egalitarian, or democratic promise. See EWICK & SILBEY, THE COMMON PLACE OF LAW, *supra* note 2. Hence it is important to acknowledge that our claim is not a general one about popular narratives involving legal disputes. However, we do contend that news coverage of civil litigation overall and in specific high-profile instances such as the *McDonald's Coffee Case* does tend to support hegemonic versions of dominant ideological traditions and to perpetuate status quo insulation of corporate power from challenge, although that is not always or necessarily the case.